ERIC M. FINK

EMPLOYMENT LAW

AN OPEN-SOURCE CASEBOOK

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Eric M. Fink
Associate Professor of Law Elon University School of Law
Greensboro, North Carolina 27408 `https://www.emfink.net/ElonLaw`

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Workin' 9 to 5, what a way to make a livin'. Barely gettin' by, it's all takin' and no givin'. They just use your mind and they never give you credit. It's enough to drive you crazy if you let it.

Dolly Parton, *9 to 5*

Contents

Preface

This book presents judicial opinions, statutes and regulations, and other material pertaining to the law governing employment and labor relations. Topics covered include establishing an employment relationship; recruitment & hiring; supervisory control and employee autonomy; confidentiality & competition; wages & hours; employee health & workplace injuries; termination of employment; and the enforcement of employee rights.

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1. *See* Jack Metzler, Cleaning Up Quotations, 18 J. App. Prac. & Process 143, 154 (2017)

Following the typographical style of Edward Tufte, this book uses sidenotes and margin notes in place of traditional footnotes or endnotes. These appear in the right-hand margin, avoiding the need to jump through hyperlinks or scroll to the note text. Numbered sidenotes[2] are used for footnotes in the source materials (with original note numbering indicated in parentheses). Unnumbered margin notes, in green sans-serif typeface, are used for editor's comments.

2. This is an example of a sidenote.

This is an example of a margin note.

Links to cross-referenced pages or external online material are indicated by red-colored text, e.g. U.S. Department of Labor.

Chapter 1: Employment as a Socio-Legal Relationship

1. Employment as Status and Contract

Karen Orren, *Belated Feudalism* (1991)

When the United Stated embarked upon full-scale industrialization in the decades following the Civil War, American labor relations were a remnant of the ancient order, in the sense that arrangements established in England in previous centuries were carried forward and enforced in law, often with only slight modification, to form the framework of relations between American employers and their employees.

The order of labor

At the most abstract level, "feudal" refers to the fact that the hierarchical relation of master and servant in nineteenth-century America was a remnant of the larger system of hierarchies that historically had extended up and down medieval society.

[B]eing a worker in late-nineteenth century America was still a legal *status*. By "status," I refer to an established position in society conferred upon an individual that does not arise from any specific action or from a contract but from the individual's personal characteristics. Nothing in American law directly stated that being a worker was a status or that there was a legal duty to work. Nevertheless, in every jurisdiction in the United States, not to work or be seeking work, if one was an able-bodied person without other visible means of support, was a crime, punishable by fine or imprisonment. Moreover, just as being a worker was a status, this crime, known as vagrancy, was one of the few acknowledged crimes of status in American law—that is, one that was not defined by an action or inaction taken in itself but was committed purely through one's personal condition, by being a member of some predefined legal category. …

The Statutes of Labourers presented the first comprehensive scheme in which the worker's failure to work was suppressed through the apparatus of the criminal law. In the text, situated between the provision that victuals must be sold at reasonable prices and the provision that a laborer accepting more wages than customary must pay the surplus to the town, appears the following:

During the Black Plague in England (1348-50), between 30-60% of the population died. The English Parliament enacted the Ordinance of Labourers (1349) and the Statute of Labourers (1351) to address the resulting labor shortage by imposing caps on wages, compelling all able-bodied men and women under age 60 (except those of independent means) to work, and restricting labor mobility.

> Item, because that many valiant [able-bodied] beggars, as long as they may live of begging do refuse to labour, giving themselves to idleness and vice, and sometime to theft and other abominations; none upon the said pain of imprisonment shall, under the colour of pity of alms, give anything to such, which may labour, or presume to favour them towards their desires, so that therby they may be compelled to labour for their necessary being.

Those statutes, which were enforced in the British colonies, went essentially unchanged into the eighteenth century, when they were grafted onto the laws of the new American statutes. The same configuration of meanings and policies in the old laws carried on into the nineteenth century. …

Another such principle was *quicquid acquietur servo acquietur domino* ("whatever is acquired by the servant is acquired by the master"). That principle was continued in the law of master and servant. A note in Hargrave's eighteeth-century edition of Coke's *Institutes* observed that the rule "about *slaves* holds *in some degree* in respect to *apprentices* and *servants*" and that it pertained with certainty to wages a worker earned from other employment when the master had given permission to the other employer without waiving the earnings.

The *Institutes of the Lawes of England* are a series of legal treatises written by Sir Edward Coke, a prominent English barrister, judge and politician in the late sixteenth and early seventeenth centuries.

By the late nineteenth century, employers in the United States could sue workers for breach of contract for their earnings in other employment only when it could be shown that the work had been done during hours and activities in which the plaintiff employer had been entitled to the worker's efforts. In an 1877 *Treatise on the Law of Master and Servant*, however, Horace Wood devoted three full pages to Hargrave's "learned note" and concluded that under the rule of *quicquid acquietur servo* the employer could also retain waged earned by a worker in outside activities if the money somehow came into the employer's hands. Moreover, even in its diluted American form, the law expressed the employer's proprietary interest not only in the worker's labor performed under the contract but also in all labor that might be performed by the worker's *person*, under a different contract, The remedy went beyond simply dismissing the worker or deducting from his wages for so many hours; it extended to the outside earnings acquired, as if they (as an extension of the worker) belonged to the master. Such a principle would seem incongruous not simply with the market-model morality of enterprising employees, but even with the more sober depictions of nineteenth-century workers as earnest breadwinners for their families. It was eminently compatible, however, with other features, likewise ancient, of the hierarchical structure of employment relations during the period.

Wood's treatise was an influential work on the law governing employment in the late 19th century. Among other things, it is widely cited as the primary source of the employment-at-will rule. See Jay M. Feinman, The Development of the Employment at Will Rule, 20 American Journal of Legal History 118, 125-27 (1976).

The judicial governance of master and servant

The links between past and present may be observed in the line of precedents used by American judges to decide the disputes between masters and servants and third parties that came before the courts. …

Regarding whether or not an employee might recover wages if asked by an employer to work on a Sunday, Wood proceeds for several pages citing precedents and authorities that include, among others, practice prior to the year 500, Edward the Confessor, *The Mirror of Justices*, and Lord Coke, reaching the conclusion that the worker may not. The point is not only that the courts followed precedent, and the precedents were ancient, but also that there was a preestablished substance that constituted the legal relations between the parties, which the courts administered in the course of litigation.

Edward the Confessor was the English king from 1042 to 1066.

The Mirror of Justices was an Anglo-Norman law text published in 1642.

As a remnant of feudalism, judicial regulation of labor relations in the nineteenth century maintained that comprehensive sense of governance, in which courts administered, and to a lesser extent, legislated, as well as adjudicated. Thus, for example, by the mid-nineteenth century, American courts, running ahead of the English, no longer permitted employers to beat their employees. Similarly, in the 1880s, judge-made law turned away from the assumption of an annual hiring, based on the English model and on the prevalence of agricultural labor, to a hiring "at-will." Such modifications were no doubt responsible for the system's survival for so long, preempting interference by other agencies of the state in unusually offensive or inconvenient circumstances. Even so, as in the case of at-will employment, the courts continued to prescribe labor relations, not derive them from contracts devised by the parties. …

Judicial governance of labor relations in the nineteenth century may best be seen in the details of cases that came regularly to the courts for decision and engaged central principles of the law. One principle was the property interest that the master legally had in the worker's labor, and indeed in all labor performed by the worker's person during the hours for which they contracted, as mentioned earlier in regard to the rule of *quicquid acquietur servo*. That property interest was further enforced in the action *per quod servitium amisit* ("by which the master lost the service"). In that action, the master might claim damages from a third party for injuries to his worker that resulted in loss of value of the worker's services, much as if the injury had been to his chattel or machines or buildings. Blackstone, typically, found a parallel action regarding servants in ancient Athens; however, his discussion was more pertinent for its stress on the traditional nonreciprocity (in the *per quod* respect, as in others) of the employment contract: The servant, having no property in the "company, care, or assistance of the superior," has no legal redress for injuries to the master.

[A] second principle in nineteenth-century labor law [was] the principle that a contract for labor was "entire." Under that principle, a worker hired for a stated job or period of time was not legally entitled to be paid for any labor performed until the job or term was completed. If he or she quit work without legal cause, nothing could be recovered for the labor performed, unless the employee could prove that the contract had been wrongfully terminated by the employer. In that circumstance, wages could be sought by a *quantum meruit* ("for the amount owed") suit or by a suit for damages for breach of contract. Legal recovery was difficult, not only because of the wide latitude given employers to discharge their workers but also because the courts were willing to accept as a justification for dismissal virtually any reason, even if that reason had not been stated or even known by the employer himself at the time the dismissal took place. If the suit was for damages, workers were required under the law to seek other employment after their dismissal, and the court normally would deduct any wages they received from what it required the defendant employer to pay.

This rule made it possible for employers to goad employees into quitting near the end of a term or pay period, and thereby benefit from their earlier labor without having to pay. But the "entire" contract principle was also basic to the full range of subject matters in dispute between nineteenth-century employers and employees, because very often other issues presented at law involved the question of whether or not a worker was entitled to, or had been unjustifiably denied, payment for his or her services. The principle was most important during the decades prior to the Civil War, when contracts definite as to term were more common than they would be later, but it retained its vitality after then as well, particularly with respect to salaried workers. The principle of hiring "at will," under which either party could terminate the contract for any reason, began to take hold in the 1880s; but in the meantime many courts continued to apply the English rule of an assumed annual hiring, or else held that the pay period (by the week, month, etc.) would determine the point at which back wages could be accrued and recovered.

The province of work

The principles of hierarchy and obedience imply the existence of jurisdictional boundaries within which authority is organized and enforced. …

Jurisdiction was an attribute of the master's property in the servant, just as was the claim over the servant's labor. … To the extent that workplace relations under the nineteenth-century law of master and servant were governed by the courts as a unit, the combined workplaces constituted, concretely and not metaphorically, a single province of work within the larger territory of American society. …

Inside the province were the inhabitants: the employer and his employees. Those were real persons, not their alienated labor or functions. It was legal cause for immediate discharge to bring in an outside worker without the master's consent to substitute for the one hired to do the work. Once having entered the contract for services, the worker was enlisted to be there and to perform during working hours, upon penalty of losing back pay for an infraction. Absense by mistake of a few days could cause discharge. The worker was not released from a tour of duty even under such circumstances as his or her accurate knowledge of the master's imminent bankruptcy.

Beyond the territory of the individual workplace itself, the inhabitants, both employer and employees, engaged in what might be referred to as interworkplace relations, that is, transactions with other employers and employees. Although easy movement across that boundary would seem natural in market-model societies, real crossings encountered fixed barriers. In the case of employees, for example, a kind of passport often was required to move from the hire of one employer to another, which was the testimonial letter. … In the late nineteenth century, testimonial letters were required to obtain employment in many major industries, and litigation arose over questions of whether or not previous employers were under legal obligation to furnish them, how complete and truthful they were required to be, and how many times they had to be provided. Another barrier to employees' free movement was that in nineteenth-century America, as in fourteenth-century England, it was illegal to harbor servants of another employer, that is, to employ a worker while knowing that he or she was still under a contract of employment with someone else. It was not essential that it be shown that the new labor had actually commenced, or that there had been an intention to deprive the first employer of his worker's services; the mere retention of the employee after learning that service was due the other employer was subject to common-law suit for damages.

Crossings of workplace boundaries met numerous other obstacles. One obstacle was the courts' enforcement of private agreements whereby the employee, upon departing service, agreed not to enter in business competition with his or her former employer for a specified number or years or over a specific territory. Another was the enforcement of what employers claimed were implied (as well as express) contracts that employees would not pass on to other certain "trade secrets," even though the machinery or processes were already known by others and were unprotected by patents. Although contracts like these are certainly familiar in the recent history of American commerce, in relations among businessmen they had a controversial status, being regarded as illegal restraints of trade, and were not enforced consistently until late in the nineteenth century. But contrast, in the master-servant context, such contracts had long been regarded as reasonable exceptions necessary for the educative and confidential relations of employment.

Of the several protective barriers surrounding the workplace, the most formidable in the law of master and servant was the provision against enticement. The Statutes of Labourers provided for both civil and criminal proceedings against any person who knowingly enticed or persuaded a servant away from his employment by another master. By 1355, an action of trespass on the case had developed; it provided an independent civil remedy of damages for those same infractions within the common law. The law of enticement is a vivid illustration of the persistence of ancient regulations into the modern period. In the leading antebellum case, *Boston Glass Manufactory v. Binney* (1827), plaintiffs based their argument on cases extending back as far as 1591, and the 1591 case had been based on precedents for the action of enticement dating from the fourteenth century.

The relations between the workplace and [the outside world] may be seen in the developing law of employer liability for injuries caused in the course of carrying on a trade or business. With respect to "strangers," third parties outside the company, the rule of *respondeat superior* ("let the mater answer") prevailed. That rule meant that the employer was liable for injuries inflicted through the fault of an employee performing his authorized duties, just as if the injury had been caused by the employer's machine or animal. Because prior to that time employees had themselves been held liable, unless the particular negligent act in question had been specifically commanded or implied by the mater, we may speculate that the newer rule … was an adaptation to the more attenuated forms of management typical of larger companies.

On the other hand, … when an injury was inflicted on an employee through negligence of a fellow servant, the master was not responsible. That judgment was consistent with the idea that the law must protect the public; however, judges would not intrude in established master-servant relations to protect the employee.

Under the rules of liability, … employees stood in relation to one another as an employee would to a piece of machinery. The employer would be held liable for an injury inflicted by a fellow employee only if the employer had not taken due care to ensure that the employee at fault had been sufficiently skilled to perform the task, just as the employer would be held liable if he or she had neglected to care for a piece of machinery.

Here the worker may be seen to have had less protection than members of the public at large against identical injuries caused by identical accidents. By virtue of one's status as an employee of the company in the course of whose business the injury occurred, one was unprotected against injuries for which the company would have assumed liability had they been inflicted on an ordinary member of the public. The evident injustice of the fellow-servant rule, which adversely affected the families and other associates of injured workers, as well as the workers themselves, would eventually lead to a major revolution in torts through the institution of workmen's compensation laws. Those laws would bring new inroads into the domain of master and servant. However, at a time when court decisions in other areas of the law were moving in the direction of universal contracts, the effect of workers' compensation laws was to enhance the status-based responsibilities of the employment relation.

The province and the republic

A final barrier against interference in the workplace was constitutional. Labor relations were bounded by the limits of legislative sovereignty. Regular payment of wages, and in money rather than scrip or credit; reasons for discharge, and wages due and service letters upon departure; removal of the fellow-servant defense against liability for injury; shorter hours of employment—these and other changes in the old law were obtained by workers and their political allies in legislation, through the activities of lobbying and elections. However, as is well known, in the majority of instances those statutes were overturned in review by the judiciary.

Within the broad doctrine of substantive due process, "liberty of contract" came closest to denying the validity of legislation per se. Among the subjects treated by the judges under the doctrine of liberty of contract, labor questions were in the forefront. The initial reference to "undue interference with men's rights of making contracts" appeared as a dictum in an opinion of the Illinois Supreme Court on legislation specifying how coal should be weighed to calculate miners' wages. The first decision to invalidate a statute as an unconstitutional infringement on liberty of contract was *Godcharles v. Wigeman*, overturning a Pennsylvania statute requiring iron mills to pay in cash. The first U.S. Supreme Court decision to invalidate a state statute based on liberty of contract was *Lochner v. New York*.

The opinions in the labor decisions indicate that the judges believed that what was at stake was no less than the moral order of things, not merely the formal division of powers or the privileges of favorite social groups. Their well-known opposition to "class" legislation was based not so much on a sense of insult to republican principles as on their fears that the entire system of society and politics faced imminent demolition should the relation of master and servant be upset. … In *Lochner*, Justice Peckham said that if an eight-hour law for bakers were condoned, personal liberty under the constitution would become "visionary":

> Not only the hours of employees, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the state be impaired.

Haskins v. Royster, 70 N.C. 600 (1874)

Rodman, J.

We take it to be a settled principle of law, that if one contracts upon a consideration to render personal services for another any third person who maliciously, that is, without a lawful justification, induces the party who contracted to render the service to refuse to do so, is liable to the injured party in an action for damages. It need scarcely be said that there is nothing in this principle inconsistent with personal freedom, else we would not find it in the laws of the freest and most enlightened States in the world. It extends impartially to every grade of service, from the most brilliant and best paid to the most homely, and it shelters our nearest and tenderest domestic relations from the interference of malicious intermeddlers. It is not derived from any idea of property by the one party in the other, but is an inference from the obligation of a contract freely made by competent persons.

We are relieved from any labor in finding authorities for this principle, by a very recent decision of the Supreme Court of Massachusetts, in which a learned and able Judge delivers the opinion of the Court. *Walker v. Cronin*, 107 Mass. 555.

That case was this: The plaintiffs declared in substance that they were shoemakers, and employed a large number of persons as bottomers of boots and shoes, and defendant unlawfully and intending to injure the plaintiff in his business, persuaded and induced the persons so employed to abandon the employment of the plaintiff, whereby plaintiff was damaged.

A second count says that plaintiff had employed certain persons named to make up stock into boots and shoes, and defendant well knowing, induced said persons to refuse to make and finish such boots and shoes.

I shall make no apology for quoting copiously from this opinion, because the high respectability of the Court, and the learning and care with which the question is discussed, make the decision eminently an authority.

> This (the declaration) sets forth sufficiently (1) intentional and willful acts, (2) calculated to cause damage to the plaintiffs in their lawful business, (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice), and (4) actual damage and loss resulting.
>
> In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages." The intentional causing such loss to another, without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong.
>
> Thus every one has an equal right to employ workmen in his business or service; and if by the exercise of this right in such manner as he may see fit, persons are induced to leave their employment elsewhere no wrong is done to him whose employment they leave, unless a contract exists by which such other person has a legal right to the further continuance of their services. If such a contract exists, one who knowingly and intentionally procures it to be violated, may be held liable for the wrong, although he did it for the purpose of promoting his own business.
>
> Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss

> come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition of the service of any interest or lawful purpose, it then stands upon a different footing, and falls within the principle of the authorities first referred to.
>
> It is a familiar and well established doctrine of the law upon the relation of master and servant, that one who entices away a servant, or induces him to leave his master, may be held liable in damages therefor, provided there exists a valid contract for continued service known to the defendant. It has sometimes been supposed that the doctrine sprang from the English statute of laborers, and was confined to menial service. But we are satisfied that it is founded upon the legal right derived from the contract, and not merely upon the relation of master and servant, and that it applies to all contracts of employment, if not to contracts of every description.

It is suggested, (for we did not have the benefit of an argument for the defendant,) that in the present case the contract between the plaintiff and Eastwood and Wilkerson is unreasonable and therefore void. We cannot suppose it to be contended that this Court, or any Court, when there is no suggestion of fraud, can inquire whether the reward agreed to be paid to a workman is the highest that he might have got in the market, and to declare the contract void, or to make a new one if it thought not to be the highest. No Court can make itself the guardian of persons *sui juris*. That would be an assumption inconsistent with their freedom. We suppose the objection to a point to that part of the contract which is, in substance, that if either party of the second part, or any person for whom they contract, shall misbehave *in the opinion of the party of the first part*, such misbehaving party shall quit the premises *and forfeit to the party of the first part* all his interest in the common crop.

It is said that these provisions make the plaintiff a judge in his own cause, which the law will not allow, and that they are manifestly so oppressive and fraudulent as to avoid the whole contract. This proposition will be found on examination to go much too far even as between the parties to the contract, and to have no application as between one of the parties and a malicious intermeddler, as the defendant must, in this stage of the case, be considered.

It is not necessary to decide what would be the effect of such a stipulation in an action on the contract between the parties to it. But as there seems to be some misconception of the law of such a case, and as although there are numerous authorities on the question, it is not yet of "familiar learning" in our Courts, a few observations will more conveniently lead us to the question actually presented.

The authorities are conclusive that the parties to a contract, if there be no fraud or concealment of the interest, may agree to make a person interested, or even one of the parties an arbitrator to decide all controversies which may arise under the contract, and such agreement will be valid and effectual.

These authorities unquestionably establish that such stipulations are not void or voidable, even as between the parties, and it has never been supposed or contended that they made the whole contract void; as even if void themselves, they are clearly separable from the other parts. Either party, therefore, could maintain an action on this contract.

It is important however to notice, that none of these authorities goes to the length of holding, that if after the contractors had duly performed all or a part of the work, the plaintiff had *mala fide*, or without lawful cause, discharged them, they could not recover upon the contract. The power attempted to be reserved cannot have any greater effect than to make the discharge *prima facie* lawful, if so much as that.

Contracts with such stipulations as we find in the present, are not to be commended as precedents. Such stipulations are unusual; they answer no useful purpose, and suggest an intent (perhaps in this case untruly) to take some improper advantage, and to exact from the employees a degree of personal deference and respect, beyond that civil and courteous deportment which every man owes to his fellow in every relation in life. To this extent, a mutual duty is implied in every contract which creates the relation of master and servant. If the servant fails in due respect, the master may discharge him, and so, if the master fails, the servant will be justified in quitting the employment.

Again it is suggested, that the contractors of the second part in this contract are *croppers*, and not servants. By cropper, I understand a laborer who is to be paid for his labor by being given a proportion of the crop. But such a person is not a tenant, for he has no estate in the land, nor in the crop until the landlord assigns him his share. He is as much a servant as if his wages were fixed and payable in money.

It is unnecessary to discuss the question whether one who maliciously persuaded a *tenant* to abandon his holding, would not be liable in damages for such officious intermeddling.

But whatever may be the effect of the provisions commented on, as between the parties to the contract, the authorities are clear and decisive that a person in the situation of the defendant, can take no advantage from them. As the case now stands, he cannot pretend to play the part of a chivalrous protector of defrauded ignorance. For the present at least, he must be regarded as a malicious intermeddler, using the word malicious in its legal sense.

There is a certain analogy among all the domestic relations, and it would be dangerous to the repose and happiness of families if the law permitted any man, under whatever professions of philanthropy or charity, to sow discontent between the head of the family and its various members, wife, children and servants. Interference with such relations can only be justified under the most special circumstances, and where there cannot be the slightest suspicion of a spirit of mischief-making, or self interest.

To enable a plaintiff to recover from one who entices his servant, it is sufficient to show *a subsisting relation of service*, even if it be determinable at will. In *Keane v. Boycott*, the plaintiff sued a recruiting officer for enticing his servant. The servant was an infant and had been a slave in St. Vincents where he indentured himself to serve the plaintiff for five years. The indenture of course was void upon a double ground, but the Court held the plaintiff entitled to recover. "The defendant in this case *had no concern in the relation between the plaintiff and his servant; he dissolved it officiously*, and to speak of his conduct in the mildest terms, he carried too far his zeal for the recruiting service."

We are of opinion that the complaint sets forth a sufficient cause of action.

Pollock v. Williams, 322 U.S. 4 (1944)

MR. JUSTICE JACKSON delivered the opinion of the Court.

Appellant Pollock questions the validity of a statute of the State of Florida making it a misdemeanor to induce advances with intent to defraud by a promise to perform labor and further making failure to perform labor for which money has been obtained *prima facie* evidence of intent to defraud. It conflicts, he says, with the Thirteenth Amendment to the Federal Constitution and with the antipeonage statute enacted by Congress thereunder. Claims also are made under the due process and equal protection clauses of the Fourteenth Amendment which we find it unnecessary to consider.

Pollock was arrested January 5, 1943, on a warrant issued three days before which charged that on the 17th of October, 1942, he did "with intent to injure and defraud under and by reason of a contract and promise to perform labor and service, procure and obtain money, to-wit: the sum of $5.00, as advances from one J.V. O'Albora, a corporation, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Florida." He was taken before the county judge on the same day, entered a plea of guilty, and was sentenced to pay a fine of $100 and in default to serve sixty days in the county jail. He was immediately committed.

On January 11, 1943, a writ of habeas corpus was issued by the judge of the circuit court, directed to the jail keeper, who is appellee here. Petition for the writ challenged the constitutionality of the statutes under which Pollock was confined and set forth that "at the trial aforesaid, he was not told that he was entitled to counsel, and that counsel would be provided for him if he wished, and he did not know that he had such right. Petitioner was without funds and unable to employ counsel. He further avers that he did not understand the nature of the charge against him, but understood that if he owed any money to his prior employer and had quit his employment without paying the same, he was guilty, which facts he admitted." The Sheriff's return makes no denial of these allegations, but merely sets forth that he holds the prisoner by virtue of the commitment "based upon the judgment and conviction as set forth in the petition." The Supreme Court of Florida has said that "undenied allegations of the petition are taken as true."

The Circuit Court held the statutes under which the case was prosecuted to be unconstitutional and discharged the prisoner. The Supreme Court of Florida reversed. It read our decisions in *Bailey v. Alabama* and *Taylor v. Georgia* to hold that similar laws are not in conflict with the Constitution in so far as they denounce the crime, but only in declaring the *prima facie* evidence rule. It stated that its first impression was that the entire Florida act would fall, as did that of Georgia, but on reflection it concluded that our decisions were called forth by operation of the presumption, and did not condemn the substantive part of the statute where the presumption was not brought into play. As the prisoner had pleaded guilty, the Florida court thought the presumption had played no part in this case, and therefore remanded the prisoner to custody. An appeal to this Court was taken and probable jurisdiction noted.

Florida advances no argument that the presumption section of this statute is constitutional, nor could it plausibly do so in view of our decisions. It contends, however, (1) that we can give no consideration to the presumption section because it was not in fact brought into play in the case, by reason of the plea of guilty; (2) that so severed the section denouncing the crime is constitutional.

I.

These issues emerge from an historical background against which the Florida legislation in question must be appraised.

The Thirteenth Amendment to the Federal Constitution, made in 1865, declares that involuntary servitude shall not exist within the United States and gives Congress power to enforce the article by appropriate legislation. Congress on March 2, 1867, enacted that all laws or usages of any state "by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise," are null and void, and denounced it as a crime to hold, arrest, or return a person to the condition of peonage.

Clyatt v. United States was a case from Florida in which the Federal Act was used as a sword and an employer convicted under it. This Court sustained it as constitutional and said of peonage: "It may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service."

Then came the twice-considered case of *Bailey v. Alabama,* in which the Act and the Constitution were raised as a shield against conviction of a laborer under an Alabama act substantially the same as the one before us now. Bailey, a Negro, had obtained $15 from a corporation on a written agreement to work for a year at $12 per month, $10.75 to be paid him and $1.25 per month to apply on his debt. In about a month he quit. He was convicted, fined $30, or in default sentenced to hard labor for 20 days in lieu of the fine and 116 days on account of costs. The Court considered that the portion of the state law defining the crime would require proof of intent to defraud, and so did not strike down that part; nor was it expressly sustained, nor was it necessarily reached, for the *prima facie* evidence provision had been used to obtain a conviction. This Court held the presumption, in such a context, to be unconstitutional.

Later came *United States v. Reynolds* in which the Act of 1867 was sword again. Reynolds and Broughton were indicted under it. The Alabama Code authorized one under some circumstances to become surety for a convict, pay his fine, and be reimbursed by labor. Reynolds and Broughton each got himself a convict to work out fines and costs as a farm hand at $6.00 per month. After a time each convict refused to labor further and, under the statute, each was convicted for the refusal. This Court said, "Thus, under pain of recurring prosecutions, the convict may be kept at labor, to satisfy the demands of his employer." It held the Alabama statute unconstitutional and employers under it subject to prosecution.

In *Taylor v. Georgia* the Federal Act was again applied as a shield, against conviction by resort to the presumption, of a Negro laborer, under a Georgia statute in effect like the one before us now. We made no effort to separate valid from invalid elements in the statute, although the substantive and procedural provisions were, as here, in separate, and separately numbered, sections. We said, "We think that the sections of the Georgia Code upon which this conviction rests are repugnant to the Thirteenth Amendment and to the Act of 1867, and that the conviction must therefore be reversed." Only recently in a case from Northern Florida a creditor-employer was indicted under the Federal Act for arresting a debtor to peonage, and we sustained the indictment. *United States v. Gaskin.*

These cases decided by this Court under the Act of 1867 came either from Florida or one of the adjoining states. And these were but a part of the stir caused by the Federal Antipeonage Act and its enforcement in this same region. This is not to intimate that this section, more than others, was sympathetic with peonage, for this evil has never had general approval anywhere, and its sporadic appearances have been neither sectional nor racial. It is mentioned, however, to indicate that the Legislature of Florida acted with almost certain knowledge in designing its successive "labor fraud" acts in relation to our series of peonage decisions. The present Act is the latest of a lineage, in which its antecedents were obviously associated with the practice of peonage. This history throws some light on whether the present state act is one "by virtue of which any attempt shall hereafter be made" to "enforce involuntary servitude," in which event the Federal Act declares it void.

In 1891, the Legislature created an offense of two elements: obtaining money or property upon a false promise to perform service, and abandonment of service without just cause and without restitution of what had been obtained. In 1905, this Court decided *Clyatt v. United States,* indicating that any person, including public officers, even if acting under state law, might be guilty of violating the Federal Act. In 1907, the Florida Legislature enacted a new statute, nearly identical in terms with that of Alabama. In 1911, in *Bailey v. Alabama,* this Court held such an act unconstitutional. In 1913, the Florida Legislature repealed the 1907 act, but re-enacted in substance the section denouncing the crime, omitting the presumption of intent from the failure to perform the service or make restitution. In 1919, the Florida Supreme Court held this act, standing alone, void under the authority of *Bailey v. Alabama.* Whereupon, at the session of 1919, the present statute was enacted, including the *prima facie* evidence provisions, notwithstanding these decisions by the Supreme Court of Florida and by this Court. The Supreme Court of Florida later upheld a conviction under this statute on a plea of guilty, but declined to pass on the presumption section, because, as in the present case, the plea of guilty was thought to make its consideration unnecessary. The statute was re-enacted without substantial change in 1941. Again in 1943 it was re-enacted despite the fact that the year before we held a very similar Georgia statute unconstitutional in its entirety.

II.

The State contends that we must exclude the *prima facie* evidence provision from consideration because in fact it played no part in producing this conviction. Such was the holding of the State Supreme Court. We are not concluded by that holding, however, but under the circumstances are authorized to make an independent determination.

What the prisoner actually did that constituted the crime cannot be gleaned from the record. The charge is cast in the words of the statute and is largely a conclusion. It affords no information except that Pollock obtained $5 from a corporation in connection with a promise to work which he failed to perform, and that his doing so was fraudulent. If the conclusion that the prisoner acted with intent to defraud rests on facts and not on the *prima facie* evidence provisions of the statute, none are stated in the warrant or appear in the record. None were so set forth that he could deny them. He obtained the money on the 14th of October, 1942, and the warrant was not sought until January 2, 1943. Whether the original advancement was more or less than $5, what he represented or promised in obtaining it, whether he worked a time and quit, or whether he never began work at all are undisclosed. About all that appears is that he obtained an advancement of $5 from a corporation and failed to keep his agreement to work it out. He admitted those facts and the law purported to supply the element of intent. He admitted the conclusion of guilt which the statute made *prima facie* thereon. He was fined $20 for each dollar of his debt, and in default of payment was required to atone for it by serving time at the rate of less than 9¢ per day.

Especially in view of the undenied assertions in Pollock's petition we cannot doubt that the presumption provision had a coercive effect in producing the plea of guilty. The statute laid its undivided weight upon him. The legislature had not even included a separability clause. Of course the function of the *prima facie* evidence section is to make it possible to convict where proof of guilt is lacking. No one questions that we clearly have held that such a presumption is prohibited by the Constitution and the federal statute. The Florida Legislature has enacted and twice re-enacted it since we so held. We cannot assume it was doing an idle thing. Since the presumption was known to be unconstitutional and of no use in a contested case, the only explanation we can find for its persistent appearance in the statute is its extra-legal coercive effect in suppressing defenses. It confronted this defendant. There was every probability that a law so recently and repeatedly enacted by the legislature would be followed by the trial court, whose judge was not required to be a lawyer. The possibility of obtaining relief by appeal was not bright, as the event proved, for Pollock had to come all the way to this Court and was required, and quite regularly, to post a supersedeas bond of $500, a hundred times the amount of his debt. He was an illiterate Negro laborer in the toils of the law for the want of $5. Such considerations bear importantly on the decision of a prisoner even if aided by counsel, as Pollock was not, whether to plead guilty and hope for leniency or to fight. It is plain that, had his plight after conviction not aroused outside help, Pollock himself would have been unheard in any appellate court.

In the light of its history, there is no reason to believe that the law was generally used or especially useful merely to punish deceit. Florida has a general and comprehensive statute making it a crime to obtain money or property by false pretenses or commit "gross fraud or cheat at common law." These appear to authorize prosecution for even the petty amount involved here. We can conceive reasons, even if unconstitutional ones, which might lead well-intentioned persons to apply this Act as a means to make otherwise shiftless men work, but if in addition to this general fraud protection employers as a class are so susceptible to imposition that they need extra legislation, or workmen so crafty and subtle as to constitute a special menace, we do not know it, nor are we advised of such facts.

We think that a state which maintains such a law in face of the court decisions we have recited may not be heard to say that a plea of guilty under the circumstances is not due to pressure of its statutory threat to convict him on the presumption.

As we have seen, Florida persisted in putting upon its statute books a provision creating a presumption of fraud from the mere nonperformance of a contract for labor service three times after the courts ruled that such a provision violates the prohibition against peonage. To attach no meaning to such action, to say that legally speaking there was no such legislation, is to be blind to fact. Since the Florida Legislature deemed these repeated enactments to be important, we take the Legislature at its own word. Such a provision is on the statute books for those who are arrested for the crime, and it is on the statute books for us in considering the practical meaning of what Florida has done.

In the view we take of the purpose and effect of this *prima facie* evidence provision it is not material whether as matter of state law it is regarded as an independent and severable provision.

III.

We are induced by the evident misunderstanding of our decisions by the Florida Supreme Court, in what we are convinced was a conscientious and painstaking study of them, to make more explicit the basis of constitutional invalidity of this type of statute.

The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States. Forced labor in some special circumstances may be consistent with the general basic system of free labor. For example, forced labor has been sustained as a means of punishing crime, and there are duties such as work on highways which society may compel. But in general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition. Whatever of social value there may be, and of course it is great, in enforcing contracts and collection of debts, Congress has put it beyond debate that no indebtedness warrants a suspension of the right to be free from compulsory service. This congressional policy means that no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor. The federal statutory test is a practical inquiry into the utilization of an act as well as its mere form and terms.

Where peonage has existed in the United States it has done so chiefly by virtue of laws like the statute in question. Whether the statute did or did not include the presumption seems to have made little difference in its practical effect. In 1910, in response to a resolution of the House of Representatives, the Immigration Commission reported the results of an investigation of peonage among immigrants in the United States. It found that no general system of peonage existed, and that sentiment did not support it anywhere. On the other hand, it found sporadic cases of probable peonage in every state in the Union except Oklahoma and Connecticut. It pointed out that “there has probably existed in Maine the most complete system of peonage in the entire country,” in the lumber camps. In 1907, Maine enacted a statute, applicable only to lumber operations but in its terms very like the section of the Florida statute we are asked to separate and save. The law was enforcible in local courts not of record. The Commission pointed out that the Maine statute, unlike that of Minnesota and the statutes of other states in the West and South, did not contain a *prima facie* evidence provision. But as a practical matter the statute led to the same result.

The fraud which such statutes purport to penalize is not the concealment or misrepresentation of existing facts, such as financial condition, ownership of assets, or data relevant to credit. They either penalize promissory representations which relate to future action and conduct or they penalize a misrepresentation of the present intent or state of mind of the laborer. In these “a hair perhaps divides the false and true.” Of course there might be provable fraud even in such matters. One might engage for the same period to several employers, collecting an advance from each, or he might work the same trick of hiring out and collecting in advance again and again, or otherwise provide proof that fraud was his design and purpose. But in not one of the cases to come before this Court under the antipeonage statute has there been evidence of such subtlety or design.

In each there was the same story, a necessitous and illiterate laborer, an agreement to work for a small wage, a trifling advance, a breach of contract to work. In not one has there been proof from which we fairly could say whether the Negro never intended to work out the advance, or quit because of some real or fancied grievance, or just got tired. If such statutes have ever on even one occasion been put to a worthier use in the records of any state court, it has not been called to our attention. If this is the visible record, it is hardly to be assumed that the off-the-record uses are more benign.

It is a mistake to believe that in dealing with statutes of this type we have held the presumption section to be the only source of invalidity. On the contrary, the substantive section has contributed largely to the conclusion of unconstitutionality of the presumption section. The latter in a different context might not be invalid. Indeed, we have sustained the power of the state to enact an almost identical presumption of fraud, but in transactions that did not involve involuntary labor to discharge a debt. *James-Dickinson Farm Mortgage Co. v. Harry.* Absent this feature any objection to *prima facie* evidence or presumption statutes of the state can arise only under the Fourteenth Amendment, rather than under the Thirteenth. In deciding peonage cases under the latter this Court has been as careful to point out the broad power of the state to create presumptions as it has to point out its power to punish frauds. It "has frequently recognized the general power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence in the courts of its own government. In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be *prima facie* evidence of the main fact in issue; and where the inference is not purely arbitrary and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law." *Bailey v. Alabama.* But the Court added that "the State may not in this way interfere with matters withdrawn from its authority by the Federal Constitution or subject an accused to conviction for conduct which it is powerless to proscribe." And it proceeded to hold that the presumption, when coupled with the other section, transgressed those limits, for while it appeared to punish fraud the inevitable effect of the law was to punish failure to perform labor contracts.

In *Taylor v. Georgia* both sections of the Act were held unconstitutional. There the State relied on the presumption to convict. But it was not denied that a state has power reasonably to prescribe the *prima facie* inferences to be drawn from circumstantial evidence. It was the substance of the crime to establish which the presumption was invoked that gave a forbidden aspect to that method of short-cutting the road to conviction. The decision striking down both sections was not, as the Supreme Court of Florida thought, a casual and unconsidered use of the plural. Mr. Justice Byrnes knew whereof he spoke; unconstitutionality inhered in the substantive quite as much as in the procedural section and no part of the invalid statute could be separated to be salvaged. Where in the same substantive context the State threatens by statute to convict on a presumption, its inherent coercive power is such that we are constrained to hold that it is equally useful in attempts to enforce involuntary service in discharge of a debt, and the whole is invalid.

It is true that in each opinion dealing with statutes of this type this Court has expressly recognized the right of the state to punish fraud, even in matters of this kind, by statutes which do not either in form or in operation lend themselves to sheltering the practice of peonage. Deceit is not put beyond the power of the state because the cheat is a laborer nor because the device for swindling is an agreement to labor. But when the state undertakes to deal with this specialized form of fraud, it must respect the constitutional and statutory command that it may not make failure to labor in discharge of a debt any part of a crime. It may not directly or indirectly command involuntary servitude, even if it was voluntarily contracted for.

From what we have said about the practical considerations which are relevant to the inquiry whether any particular state act conflicts with the Antipeonage Act of 1867 because it is one by which “any attempt shall hereafter be made to establish, maintain or enforce” the prohibited servitude, it is apparent that we should not pass on hypothetical acts. Reservation of the question of the validity of an act unassociated with a presumption now, as heretofore, does not denote approval. The Supreme Court of Florida has held such an act standing alone unconstitutional. A considerable recorded experience would merit examination in relation to any specific labor fraud act. We do not enter upon the inquiry further than the Act before us.

Another matter deserves notice. In *Bailey v. Alabama* it was observed that the law of that state did not permit the prisoner to testify to his uncommunicated intent, which handicapped him in meeting the presumption. In *Taylor v. Georgia*, the prisoner could not be sworn, but could and did make a statement to the jury. In this Florida case appellee is under neither disability, but is at liberty to offer his sworn word as against presumptions. These distinctions we think are without consequence. As Mr. Justice Byrnes said in *Taylor v. Georgia*, the effect of this disability "was simply to accentuate the harshness of an otherwise invalid statute."

We impute to the Legislature no intention to oppress, but we are compelled to hold that the Florida Act of 1919 as brought forward on the statutes as §§ 817.09 and 817.10 of the Statutes of 1941 are, by virtue of the Thirteenth Amendment and the Antipeonage Act of the United States, null and void. The judgment of the court below is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

2. Employer Control

Elizabeth Anderson, *Private Government* (2017)

Most workers in the United States are governed by dictatorships in their work lives. Usually, those dictatorships have the legal authority to regulate workers' off-hour lives as well—their political activities, speech, choice of sexual partner, use of recreational drugs, alcohol, smoking, and exercise. Because most employers exercise this off-hours authority irregularly, arbitrarily, and without warning, most workers are unaware of how sweeping it is. Most believe, for example, that their boss cannot fire them for their off-hours Facebook postings, or for supporting a political candidate their boss opposes. Yet only about half of U.S. workers enjoy even partial protection of their off-duty speech from employer meddling. Far fewer enjoy legal protection of their speech on the job, except in narrowly defined circumstances. Even where they are entitled to legal protection, as in speech promoting union activity, their legal rights are often a virtual dead letter due to lax enforcement: employers determined to keep out unions immediately fire any workers who dare mention them, and the costs of litigation make it impossible for workers to hold them accountable for this.

Employees are pervasively subject to private government, as I have defined it. Why is this so? As far as the legal authority of the employer to govern employees was concerned, the Industrial Revolution did not mark a significant break. Legally speaking employers have always been authoritarian rulers, as an extension of their patriarchal rights to govern their households.

The Industrial Revolution moved the primary site of paid work from the household to the factory. In principle, this could have been a liberating moment, insofar as it opened the possibility of separating the governance of the workplace from the governance of the home. Yet industrial employers retained their legal entitlement to govern their employees' domestic lives. In the early twentieth century, the Ford Motor Company established a Sociological Department, dedicated to inspecting employees' homes unannounced, to ensure that they were leading orderly lives. Workers were eligible for Ford's famous $5 daily wage only if they kept their homes clean, ate diets deemed healthy, abstained from drinking, used the bathtub appropriately, did not take in boarders, avoided spending too much on foreign relatives, and were assimilated to American cultural norms.

Workers today might breathe a sigh of relief, except that most are still subject to employer governance of their private lives. In some cases, this is explicit, as in employer-provided health insurance plans. Under the Affordable Care Act (ACA), employers may impose a 30 percent premium penalty on covered workers if they do not comply with employer-imposed wellness programs, which may prescribe exercise programs, diets, and abstinence from alcohol and other substances. In accordance with this provision, Penn State University recently threatened to impose a $100 per month surcharge on workers who did not answer a health survey that included questions about their marital situation, sexual conduct, pregnancy plans, and personal finances. In other cases, employer authority over workers' off-duty lives is implicit, a by-product of the employment-at-will rule: since employers may fire workers for any or no reason, they may fire them for their sexual activities, partner choice, or any other choice workers think of as private from their employer, unless the state has enacted a law specifically forbidding employer discrimination on these grounds. Workplace authoritarianism is still with us.

The pro-market egalitarian aspiration toward nearly universal self-employment aimed to liberate workers from such governance by opening opportunities for nearly everyone to become their own boss. Why did it fail? Why are workers subject to dictatorship? Within economics, the theory of the firm is supposed to answer this question. It purports to offer politically neutral, technical, economic reasons why most production is undertaken by hierarchical organizations, with workers subordinate to bosses, rather than by autonomous individual workers. The theory of the firm contains important insights into the organization of production in advanced economies. However, it fails to explain the sweeping scope of authority that employers have over workers. What is worse, its practitioners sometimes even deny that workers lie under the authority of their bosses, in terms that reflect and reinforce an illusion of workers' freedom that also characterizes much of public discourse. Both the theory of the firm, and public discourse, are missing an important reality: that workers are subject to their employers' private government.

The pro-market egalitarian dream failed in part due to economies of scale. The technological changes that drove the Industrial Revolution involved huge concentrations of capital. A steam-powered cotton mill, steel foundry, cement or chemical factory, or railway must be worked by many hands. The case is no different for modern workplaces such as airports, hospitals, pharmaceutical labs, and computer assembly factories, as well as lower-tech workplaces such as amusement parks, slaughterhouses, conference hotels, and big-box retail stores. The greater efficiency of production using large, indivisible capital inputs explains why few individual workers can afford to supply their own capital. It explains why, contrary to the pro-market egalitarian hope, the enterprises responsible for most production are not sole proprietorships.

But economies of scale do not explain why production is not managed by independent contractors acting without external supervision, who rent their capital. One could imagine a manufacturing enterprise renting its floor space and machinery and supplying materials to a set of self-employed independent contractors. Each contractor would produce a part or stage of the product for sale to contractors at the next stage of production. The final contractor would sell the finished product to wholesalers, or perhaps back to the capital supplier. Some New England factories operated on a system like this from the Civil War to World War I. They were superseded by hierarchically organized firms. According to the theory of the firm, this is due to the excessive costs of contracting between suppliers of factors of production. In the failed New England system, independent contractors faced each other in a series of bilateral monopolies, which led to opportunistic negotiations. The demand to periodically renegotiate rates led contractors to hoard information and delay innovation for strategic reasons. Independent contractors wore out the machinery too quickly, failed to tightly coordinate their production with workers at other stages of production (leading to excess inventory of intermediate products), and lacked incentives to innovate, both with respect to saving materials and with respect to new products.

The modern firm solves these problems by replacing contractual relations among workers, and between workers and owners of other factors of production, with centralized authority. A manager, or hierarchy of managers, issues orders to workers in pursuit of centralized objectives. This enables close coordination of different workers and internalizes the benefits of all types of innovation within the firm as a whole. Managers can monitor workers to ensure that they work hard, cooperate with fellow workers, and do not waste capital. Because they exercise open-ended authority over workers, they can redeploy workers' efforts as needed to implement innovations, replace absentees, and deal with unforeseen difficulties. Authority relations eliminate the costs associated with constant negotiation and contracting among the participants in the firm's production. To put the point another way, the key to the superior efficiency of hierarchy is the open-ended authority of managers. It is impossible to specify in advance all of the contingencies that may require an alteration in an initial understanding of what a worker must do. Efficient employment contracts are therefore necessarily incomplete: they do not specify precisely everything a worker might be asked to do.

While this theory explains why firms exist and why they are constituted by hierarchies of authority, it does not explain the sweeping scope of employers' authority over workers in the United States. It does not explain, for example, why employers continue to have authority over workers' off-duty lives, given that their choice of sexual partner, political candidate, or Facebook posting has nothing to do with productive efficiency. Even worse, theorists of the firm appear not to even recognize how authoritarian firm governance is. Major theorists soft-pedal or even deny the very authority they are supposed to be trying to explain.

Consider Ronald Coase, the originator of the theory of the firm. He acknowledges that firms are “islands of conscious power.” The employment contract is one in which the worker “agrees to obey the directions of an entrepreneur.” But, he insists, “the essence of the contract is that it should only state the limits to the powers of the entrepreneur.” This suggests that the limits of the employer’s powers are an object of negotiation or at least communication between the parties. In the vast majority of cases, outside the contexts of collective bargaining or for higher-level employees, this is not true. Most workers are hired without any negotiation over the content of the employer’s authority, and without a written or oral contract specifying any limits to it. If they receive an employee handbook indicating such limits, the inclusion of a simple disclaimer (which is standard practice) is sufficient to nullify any implied contract exception to at-will employment in most states. No wonder they are shocked and outraged when their boss fires them for being too attractive, for failing to show up at a political rally in support of the boss’s favored political candidate, even because their daughter was raped by a friend of the boss.

What, then, determines the scope and limits of the employer’s authority, if it is not a meeting of minds of the parties? The state does so, through a complex system of laws—not only labor law, but laws regulating corporate governance, workplace safety, fringe benefits, discrimination, and other matters. In the United States, the default employment contract is employment-at-will. There are a few exceptions in federal law to this doctrine, notably concerning discrimination, family and medical leave, and labor union activity. For the most part, however, at-will employment, which entitles employers to fire workers for any or no reason, grants the employer sweeping legal authority not only over workers’ lives at work but also over their off-duty conduct. Under the employment-at-will baseline, workers, in effect, cede all of their rights to their employers, except those specifically guaranteed to them by law, for the duration of the employment relationship. Employers’ authority over workers, outside of collective bargaining and a few other contexts, such as university professors’ tenure, is sweeping, arbitrary, and unaccountable—not subject to notice, process, or appeal. The state has established the constitution of the government of the workplace: it is a form of private government.

Resistance to recognizing this reality appears to be widespread among theorists of the firm. Here, for example, is what Armen Alchian and Harold Demsetz say in their classic paper on the subject:

> It is common to see the firm characterized by the power to settle issues by fiat, by authority, or by disciplinary action. This is delusion. The firm has no power of fiat, no authority, no disciplinary action any different in the slightest degree from ordinary market contracting between any two people. I can "punish" you only by withdrawing future business or by seeking redress in the courts for any failure to honor our exchange agreement. That is exactly all that any employer can do. He can fire or sue, just as I can fire my grocer by stopping purchases from him or sue him for delivering faulty products. What then is the content of the presumed power to manage and assign workers to various tasks? Exactly the same as one little consumer's power to manage and assign his grocer to various tasks. To speak of managing, directing, or assigning workers to various tasks is a deceptive way of noting that the employer continually is involved in renegotiation of contracts on terms that must be acceptable to both parties. Telling an employee to type this letter rather than to file that document is like telling a grocer to sell me this brand of tuna rather than that brand of bread. I have no contract to continue to purchase from the grocer and neither the employer nor the employee is bound by any contractual obligations to continue their relationship.

Alchian and Demsetz appear to be claiming that wherever individuals are free to exit a relationship, authority cannot exist within it. This is like saying that Mussolini was not a dictator, because Italians could emigrate. While emigration rights may give governors an interest in voluntarily restraining their power, such rights hardly dissolve it.

Alternatively, their claim might be that where the only sanctions for disobedience are exile, or a civil suit, authority does not exist. That would come as a surprise to those subject to the innumerable state regulations that are backed only by civil sanctions. Nor would a state regulation lack authority if the only sanction for violating it were to force one out of one's job. Finally, managers have numerous other sanctions at their disposal besides firing and suing: they can and often do demote employees; cut their pay; assign them inconvenient hours or too many or too few hours; assign them more dangerous, dirty, menial, or grueling tasks; increase their pace of work; set them up to fail; and, within very broad limits, humiliate and harass them.

Perhaps the thought is that where consent mediates the relationship between the parties, the relationship cannot be one of subordination to authority. That would be a surprise to the entire social contract tradition, which is precisely about how the people can consent to government. Or is the idea that authority exists only where subordinates obey orders blindly and automatically? But then it exists hardly anywhere. Even the most repressive regimes mostly rely on means besides sheer terror and brainwashing to elicit compliance with their orders, focusing more on persuasion and rewards.

Alchian and Demsetz may be hoodwinked by the superficial symmetry of the employment contract: under employment-at-will, workers, too, may quit for any or no reason. This leads them to represent quitting as equivalent to firing one's boss. But workers have no power to remove the boss from his position within the firm. And quitting often imposes even greater costs on workers than being fired does, for it makes them ineligible for unemployment insurance. It is an odd kind of countervailing power that workers supposedly have to check their bosses' power, when they typically suffer more from imposing it than they would suffer from the worst sanction bosses can impose on them. Threats, to be effective, need to be credible.

The irony is that Alchian and Demsetz are offering a theory of the firm. The question the theory is supposed to answer is why production is not handled entirely by market transactions among independent, self-employed people, but rather by authority relations. That is, it is supposed to explain why the hope of pro-market pre–Industrial Revolution egalitarians did not pan out. Alchian and Demsetz cannot bear the full authoritarian implications of recognizing the boundary between the market and the firm, even in a paper devoted to explaining it. So they attempt to extend the metaphor of the market to the internal relations of the firm and pretend that every interaction at work is mediated by negotiation between managers and workers. Yet the whole point of the firm, according to the theory, is to eliminate the costs of markets—of setting internal prices via negotiation over every transaction among workers and between workers and managers.

Alchian and Demsetz are hardly alone. Michael Jensen and William Meckling agree with them that authority has nothing to do with the firm; it is merely a nexus of contracts among independent individuals. John Tomasi, writing today, continues to promote the image of employees as akin to independent contractors, freely negotiating the terms of their contract with their employers, to obtain work conditions tailor-made to their idiosyncratic specifications. While workers at the top of the corporate hierarchy enjoy such freedom, as well as a handful of elite athletes, entertainers, and star academics, Tomasi ignores the fact that the vast majority of workers not represented by unions do not negotiate terms of the employer's authority at all. Why would employers bother, when, by state fiat, workers automatically cede all liberties not reserved to them by the state, upon accepting an offer of work?

Not just theorists of the firm, but public discourse too, tend to represent employees as if they were independent contractors. This makes it seem as if the workplace is a continuation of arm's-length market transactions, as if the labor contract were no different from a purchase from Smith's butcher, baker, or brewer. Alchian and Demsetz are explicit about this, in drawing the analogy of the employment relation with the customer–grocer relation. But the butcher, baker, and brewer remain independent from their customers after selling their goods. In the employment contract, by contrast, the workers cannot separate themselves from the labor they have sold; in purchasing command over labor, employers purchase command over people.

What accounts for this error? The answer is, in part, that a representation of what egalitarians hoped market society would deliver for workers before the Industrial Revolution has been blindly carried over to the post–Industrial Revolution world. People continue to deploy the same justification of market society—that it would secure the personal independence of workers from arbitrary authority—long after it failed to deliver on its original aspiration. The result is a kind of political hemiagnosia: like those patients who cannot perceive one-half of their bodies, a large class of libertarian-leaning thinkers and politicians, with considerable public following, cannot perceive half of the economy: they cannot perceive the half that takes place beyond the market, after the employment contract is accepted.

Hemiagnosia, also known as hemispatial neglect, is a neuropsychologial condition, resulting from brain damage after a stroke or injury, in which a person loses awareness of objects and stimuli on one side of their body. Oliver Sacks described one such case in his book, *The Man Who Mistook His Wife for a Hat*.

This tendency was reinforced by a narrowing of egalitarian vision in the transition to the Industrial Revolution. While the Levellers and other radicals of the mid-seventeenth century agitated against all kinds of arbitrary government, Thomas Paine mainly narrowed his critique to state abuses. Similarly, the Republican Party kept speaking mainly on behalf of the interests of businesspeople and those who hoped to be in business for themselves, even after it was clear that the overwhelming majority of workers had no realistic prospect of attaining this status, and that the most influential businesspeople were not, as Lincoln hoped, sole proprietors (with at most a few employees, the majority of whom were destined to rise to self-employed status after a few years), but managers in large organizations, governing workers destined to be wage laborers for their entire working lives. Thus, a political agenda that once promised equalizing as well as liberating outcomes turned into one that reinforced private, arbitrary, unaccountable government over the vast majority.

Finally, nineteenth-century laissez-faire liberals, with their bizarre combination of hostility toward state power and enthusiasm for hyperdisciplinary total institutions, attempted to reconcile these contradictory tendencies by limiting their focus to the entry and exit conditions of the labor contract, while blackboxing what actually went on in the factories. In fact, they did drive a dramatic improvement in workers' freedom of entry and exit. Under the traditional common law of master and servant, employees were bound to their employers by contracts of one year (apprentices and indentured servants for longer), could quit before then only on pain of losing all their accrued wages, and were not entitled to keep wages from moonlighting. Other employers were forbidden to bid for their labor while they were still under contract. Workers were liberated from these constraints over the course of the nineteenth century.

This liberation, as is well-known, was a double-edged sword. Employers, too, were liberated from any obligation to employ workers. As already noted, the worst the workers could do to the boss often involved suffering at least as much as the worst the boss could do to them. For the bulk of workers, who lived at the bottom of the hierarchy, this was not much of a threat advantage, unless it was exercised collectively in a strike. They had no realistic hope under these conditions for liberation from workplace authoritarianism.

No wonder a central struggle of British workers in the mid-nineteenth century was for limits on the length of the working day—even more than for higher wages. This was true, even though workers at this period of the Industrial Revolution were suffering through “Engels’s pause”—the first fifty to sixty years of the Industrial Revolution during which wages failed to grow. My focus, like theirs, is not on issues of wages or distributive justice. It is on workers’ freedom. If the Industrial Revolution meant they could not be their own bosses at work, at least they could try to limit the length of the working day so that they would have some hours during which they could choose for themselves, rather than follow someone else’s orders.

That was an immediate aim of European workers’ movements in the mid-nineteenth century. As the century unfolded, workers largely abandoned their pro-market, individualistic egalitarian dream and turned to socialist, collectivist alternatives—that is, to restructuring the internal governance of the workplace. The problem was that the options open to workers consisted almost exclusively of private governments. Laissez-faire liberals, touting the freedom of the free market, told workers: choose your Leviathan. That is like telling the citizens of the Communist bloc of Eastern Europe that their freedom could be secured by a right to emigrate to any country—as long as they stayed behind the Iron Curtain. Population movements would likely have put some pressure on Communist rulers to soften their rule. But why should Leviathan set the baseline against which competition took place? No liberal or libertarian would be satisfied with a competitive equilibrium set against this baseline, where the choice of state governments is concerned. Workers’ movements rejected it for nonstate governments as well.

To their objection, libertarians and laissez-faire liberals had no credible answer. Let us not fool ourselves into supposing that the competitive equilibrium of labor relations was ever established by politically neutral market forces mediated by pure freedom of contract, with nothing but the free play of individuals’ idiosyncratic preferences determining the outcome. This is a delusion as great as the one that imagines that the workplace is not authoritarian. Every competitive equilibrium is established against a background assignment of property rights and other rights established by the state. The state supplies the indispensable legal infrastructure of developed economies as a kind of public good, and is needed to do so to facilitate cooperation on the vast scales that characterize today's rich and sophisticated economies. Thus, it is the state that establishes the default constitution of workplace governance. It is a form of authoritarian, private government, in which, under employment-at-will, workers cede all their rights to their employers, except those specifically reserved for them by law.

Freedom of entry and exit from any employment relation is not sufficient to justify the outcome. To see this, consider an analogous case for the law of coverture, which the state had long established as the default marriage contract. Under coverture, a woman, upon marrying her husband, lost all rights to own property and make contracts in her own name. Her husband had the right to confine her movements, confiscate any wages she might earn, beat her, and rape her. Divorce was very difficult to obtain. The marriage contract was valid only if voluntarily accepted by both parties. It was a contract into subjection, entailing the wife's submission to the private government of her husband. Imagine a modification of this patriarchal governance regime, allowing either spouse to divorce at will and allowing any clause of the default contract to be altered by a prenuptial agreement. This is like the modification that laissez-faire liberals added to the private government of the workplace. Women would certainly have sufficient reason to object that their liberties would still not be respected under this modification, in that it preserves a patriarchal baseline, in which men still hold virtually all the cards. It would allow a lucky few to escape subjection to their husbands, but that is not enough to justify the patriarchal authority the vast majority of men would retain over their wives. Consent to an option within a set cannot justify the option set itself.

I do not claim that private governments at work are as powerful as states. Their sanctioning powers are lower, and the costs of emigration from oppressive private governments are generally lower than the costs of emigration from states. Yet private governments impose a far more minute, exacting, and sweeping regulation of employees than democratic states do in any domain outside of prisons and the military. Private governments impose controls on workers that are unconstitutional for democratic states to impose on citizens who are not convicts or in the military.

The negative liberties most workers enjoy de facto are considerably greater than the ones they are legally entitled to under their employers. Market pressures, social norms, lack of interest, and simple decency keep most employers from exercising the full scope of their authority. We should care nevertheless about the insecurity of employees' liberty. They work in a state of republican unfreedom, their liberties vulnerable to cancellation without justification, notice, process, or appeal. That they enjoy substantially greater negative liberty than they are legally entitled to no more justifies their lack of republican liberty than the fact that most wives enjoyed greater freedoms than they were legally entitled to justified coverture—or even coverture modified by free divorce.

Suppose people find themselves under private government. This is a state of republican unfreedom, of subjection to the arbitrary will of another. It is also usually a state of substantial constraints on negative liberty. By what means could people attain their freedom? One way would be to end subjection to government altogether. When the government is a state, this is the anarchist answer. We have seen that when the government is an employer, the answer of many egalitarians before the Industrial Revolution was to advance a property regime that promotes self-employment, perhaps even to make self-employment a nearly universally accessible opportunity, at least for men. This amounts to promoting anarchy as the primary form of workplace order.

The theory of the firm explains why this approach cannot preserve the productive advantages of large-scale production. Some kind of incompletely specified authority over groups of workers is needed to replace market relations within the firm. However, the theory of the firm, although it explains the necessity of hierarchy, neither explains nor justifies private government in the workplace. That the constitution of workplace government is both arbitrary and dictatorial is not dictated by efficiency or freedom of contract, but rather by the state. Freedom of contract no more explains the equilibrium workplace constitution than freedom to marry explained women's subjection to patriarchy under coverture.

In other words, in the great contest between individualism and collectivism regarding the mode of production, collectivism won, decisively. Now nearly all production is undertaken by teams of workers using large, indivisible forms of capital equipment held in common. The activities of these teams are governed by managers according to a centralized production plan. This was an outcome of the Industrial Revolution, and equally much embraced by capitalists and socialists. That advocates of capitalism continue to speak as if their preferred system of production upholds "individualism" is simply a symptom of institutional hemiagnosia, the misdeployment of a hopeful preindustrial vision of what market society would deliver as if it described our current reality, which replaces market relations with governance relations across wide domains of production.

Workers in the nineteenth century turned from individualistic to collectivist solutions to workplace governance because they saw that interpersonal authority—governments over groups of workers—was inescapable in the new industrial order. If government is inescapable or necessary for solving certain important problems, the only way to make people free under that government is to make that government a public thing, accountable to the governed. The task is to replace private government with public government.

When the government is a state, we have some fairly good ideas of how to proceed: the entire history of democracy under the rule of law is a series of experiments in how to make the government of the state a public thing, and the people free under the state. These experiments continue to this day.

But what if the government is an employer? Here matters are more uncertain. There are four general strategies for advancing and protecting the liberties and interests of the governed under any type of government: (1) exit, (2) the rule of law, (3) substantive constitutional rights, and (4) voice. Let us consider each in turn.

Exit is usually touted as a prime libertarian strategy for protecting individual rights. By forcing governments to compete for subjects, exit rights put pressure on governments to offer their subjects better deals. "The defense against oppressive hours, pay, working conditions, or treatment is the right to change employers." Given this fact, it is surprising how comfortable some libertarians are with the validity of contracts into slavery, from which exit is disallowed. In their view, freedom of contract trumps the freedom of individuals under government, or even the freedom to leave that government. While contracts into slavery and peonage are no longer valid, other contractual barriers to exit are common and growing. Noncompete clauses, which bar employees from working for other employers in the same industry for a period of years, have spread from technical professions (where nearly half of employees are subject to them) to jobs such as sandwich maker, pesticide sprayer, summer camp counselor, and hairstylist. While employers can no longer hold workers in bondage, they can imprison workers' human capital. California is one of the few states that prohibit noncompete clauses. As the dynamism of its economy proves, such contractual barriers to exit are not needed for economic growth, and probably undermine it. There should be a strong legal presumption against such barriers to exit, to protect workers' freedom to exit their employers' government.

The rule of law is a complex ideal encompassing several protections of subjects' liberties: (a) Authority may be exercised only through laws duly passed and publicized in advance, rather than arbitrary orders issued without any process. (b) Subjects are at liberty to do anything not specifically prohibited by law. (c) Laws are generally applicable to everyone in similar circumstances. (d) Subjects have rights of due process before suffering any sanctions for noncompliance. Not all of these protections, which were devised with state authority in mind, can be readily transferred to the employment context. Most of the solutions to problems the state must address involve regulations that leave open to individuals a vast array of options for selecting both ends and means. By contrast, efficient production nearly always requires close coordination of activities according to centralized objectives, directed by managers exercising discretionary authority. This frequently entails that the authority of managers over workers be both intensive (limiting workers to highly particular movements and words, not allowing them to pursue their own personal objectives at work or even to select their own means to a prescribed end) and incompletely specified. The state imposes traffic laws that leave people free to choose their own destinations, routes, and purposes. Walmart tells its drivers what they have to pick up, when and where they have to deliver it, and what route they have to take. In addition, managers need incompletely specified authority to rapidly reassign different tasks to different workers to address new circumstances. Finally, excessively costly procedural protections against firing also discourage hiring. All these obstacles to applying rule-of-law protections in the workplace empower employers to abuse their authority, subject workers to humiliating treatment, and impose excessive constraints on their freedom.

At the same time, it is easy to exaggerate the obstacles to imposing rule-of-law protections at work. Larger organizations generally have employee handbooks and standard practice guides that streamline authority along legalistic lines. Equal protection and due process rights already exist for workers in larger organizations with respect to limited issues. A worker who has been sexually harassed by her boss normally has recourse to intrafirm procedures for resolving her complaint. Such protections reflect a worldwide “blurring of boundaries” among business, nonprofit, and state organizations, which appears to be driven not simply by legal changes, but by cultural imperatives of scientific management and ideas of individual rights and organizational responsibilities. Some but not all of these managerial developments are salutary. They are proper subjects of investigation for political theory, once we get beyond the subject’s narrow focus on the state.

A just workplace constitution should incorporate basic constitutional rights, akin to a bill of rights against employers. To some extent, the Fair Labor Standards Act, anti-discrimination laws, and other workplace regulations already serve this function. A workers’ bill of rights could be strengthened by the addition of more robust protections of workers’ freedom to engage in off-duty activities, such as exercising their political rights, free speech, and sexual choices. Similar protections for employee privacy could be extended in the workplace during work breaks. The Occupational Safety and Health Administration (OSHA) prohibitions of particularly degrading, dangerous, and onerous working conditions can be viewed as part of a workers’ bill of rights. Nabisco once threatened its female production line workers with three-day suspensions for using the bathroom, and ordered them to urinate in their clothes instead. It was only in 1998 that OSHA issued a regulation requiring employers to recognize workers’ right to use a bathroom, after cases such as Nabisco’s aroused public outrage. Workers in Europe are protected from harassment of all kinds by anti-mobbing laws. This gives them far more robust workplace constitutional rights than workers in the United States, who may be legally harassed as long as their harassers do not discriminate by race, gender, or other protected identities in choosing their victims.

There are limits, however, to how far a bill of rights can go in protecting workers from abuse. Because they prescribe uniformity across workplaces, they can at best offer a minimal floor. In practice, they are also grossly underenforced for the least advantaged workers. Furthermore, such laws do not provide for worker participation in governance at the firm level. They merely impose limits on employer dictatorship.

For these reasons, there is no adequate substitute for recognizing workers' voice in their government. Voice can more readily adapt workplace rules to local conditions than state regulations can, while incorporating respect for workers' freedom, interests, and dignity. Just because workplace governance requires a hierarchy of offices does not mean that higher officeholders must be unaccountable to the governed, or that the governed should not play any role in managerial decision-making. In the United States, two models for workers' voice have received the most attention: workplace democracy and labor unions. Workplace democracy, in the form of worker-owned and -managed firms, has long stood as an ideal for many egalitarians. While much could be done to devise laws more accommodating of this structure, some of its costs may be difficult to surmount. In particular, the costs of negotiation among workers with asymmetrical interests (for example, due to possession of different skills) appear to be high.

In the United States, collective bargaining has been the primary way workers have secured voice within the government of the workplace. However, even at its peak in 1954, only 28.3 percent of workers were represented by a labor union. Today, only 11.1 percent of all workers and 6.6 percent of private sector workers are represented. Although laws could be revised to make it easier for workers to organize into a union, this does not address difficulties inherent to the U.S. labor union model. The U.S. model organizes workers at the firm level rather than the industry level. Firms vigorously resist unionization to avoid a competitive disadvantage with non-unionized firms. Labor unions also impose inefficiencies due to their monopoly power. They also take an adversarial stance toward management—one that makes not only managers but also many workers uncomfortable. At the same time, they often provide the only effective voice employees have in workplace governance.

It is possible to design a workplace constitution in which workers have a non-adversarial voice in workplace governance, without raising concerns about monopolization. The overwhelming majority of workers in the United States would like to have such a voice: 85 percent would like firm governance to be "run jointly" by management and workers. In the United States, such a constitution is illegal under the National Labor Relations

Act, which prohibits company unions. Yet this structure is commonplace in Europe. Germany's system of codetermination, begun in the Weimar era and elaborately developed since World War II, offers one highly successful model.

It is not my intention in this lecture to defend any particular model of worker participation in firm governance. My point is rather to expose a deep failure in current ways of thinking about how government fits into Americans' lives. We do not live in the market society imagined by Paine and Lincoln, which offered an appealing vision of what a free society of equals would look like, combining individualistic libertarian and egalitarian ideals. Government is everywhere, not just in the form of the state, but even more pervasively in the workplace. Yet public discourse and much of political theory pretends that this is not so. It pretends that the constitution of workplace government is somehow the object of voluntary negotiation between workers and employers. This is true only for a tiny proportion of privileged workers. The vast majority are subject to private, authoritarian government, not through their own choice, but through laws that have handed nearly all authority to their employers.

Workman v. United Parcel Service, Inc., 234 F.3d 998 (7th Cir. 2000)

Posner, Circuit Judge

This is a diversity suit, governed by Indiana law and resolved in favor of the defendant on summary judgment, for breach of contract and promissory estoppel. The plaintiff is an employee of UPS who claims that the company made a binding promise not to demote him without just cause and broke its promise.

On the merits, the plaintiff relies for both his contractual claim and his claim of promissory estoppel on a handbook that UPS gives its employees explaining its employment policies. Under the law of many states, such a handbook can create a binding contract if it contains clear promissory language that makes the handbook an offer that the employee accepts by continuing to work after receiving it. Indiana has yet to decide whether to follow these states. We need not speculate about whether it will. Even if we assume it will, and even if the UPS handbook could, as we doubt, be interpreted to contain a clear promise not to demote an employee except for cause, the plaintiff's contractual claim is extinguished by the statement in the handbook that "this Policy Book is not a contract of employment and does not affect your rights as an employee of UPS."

Such a disclaimer, if clear and forthright, as it is here, is a complete defense to a suit for breach of contract based on an employee handbook. Since an employer is under no legal obligation to furnish its employees with a statement of its employment policies, we cannot think of a basis for holding that any statement it does give them has to be legally binding. The only effect of such a rule would be to extinguish employee handbooks.

We are mindful of cases that hold that it is not enough for the handbook to disclaim creating an employment contract; it must state in addition that the employee can be terminated at the will of the employer.

The decisions that refuse to give effect to the short-form disclaimer strike us as paternalistic in the extreme. Employment at will is the norm in the United States. An employee therefore has no reason to presume that he has tenure, and a disclaimer that a handbook creates a contract is a clear statement that if he is fired he can't sue for breach of contract. What more is needed? But there was more here, enough more perhaps to satisfy the courts that rendered the decisions we just cited: the statement that the handbook gives the employee no rights.

One might wonder what function an employee handbook serves if it does not create enforceable obligations. The answer is that it conveys useful information to the employee. And more—for to the extent that it does contain promises, even if not legally binding ones, it places the employer under a moral obligation, or more crassly gives him a reputational incentive, to honor those promises. Such promises may not be worth as much to the promisee as a promise that the law enforces, but they are worth more than nothing, and it is nothing that the employee can expect if employers must choose between nothing and giving up employment at will.

A disclaimer that is effective against a claim of breach of contract is also effective, we believe, against a claim of promissory estoppel. The function of the doctrine of promissory estoppel is to provide an alternative basis to consideration for making promises legally enforceable. A promise can be legally binding because it is supported by consideration or because it induces reasonable reliance, but in either case the promisor is free by a suitable disclaimer to deny any legally binding effect to the promise. To put this differently, consideration or reliance is a necessary but not a sufficient condition of the enforceability of a promise. Another necessary condition is that the promise be worded consistently with its being intended to be enforceable. Because of the disclaimer, that condition was not fulfilled in this case.

Chapter 2: Labor Organizing & Collective Bargaining

1. Collective Action as an Illegal Conspiracy

Commonwealth v. Pullis (Phila. 1806), 3 Doc. Hist. of Am. Ind. Soc. 59 (2d ed. Commons 1910)

Indictment for common law conspiracy, tried before a jury consisting of two inn-keepers, a tavern-keeper, three grocers, a merchant, a hatter, a tobacconist, a watchmaker, a tailor, a bottler.

The indictment charged in substance:

(1) That defendants conspired and agreed that none of them would work at the shoemaking craft except at certain specified prices higher than prices which had theretofore customarily been paid;

(2) that defendants conspired and agreed that they would endeavor to prevent "by threats, menaces, and other unlawful means" other craftsmen from working except at said specified rates; and

(3) that defendants, having formed themselves into an association, conspired and agreed that none of them would work for any master who should employ a cordwainer who had broken any rule or bylaw of the association, and that defendants, in accordance with such agreement refused to work at the usual rates and prices.

Cordwainer is an archaic term for a shoemaker.

Counsel for the prosecution were Jared Ingersol and Joseph Hopkinson. Counsel for the defendants were Caesar A. Rodney and Walter Franklin. During his address to the jury, Joseph Hopkinson, for the prosecution, stated, among other things, the following:

Recorder Levy, in his charge to the jury, made the following statements, among others:

It is proper to consider, is such a combination consistent with the principles of our law, and injurious to the public welfare? The usual means by which the prices of work are regulated, are the demand for the article and the excellence of its fabric. Where the work is well done, and the demand is considerable, the prices will necessarily be high. Where the work is ill done, and the demand is inconsiderable, they will unquestionably be low. If there are many to consume, and few to work, the price of the article will be high; but if there are few to consume, and many to work, the article must be low.

Much will depend, too, upon these circumstances, whether the materials are plenty or scarce; the price of the commodity, will in consequence be higher or lower. These are the means by which prices are regulated in the natural course of things. To make an artificial regulation, is not to regard the excellence of the work or quality of the material, but to fix a positive and arbitrary price, governed by no standard, controlled by no impartial person, but dependent on the will of the few who are interested; this is the unnatural way of raising the price of goods or work. This is independent of the number who are to do the work. It is an unnatural, artificial means of raising the price of work beyond its standard, and taking an undue advantage of the public. Is the rule of law bottomed upon such principles, as to permit or protect such conduct?

Consider it on the footing of the general commerce of the city. Is there any man who can calculate (if this is tolerated) at what price he may safely contract to deliver articles, for which he may receive orders, if he is to be regulated by the journeymen in an arbitrary jump from one price to another? It renders it impossible for a man, making a contract for a large quantity of such goods, to know whether he shall lose or gain by it. If he makes a large contract for goods today, for delivery at three, six or nine months hence, can he calculate what the prices will be then, if the journeymen in the intermediate time, are permitted to meet and raise their prices, according to their caprice or pleasure? Can he fix the price of his commodity for a future day? It is impossible that any man can carry on commerce in this way. There cannot be a large contract entered into, but what the contractor will make at his peril. He may be ruined by the difference of prices made by the journeymen in the intermediate time. What then is the operation of this kind of conduct upon the commerce of the city? It exposes it to inconveniences, if not to ruin; therefore, it is against the public welfare.

What is the case now before us? A combination of workmen to raise their wages may be considered in a two fold point of view; one is to benefit themselves the other is to injure those who do not join their society. The rule of law condemns both. If the rule be clear, we are bound to conform to it even though we do not comprehend the principle upon which it is founded. We are not to reject it because we do not see the reason of it. It is enough, that is the will of the majority. It is law because it is their will—if it is law, there may be good reasons for it though we cannot find them out. But the rule in this case is pregnant with sound sense and all the authorities are clear upon the subject.

It is adopted by Blackstone, and laid down as the law by Lord Mansfield, that an act innocent in an individual, is rendered criminal by a confederacy to effect it. One man determines not to work under a certain price and it may be individually the opinion of all; in such a case it would" be lawful in each to refuse to do so, for if each stands, alone, either may extract from his determination when he pleases. In the turn-out of last fall, if each member of the body had stood alone, fettered by no promises to the rest, many of them might have changed their opinion as to the price of wages and gone to work; but it has been given to you in evidence, that they were bound down by their agreement, and pledged by mutual engagements, to persist in it, however contrary to their own judgment. The continuance in improper conduct may therefore well be attributed to the combination. The good sense of those individuals was prevented by this agreement, from having its free exercise.

William Blackstone (1723-1780) was a British lawyer, judge, and legal scholar. His treatise on the common law, *Commentaries on the Laws of England*, was frequently cited as an authority by 19th century U.S. courts.

William Murray, 1st Earl of Mansfield (1705-1793) was a prominant British lawyer and judge.

Turnout is an archaic word for a labor strike.

The defendants were found guilty and were fined eight dollars each plus costs.

Commonwealth v Hunt, 45 Mass. 111 (1842)

Shaw, C.J.

The general rule of the common law is, that it is a criminal and indictable offence, for two or more to confederate and combine together, by concerted means, to do that which is unlawful or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual. This rule of law may be equally in force as a rule of the common law, in England and in this Commonwealth; and yet it must depend upon the local laws of each country to determine, whether the purpose to be accomplished by the combination, or the concerted means of accomplishing it, be unlawful or criminal in the respective countries.

But the great difficulty is, in framing any definition or description, to be drawn from the decided cases, which shall specifically identify this offence—a description broad enough to include all cases punishable under this description, without including acts which are not punishable. Without attempting to review and reconcile all the cases, we are of opinion, that as a general description, though perhaps not a precise and accurate definition, a conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. We use the terms criminal or unlawful, because it is manifest that many acts are unlawful, which are not punishable by indictment or other public prosecution; and yet there is no doubt, we think, that a combination by numbers to do them would be an unlawful conspiracy, and punishable by indictment.

But yet it is clear, that it is not every combination to do unlawful acts, to the prejudice of another by a concerted action, which is punishable as conspiracy.

Several rules upon the subject seem to be well established, to wit, that the unlawful agreement constitutes the gist of the offence, and therefore that it is not necessary to charge the execution of the unlawful agreement. And when such execution is charged, it is to be regarded as proof of the intent, or as an aggravation of the criminality of the unlawful combination.

Another rule is a necessary consequence of the former, which is, that the crime is consummate and complete by the fact of unlawful combination, and, therefore, that if the execution of the unlawful purpose is averred, it is by way of aggravation, and proof of it is not necessary to conviction.

And it follows, as another necessary legal consequence, from the same principle, that the indictment must—by averring the unlawful purpose of the conspiracy, or the unlawful means by which it is contemplated and agreed to accomplish a lawful purpose, or a purpose not of itself criminally punishable—set out an offence complete in itself, without the aid of any averment of illegal acts done in pursuance of such an agreement; and that an illegal combination, imperfectly and insufficiently set out in the indictment, will not be aided by averments of acts done in pursuance of it.

From these views of the rules of criminal pleading, it appears to us to follow, as a necessary legal conclusion, that when the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; and if the criminality of the offence, which is intended to be charged, consists in the agreement to compass or promote some purpose, not of itself criminal or unlawful, by the use of fraud, force, falsehood, or other criminal or unlawful means, such intended use of fraud, force, falsehood, or other criminal or unlawful means, must be set out in the indictment.

The first count set forth, that the defendants, with divers others unknown, on the day and at the place named, being workmen, and journeymen, in the art and occupation of bootmakers, unlawfully, perniciously and deceitfully designing and intending to continue, keep up, form, and unite themselves, into an unlawful club, society and combination, and make unlawful by-laws, rules and orders among themselves, and thereby govern themselves and other workmen, in the said art, and unlawfully and unjustly to extort great sums of money by means thereof, did unlawfully assemble and meet together, and being so assembled, did unjustly and corruptly conspire, combine, confederate and agree together, that none of them should thereafter, and that none of them would, work for any master or person whatsoever, in the said art, mystery and occupation, who should employ any workman or journeyman, or other person, in the said art, who was not a member of said club, society or combination, after notice given him to discharge such workman, from the employ of such master; to the great damage and oppression, etc.

Now it is to be considered, that the preamble and introductory matter in the indictment—such as unlawfully and deceitfully designing and intending unjustly to extort great sums, etc.—is mere recital and therefore cannot aid an imperfect averment of the facts constituting the description of the offence. The same may be said of the concluding matter, which follows the averment, as to the great damage and oppression not only of their said masters, employing them in said art and occupation, but also of divers other workmen in the same art, mystery and occupation, to the evil example, etc. If the facts averred constitute the crime, these are properly stated as the legal inferences to be drawn from them. If they do not constitute the charge of such an offence, they cannot be aided by these alleged consequences.

Stripped then of these introductory recitals and alleged injurious consequences, and of the qualifying epithets attached to the facts, the averment is this; that the defendants and others formed themselves into a society, and agreed not to work for any person, who should employ any journeyman or other person, not a member of such society, after notice given him to discharge such workman.

The manifest intent of the association is, to induce all those engaged in the same occupation to become members of it. Such a purpose is not unlawful. It would give them a power which might be exerted for useful and honorable purposes, or for dangerous and pernicious ones. If the latter were the real and actual object, and susceptible of proof, it should have been specially charged. Such an association might be used to afford each other assistance in times of poverty, sickness and distress; or to raise their intellectual, moral and social condition; or to make improvement in their art; or for other proper purposes. Or the association might be designed for purposes of oppression and injustice. But in order to charge all those, who become members of an association, with the guilt of a criminal conspiracy, it must be averred and proved that the actual, if not the avowed object of the association, was criminal. An association may be formed, the declared objects of which are innocent and laudable, and yet they may have secret articles, or an agreement communicated only to the members, by which they are banded together for purposes injurious to the peace of society or the rights of its members. Such would undoubtedly be a criminal conspiracy, on proof of the fact, however meritorious and praiseworthy the declared objects might be. The law is not to be hoodwinked by colorable pretences. It looks at truth and reality, through whatever disguise it may assume. But to make such an association, ostensibly innocent, the subject of prosecution as a criminal conspiracy, the secret agreement, which makes it so, is to be averred and proved as the gist of the offence. But when an association is formed for purposes actually innocent, and afterwards its powers are abused, by those who have the control and management of it, to purposes of oppression and injustice, it will be criminal in those who thus misuse it, or give consent thereto, but not in the other members of the association. In this case, no such secret agreement, varying the objects of the association from those avowed, is set forth in this count of the indictment.

Nor can we perceive that the objects of this association, whatever they may have been, were to be attained by criminal means. The means which they proposed to employ, as averred in this count, and which, as we are now to presume, were established by the proof, were, that they would not work for a person, who, after due notice, should employ a journeyman not a member of their society. Supposing the object of the association to be laudable and lawful, or at least not unlawful, are these means criminal? The case supposes that these persons are not bound by contract, but free to work for whom they please, or not to work, if they so prefer. In this state of things, we cannot perceive, that it is criminal for men to agree together to exercise their own acknowledged rights, in such a manner as best to subserve their own interests. One way to test this is, to consider the effect of such an agreement, where the object of the association is acknowledged on all hands to be a laudable one. Suppose a class of workmen, impressed with the manifold evils of intemperance, should agree with each other not to work in a shop in which ardent spirit was furnished, or not to work in a shop with any one who used it, or not to work for an employer, who should, after notice, employ a journeyman who habitually used it. The consequences might be the same. A workman, who should still persist in the use of ardent spirit, would find it more difficult to get employment; a master employing such an one might, at times, experience inconvenience in his work, in losing the services of a skilful but intemperate workman. Still it seems to us, that as the object would be lawful, and the means not unlawful, such an agreement could not be pronounced a criminal conspiracy.

From this count in the indictment, we do not understand that the agreement was, that the defendants would refuse to work for an employer, to whom they were bound by contract for a certain time, in violation of that contract; nor that they would insist that an employer should discharge a workman engaged by contract for a certain time, in violation of such contract. It is perfectly consistent with every thing stated in this count, that the effect of the agreement was, that when they were free to act, they would not engage with an employer, or continue in his employment, if such employer, when free to act, should engage with a workman, or continue a workman in his employment, not a member of the association. If a large number of men, engaged for a certain time, should combine together to violate their contract, and quit their employment together, it would present a very different question. Suppose a farmer, employing a large number of men, engaged for the year, at fair monthly wages, and suppose that just at the moment that his crops were ready to harvest, they should all combine to quit his service, unless he would advance their wages, at a time when other laborers could not be obtained. It would surely be a conspiracy to do an unlawful act, though of such a character, that if done by an individual, it would lay the foundation of a civil action only, and not of a criminal prosecution. It would be a case very different from that stated in this count.

The second count, omitting the recital of unlawful intent and evil disposition, and omitting the direct averment of an unlawful club or society, alleges that the defendants, with others unknown, did assemble, conspire, confederate and agree together, not to work for any master or person who should employ any workman not being a member of a certain club, society or combination, called the Boston Journeymen Bootmaker's Society, or who should break any of their by-laws, unless such workmen should pay to said club, such sum as should be agreed upon as a penalty for the breach of such unlawful rules, etc; and that by means of said conspiracy they did compel one Isaac B. Wait, a master cordwainer, to turn out of his employ one Jeremiah Horne, a journeyman boot-maker, etc. in evil example, etc. So far as the averment of a conspiracy is concerned, all the remarks made in reference to the first count are equally applicable to this. It is simply an averment of an agreement amongst themselves not to work for a person, who should employ any person not a member of a certain association. It sets forth no illegal or criminal purpose to be accomplished, nor any illegal or criminal means to be adopted for the accomplishment of any purpose. It was an agreement, as to the manner in which they would exercise an acknowledged right to contract with others for their labor. It does not aver a conspiracy or even an intention to raise their wages; and it appears by the bill of exceptions, that the case was not put upon the footing of a conspiracy to raise their wages.

As to the latter part of this count, which avers that by means of said conspiracy, the defendants did compel one Wait to turn out of his employ one Jeremiah Horne, we remark, in the first place, that as the acts done in pursuance of a conspiracy, as we have before seen, are stated by way of aggravation, and not as a substantive charge; if no criminal or unlawful conspiracy is stated, it cannot be aided and made good by mere matter of aggravation. If the principal charge falls, the aggravation falls with it.

But further; if this is to be considered as a substantive charge, it would depend altogether upon the force of the word "compel," which may be used in the sense of coercion, or duress, by force or fraud. It would therefore depend upon the context and the connexion with other words, to determine the sense in which it was used in the indictment. If, for instance, the indictment had averred a conspiracy, by the defendants, to compel Wait to turn Horne out of his employment, and to accomplish that object by the use of force or fraud, it would have been a very different case; especially if it might be fairly construed, as perhaps in that case it might have been, that Wait was under obligation, by contract, for an unexpired term of time, to employ and pay Horne. As before remarked, it would have been a conspiracy to do an unlawful, though not a criminal act, to induce Wait to violate his engagement, to the actual injury of Horne. To mark the difference between the case of a journeyman or a servant and master, mutually bound by contract, and the same parties when free to engage anew, I should have before cited the case of the *Boston Glass Co. v. Binney*.[^hunt1] In that case, it was held actionable to entice another person's hired servant to quit his employment, during the time for which he was engaged; but not actionable to treat with such hired servant, whilst actually hired and employed by another, to leave his service, and engage in the employment of the person making the proposal, when the term for which he is engaged shall expire. It acknowledges the established principle, that every free man, whether skilled laborer, mechanic, farmer or domestic servant, may work or not work, or work or refuse to work with any company or individual, at his own option, except so far as he is bound by contract. But whatever might be the force of the word "compel," unexplained by its connexion, it is disarmed and rendered harmless by the precise statement of the means, by which such compulsion was to be effected. It was the agreement not to work for him, by which they compelled Wait to decline employing Horne longer. On both of these grounds, we are of opinion that the statement made in this second count, that the unlawful agreement was carried into execution, makes no essential difference between this and the first count.

The third count, reciting a wicked and unlawful intent to impoverish one Jeremiah Horne, and hinder him from following his trade as a boot-maker, charges the defendants, with others unknown, with an unlawful conspiracy, by wrongful and indirect means, to impoverish said Horne and to deprive and hinder him, from his said art and trade and getting his support thereby, and that, in pursuance of said unlawful combination, they did unlawfully and indirectly hinder and prevent, etc. and greatly impoverish him.

If the fact of depriving Jeremiah Horne of the profits of his business, by whatever means it might be done, would be unlawful and criminal, a combination to compass that object would be an unlawful conspiracy, and it would be unnecessary to state the means.

Suppose a baker in a small village had the exclusive custom of his neighborhood, and was making large profits by the sale of his bread. Supposing a number of those neighbors, believing the price of his bread too high, should propose to him to reduce his prices, or if he did not, that they would introduce another baker; and on his refusal, such other baker should, under their encouragement, set up a rival establishment, and sell his bread at lower prices; the effect would be to diminish the profit of the former baker, and to the same extent to impoverish him. And it might be said and proved, that the purpose of the associates was to diminish his profits, and thus impoverish him, though the ultimate and laudable object of the combination was to reduce the cost of bread to themselves and their neighbors. The same thing may be said of all competition in every branch of trade and industry; and yet it is through that competition, that the best interests of trade and industry are promoted. It is scarcely necessary to allude to the familiar instances of opposition lines of conveyance, rival hotels, and the thousand other instances, where each strives to gain custom to himself, by ingenious improvements, by increased industry, and by all the means by which he may lessen the price of commodities, and thereby diminish the profits of others.

We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another, that is, to diminish his gains and profits, and yet so far from being criminal or unlawful, the object may be highly meritorious and public spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment. If it is to be carried into effect by fair or honorable and lawful means, it is, to say the least, innocent; if by falsehood or force, it may be stamped with the character of conspiracy. It follows as a necessary consequence, that if criminal and indictable, it is so by reason of the criminal means intended to be employed for its accomplishment; and as a further legal consequence, that as the criminality will depend on the means, those means must be stated in the indictment. If the same rule were to prevail in criminal, which holds in civil proceedings–that a case defectively stated may be aided by a verdict–then a court might presume, after verdict, that the indictment was supported by proof of criminal or unlawful means to effect the object. But it is an established rule in criminal cases, that the indictment must state a complete indictable offence, and cannot be aided by the proof offered at the trial.

The fourth count avers a conspiracy to impoverish Jeremiah Horne, without stating any means; and the fifth alleges a conspiracy to impoverish employers, by preventing and hindering them from employing persons, not members of the Bootmakers' Society; and these require no remarks, which have not been already made in reference to the other counts.

Whatever illegal purpose can be found in the constitution of the Bootmakers' Society, it not being clearly set forth in the indictment, cannot be relied upon to support this conviction. So if any facts were disclosed at the trial, which, if properly averred, would have given a different character to the indictment, they do not appear in the bill of exceptions, nor could they, after verdict, aid the indictment. But looking solely at the indictment, disregarding the qualifying epithets, recitals and immaterial allegations, and confining ourselves to facts so averred as to be capable of being traversed and put in issue, we cannot perceive that it charges a criminal conspiracy punishable by law. The exceptions must, therefore, be sustained, and the judgment arrested.

2. Labor Injunctions and Yellow Dog Contracts

In the early 20th century, employers turned to a new weapon against organized labor: the Sherman Antitrust Act of 1890,[3] which outlaws “conspiracies in restraint of trade or commerce among the several States”. The Supreme Court endorsed the application of the Sherman Act against labor union activity in the Danbury Hatters’ case, *Loewe v. Lawlor*.[4] The case arose out of organizing efforts by the United Hatters of North America. The union called for a boycott of manufacturers who refused to recognize and bargain with the union. D. E. Loewe & Company, a manufacturer that resisted the union’s demand, sued more than 200 union members, alleging that the boycott interfered with the company’s sale of hats. The trial court dismissed the suit, concluding that the Sherman Act did not apply to the union’s conduct. But the Supreme Court reversed, holding that the boycott fell within the prohibition against conspiracies in restraint of interstate commerce.

3. 15 U.S.C. § 1

4. 208 U.S. 274 (1908)

> *The impact of Danbury Hatters was devastating for organized labor. The unions, and many others, felt that the statute had been interpreted improperly, inasmuch as organized labor was not the focal point of congressional debate that took place prior to the enactment of antitrust legislation. Moreover, because the Sherman Antitrust Act provides for treble damages rather than the actual amount of the losses incurred (as well as criminal sanctions), the final judgment after fourteen years of litigation in Danbury Hatters awarded a substantial amount of money ($250,000). What was particularly troublesome about the judgment was that the members of the union were individually and personally liable. Though the case was settled in 1917 for slightly over $234,000 and the AFL was able to obtain $216,000 in voluntary contributions from union*

Equivalent to about $5.6 million in 2023.

> *members, the fact that labor had to "pass the hat" to avoid the foreclosure of members' homes made the case unforgettable.*[5]

In 1914, Congress amended federal antitrust law with the Clayton Antitrust Act, which included provisions that union leader Samuel Gompers hailed as "labor's Magna Carta and Bill of Rights and the most important legislation since the abolition of slavery."[6]

Section 6 of the Clayton Act[7] sought to exempt labor activity from antitrust liability:

> *The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.*

Section 20 of the Clayton Act[8] sought to restrict the use of injunctions in labor disputes:

> *No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.*

5. William J. Gould, *A Primer on American Labor Law* at 14-15 (4th ed. 2004).

6. Gould, *A Primer on American Labor Law* at 15-16.

7. 15 U.S.C. § 17

8. 29 U.S.C. § 52

> *And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.*

But in *Duplex Printing Press Co. v. Deering*,[9] the Supreme Court, interpreting these provisions narrowly, held that they did not prohibit the issuance of injunctions against secondary boycotts (i.e. where a union has a dispute with an employer, the "primary" target, and calls for strikes or boycotts of the employer's customers, the "secondary" targets, so that they will cease doing business with the primary target). Like the Danbury Hatters' case, *Duplex Printing* involved an organizing campaign in which the company resisted the union's demand for a closed shop.

9. 254 U.S. 443 (1921)

> *When only a few of the workers joined in the union's efforts, the union attempted to boycott the company's products by warning customers that it would be better for them not to purchase from the company, threatening customers with sympathetic strikes, and inciting the employees of customers to strike against their employers. It also notified repair shops not to do repair work on Duplex presses and threatened union men with the loss of their union cards if they assisted in the installation of Duplex presses. The Duplex company brought an antitrust action against the union for unlawful restraint of trade.*

The Court stated that a distinction between a primary and a secondary boycott was material to the question of whether union conduct was immunized by virtue of the Clayton Act. The Court first examined section 6 and stated the following:

> The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the antitrust laws shall be construed to forbid the existence and operation of such organizations, or to forbid their members from lawfully carrying out their legitimate objects; and that such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade. But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination of conspiracy in restraint of trade.

The Court then focused on section 20 of the Clayton Act, noting that the provision specifically forbade the issuance of restraining orders or injunctions in U.S. courts where there was a labor dispute between an "employer and employees" and that the first paragraph's prohibition of orders in such circumstances "unless necessary to prevent irreparable injury to property, or to a property right" where there was no adequate remedy of law (that is to say, where the wronged party could not be adequately compensated through damages) was merely "declaratory of the law as it stood before." … The Court noted that the second paragraph referred to cases where the parties were "standing in proximate relation to a controversy" of the kind designated in the first paragraph. Noting that the majority of the circuit courts of appeals had previously concluded that the words "employers and employees" should be treated as referring to "the business class or clan to which the parties litigant respectively belong," the Court nevertheless concluded that any construction of the statute that would preclude employer relief where union secondary activity was involved against employers "wholly unconnected" with the Battle Creek factory was a statutory construction "altogether inadmissible." … Significantly, the Court made clear its condemnation of the damage done to "many innocent people"—secondary employees and employees who were "far remote" from the "original" dispute. [10]

10. Gould, *A Primer on American Labor Law* at 16-18.

Another legal strategy employers used against labor organizing was the "yellow dog" contract, in which employees promised not to join or remain a member of a union. Labor opposition led to the adoption of statutes outlawing yellow dog contracts. But, following *Lochner v. New York*,[11] the Supreme Court struck down those statutes as unconstitutional infringements on liberty of contract. *Adair v. United States*[12] (striking down federal statute making it a criminal offense for a railroad to fire an employee because of union membership); *Coppage v. Kansas*[13] (striking down state statute making it a crime for employers to require yellow dog contracts as a condition of employment).

11. 198 U.S. 45 (1905)

12. 208 U.S. 161 (1908)

13. 236 U.S. 1 (1915)

3. Legal Protection for Concerted Labor Activity

In the 1930s, the landscape of U.S. labor law changed dramatically with the passage of two federal statutes.

First, the Norris-LaGuardia Act (1932)[14] declared "yellow dog" contracts unenforceable and significantly limited the ability of federal courts to issue injuctions in cases involving labor disputes. Many states followed suit by adopting "Little Norris-LaGuardia Acts" restricting labor injunctions in state court.

14. 29 U.S.C. §§101 et seq.

Second, the National Labor Relations Act (1935)[15] enshrined the right of employees to organize and engage in collective bargaining and other concerted activity (§ 7), prohibited unfair labor practices by employers (§ 8), established a framework for union representation based on majority support of employees (§ 9), and created the National Labor Relations Board to administer and enforce the Act (§§ 3-6, 10-11). The Labor-Management Relations Act (1947) amended the NLRA, including the addition of § 8(b) prohibiting unfair labor practices by unions.

15. 29 U.S.C. §§ 151 et seq.,

Under the NLRA, once a majority of employees within a designated bargaining unit have opted for union representation, the union becomes the exclusive bargaining agent for all employees within the unit. The union owes a duty of fair representation to all bargaining unit employees, regardless of whether or not they are union members.

Even where employees are not represented by a union, NLRA § 7 protects their right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection".

National Labor Relations Act, 29 U.S.C. §§ 151 et seq.

Section 1—Declaration of Policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 2—Definitions

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

Section 7—Right of employees as to organization, collective bargaining, etc.

Employees shall have the 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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8—Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this chapter-title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership […];
>
> (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;
>
> […]

(d) Obligation to bargain collectively.

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession

Section 9—Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) Determination of bargaining unit by Board

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

Section 13—Right to strike preserved

Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

NLRB v. Washington Aluminum, 370 U.S. 9 (1962)

MR. JUSTICE BLACK delivered the opinion of the Court.

The Court of Appeals for the Fourth Circuit, with Chief Judge Sobeloff dissenting, refused to enforce an order of the National Labor Relations Board directing the respondent Washington Aluminum Company to reinstate and make whole seven employees whom the company had discharged for leaving their work in the machine shop without permission on claims that the shop was too cold to work in. Because that decision raises important questions affecting the proper administration of the National Labor Relations Act, we granted certiorari.

The Board's order, as shown by the record and its findings, rested upon these facts and circumstances. The respondent company is engaged in the fabrication of aluminum products in Baltimore, Maryland, a business having interstate aspects that subject it to regulation under the National Labor Relations Act. The machine shop in which the seven discharged employees worked was not insulated and had a number of doors to the outside that had to be opened frequently. An oil furnace located in an adjoining building was the chief source of heat for the shop, although there were two gas-fired space heaters that contributed heat to a lesser extent. The heat produced by these units was not always satisfactory and, even prior to the day of the walkout involved here, several of the eight machinists who made up the day shift at the shop had complained from time to time to the company's foreman "over the cold working conditions."

January 5, 1959, was an extraordinarily cold day for Baltimore, with unusually high winds and a low temperature of 11 degrees followed by a high of 22. When the employees on the day shift came to work that morning, they found the shop bitterly cold, due not only to the unusually harsh weather, but also to the fact that the large oil furnace had broken down the night before and had not as yet been put back into operation. As the workers gathered in the shop just before the starting hour of 7:30, one of them, a Mr. Caron, went into the office of Mr. Jarvis, the foreman, hoping to warm himself but, instead, found the foreman's quarters as uncomfortable as the rest of the shop. As Caron and Jarvis sat in Jarvis' office discussing how bitingly cold the building was, some of the other machinists walked by the office window "huddled" together in a fashion that caused Jarvis to exclaim that "if those fellows had any guts at all, they would go home." When the starting buzzer sounded a few moments later, Caron walked back to his working place in the shop and found all the other machinists "huddled there, shaking a little, cold." Caron then said to these workers, "Dave Jarvis told me if we had any guts, we would go home. I am going home, it is too damned cold to work." Caron asked the other workers what they were going to do and, after some discussion among themselves, they decided to leave with him. One of these workers, testifying before the Board, summarized their entire discussion this way: "And we had all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way." As they started to leave, Jarvis approached and persuaded one of the workers to remain at the job. But Caron and the other six workers on the day shift left practically in a body in a matter of minutes after the 7:30 buzzer.

When the company's general foreman arrived between 7:45 and 8 that morning, Jarvis promptly informed him that all but one of the employees had left because the shop was too cold. The company's president came in at approximately 8:20 a.m. and, upon learning of the walkout, immediately said to the foreman, "if they have all gone, we are going to terminate them." After discussion "at great length" between the general foreman and the company president as to what might be the effect of the walkout on employee discipline and plant production, the president formalized his discharge of the workers who had walked out by giving orders at 9 a.m. that the affected workers should be notified about their discharge immediately, either by telephone, telegram or personally. This was done.

On these facts the Board found that the conduct of the workers was a concerted activity to protest the company's failure to supply adequate heat in its machine shop, that such conduct is protected under the provision of § 7 of the National Labor Relations Act which guarantees that "Employees shall have the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection," and that the discharge of these workers by the company amounted to an unfair labor practice under § 8 (a) (1) of the Act, which forbids employers "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." The Board then ordered the company to reinstate the discharged workers to their previous positions and to make them whole for losses resulting from what the Board found to have been the unlawful termination of their employment.

In denying enforcement of this order, the majority of the Court of Appeals took the position that because the workers simply "summarily left their place of employment" without affording the company an "opportunity to avoid the work stoppage by granting a concession to a demand," their walkout did not amount to a concerted activity protected by § 7 of the Act On this basis, they held that there was no justification for the conduct of the workers in violating the established rules of the plant by leaving their jobs without permission and that the Board had therefore exceeded its power in issuing the order involved here because § 10 (c) declares that the Board shall not require reinstatement or back pay for an employee whom an employer has suspended or discharged "for cause."

We cannot agree that employees necessarily lose their right to engage in concerted activities under § 7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable. The language of § 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made. To compel the Board to interpret and apply that language in the restricted fashion suggested by the respondent here would only tend to frustrate the policy of the Act to protect the right of workers to act together to better their working conditions. Indeed, as indicated by this very case, such an interpretation of § 7 might place burdens upon employees so great that it would effectively nullify the right to engage in concerted activities which that section protects. The seven employees here were part of a small group of employees who were wholly unorganized. They had no bargaining representative and, in fact, no representative of any kind to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could. As pointed out above, prior to the day they left the shop, several of them had repeatedly complained to company officials about the cold working conditions in the shop. These had been more or less spontaneous individual pleas, unsupported by any threat of concerted protest, to which the company apparently gave little consideration and which it now says the Board should have treated as nothing more than "the same sort of gripes as the gripes made about the heat in the summertime." The bitter cold of January 5, however, finally brought these workers' individual complaints into concert so that some more effective action could be considered. Having no bargaining representative and no established procedure by which they could take full advantage of their unanimity of opinion in negotiations with the company, the men took the most direct course to let the company know that they wanted a warmer place in which to work. So, after talking among themselves, they walked out together in the hope that this action might spotlight their complaint and bring about some improvement in what they considered to be the "miserable" conditions of their employment. This we think was enough to justify the Board's holding that they were not required to make any more specific demand than they did to be entitled to the protection of § 7.

Although the company contends to the contrary, we think that the walkout involved here did grow out of a "labor dispute" within the plain meaning of the definition of that term in § 2 (9) of the Act, which declares that it includes "any controversy concerning terms, tenure or *conditions of employment* ." The findings of the Board, which are supported by substantial evidence and which were not disturbed below, show a running dispute between the machine shop employees and the company over the heating of the shop on cold days— a dispute which culminated in the decision of the employees to act concertedly in an effort to force the company to improve that condition of their employment. The fact that the company was already making every effort to repair the furnace and bring heat into the shop that morning does not change the nature of the controversy that caused the walkout. At the very most, that fact might tend to indicate that the conduct of the men in leaving was unnecessary and unwise, and it has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not. Moreover, the evidence here shows that the conduct of these workers was far from unjustified under the circumstances. The company's own foreman expressed the opinion that the shop was so cold that the men should go home. This statement by the foreman but emphasizes the obvious— that is, that the conditions of coldness about which complaint had been made before had been so aggravated on the day of the walkout that the concerted action of the men in leaving their jobs seemed like a perfectly natural and reasonable thing to do.

Nor can we accept the company's contention that because it admittedly had an established plant rule which forbade employees to leave their work without permission of the foreman, there was justifiable "cause" for discharging these employees, wholly separate and apart from any concerted activities in which they engaged in protest against the poorly heated plant. Section 10 (c) of the Act does authorize an employer to discharge employees for "cause" and our cases have long recognized this right on the part of an employer. But this, of course, cannot mean that an employer is at liberty to punish a man by discharging him for engaging in concerted activities which § 7 of the Act protects. And the plant rule in question here purports to permit the company to do just that for it would prohibit even the most plainly protected kinds of concerted work stoppages until and unless the permission of the company's foreman was obtained.

It is of course true that § 7 does not protect all concerted activities, but that aspect of the section is not involved in this case. The activities engaged in here do not fall within the normal categories of unprotected concerted activities such as those that are unlawful, violent, or in breach of contract. Nor can they be brought under this Court's more recent pronouncement which denied the protection of § 7 to activities characterized as "indefensible" because they were there found to show a disloyalty to the workers' employer which this Court deemed unnecessary to carry on the workers' legitimate concerted activities. The activities of these seven employees cannot be classified as "indefensible" by any recognized standard of conduct. Indeed, concerted activities by employees for the purpose of trying to protect themselves from working conditions as uncomfortable as the testimony and Board findings showed them to be in this case are unquestionably activities to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours.

We hold therefore that the Board correctly interpreted and applied the Act to the circumstances of this case and it was error for the Court of Appeals to refuse to enforce its order. The judgment of the Court of Appeals is reversed and the cause is remanded to that court with directions to enforce the order in its entirety.

NLRB v. City Disposal Systems, 465 U.S. 822 (1984)

JUSTICE BRENNAN delivered the opinion of the Court.

James Brown, a truck driver employed by respondent, was discharged when he refused to drive a truck that he honestly and reasonably believed to be unsafe because of faulty brakes. Article XXI of the collective-bargaining agreement between respondent and Local 247 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which covered Brown, provides:

> The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with the safety appliances prescribed by law. It shall not be a violation of this Agreement where employees refuse to operate such equipment unless such refusal is unjustified.

The question to be decided is whether Brown's honest and reasonable assertion of his right to be free of the obligation to drive unsafe trucks constituted "concerted activity" within the meaning of § 7 of the National Labor Relations Act (NLRA or Act). The National Labor Relations Board (NLRB or Board) held that Brown's refusal was concerted activity within § 7, and that his discharge was, therefore, an unfair labor practice under § 8(a)(1) of the Act. The Court of Appeals disagreed and declined enforcement. At least three other Courts of Appeals, however, have accepted the Board's interpretation of "concerted activities" as including the assertion by an individual employee of a right grounded in a collective-bargaining agreement. We granted certiorari to resolve the conflict, and now reverse.

I

The facts are not in dispute in the current posture of this case. Respondent, City Disposal Systems, Inc. (City Disposal), hauls garbage for the city of Detroit. Under the collective-bargaining agreement with Local Union No. 247, respondent's truckdrivers haul garbage from Detroit to a landfill about 37 miles away. Each driver is assigned to operate a particular truck, which he or she operates each day of work, unless that truck is in disrepair.

James Brown was assigned to truck No. 245. On Saturday, May 12, 1979, Brown observed that a fellow driver had difficulty with the brakes of another truck, truck No. 244. As a result of the brake problem, truck No. 244 nearly collided with Brown's truck. After unloading their garbage at the landfill, Brown and the driver of truck No. 244 brought No. 244 to respondent's truck-repair facility, where they were told that the brakes would be repaired either over the weekend or in the morning of Monday, May 14.

Early in the morning of Monday, May 14, while transporting a load of garbage to the landfill, Brown experienced difficulty with one of the wheels of his own truck — No. 245 — and brought that truck in for repair. At the repair facility, Brown was told that, because of a backlog at the facility, No. 245 could not be repaired that day. Brown reported the situation to his supervisor, Otto Jasmund, who ordered Brown to punch out and go home. Before Brown could leave, however, Jasmund changed his mind and asked Brown to drive truck No. 244 instead. Brown refused, explaining that "there's something wrong with that truck. Something was wrong with the brakes there was a grease seal or something leaking causing it to be affecting the brakes." Brown did not, however, explicitly refer to Article XXI of the collective-bargaining agreement or to the agreement in general. In response to Brown's refusal to drive truck No. 244, Jasmund angrily told Brown to go home. At that point, an argument ensued and Robert Madary, another supervisor, intervened, repeating Jasmund's request that Brown drive truck No. 244. Again, Brown refused, explaining that No. 244 "has got problems and I don't want to drive it." Madary replied that half the trucks had problems and that if respondent tried to fix all of them it would be unable to do business. He went on to tell Brown that "we've got all this garbage out here to haul and you tell me about you don't want to drive." Brown responded, "Bob, what you going to do, put the garbage ahead of the safety of the men?" Finally, Madary went to his office and Brown went home. Later that day, Brown received word that he had been discharged. He immediately returned to work in an attempt to gain reinstatement but was unsuccessful.

On May 15, the day after the discharge, Brown filed a written grievance, pursuant to the collective-bargaining agreement, asserting that truck No. 244 was defective, that it had been improper for him to have been ordered to drive the truck, and that his discharge was therefore also improper. The union, however, found no objective merit in the grievance and declined to process it.

On September 7, 1979, Brown filed an unfair labor practice charge with the NLRB, challenging his discharge. The Administrative Law Judge (ALJ) found that Brown had been discharged for refusing to operate truck No. 244, that Brown's refusal was covered by § 7 of the NLRA, and that respondent had therefore committed an unfair labor practice under § 8(a)(1) of the Act. The ALJ held that an employee who acts alone in asserting a contractual right can nevertheless be engaged in concerted activity within the meaning of § 7:

> When an employee makes complaints concerning safety matters which are embodied in a contract, he is acting not only in his own interest, but is attempting to enforce such contract provisions in the interest of all the employees covered under that contract. Such activity we have found to be concerted and protected under the Act, and the discharge of an individual for engaging in such activity to be in violation of Section 8(a)(1).

The NLRB adopted the findings and conclusions of the ALJ and ordered that Brown be reinstated with backpay.

On a petition for enforcement of the Board's order, the Court of Appeals disagreed with the ALJ and the Board. Finding that Brown's refusal to drive truck No. 244 was an action taken solely on his own behalf, the Court of Appeals concluded that the refusal was not a concerted activity within the meaning of § 7.

II

Section 7 of the NLRA provides that "employees shall have the right to 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." 29 U. S. C. § 157. The NLRB's decision in this case applied the Board's longstanding "*Interboro* doctrine," under which an individual's assertion of a right grounded in a collective-bargaining agreement is recognized as "concerted activity" and therefore accorded the protection of § 7. The Board has relied on two justifications for the doctrine: First, the assertion of a right contained in a collective-bargaining agreement is an extension of the concerted action that produced the agreement; and second, the assertion of such a right affects the rights of all employees covered by the collective-bargaining agreement.

We have often reaffirmed that the task of defining the scope of § 7 "is for the Board to perform in the first instance as it considers the wide variety of cases that come before it," and, on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference. The question for decision today is thus narrowed to whether the Board's application of § 7 to Brown's refusal to drive truck No. 244 is reasonable. Several reasons persuade us that it is.

A

Neither the Court of Appeals nor respondent appears to question that an employee's invocation of a right derived from a collective-bargaining agreement meets § 7's requirement that an employee's action be taken "for purposes of collective bargaining or other mutual aid or protection." As the Board first explained in the *Interboro* case, a single employee's invocation of such rights affects all the employees that are covered by the collective-bargaining agreement. This type of generalized effect, as our cases have demonstrated, is sufficient to bring the actions of an individual employee within the "mutual aid or protection" standard, regardless of whether the employee has his own interests most immediately in mind.

The term "concerted activity" is not defined in the Act but it clearly enough embraces the activities of employees who have joined together in order to achieve common goals. What is not self-evident from the language of the Act, however, and what we must elucidate, is the precise manner in which particular actions of an individual employee must be linked to the actions of fellow employees in order to permit it to be said that the individual is engaged in concerted activity. We now turn to consider the Board's analysis of that question as expressed in the *Interboro* doctrine.

Although one could interpret the phrase, "to engage in other concerted activities," to refer to a situation in which two or more employees are working together at the same time and the same place toward a common goal, the language of § 7 does not confine itself to such a narrow meaning. In fact, § 7 itself defines both joining and assisting labor organizations — activities in which a single employee can engage — as concerted activities. Indeed, even the courts that have rejected the *Interboro* doctrine recognize the possibility that an individual employee may be engaged in concerted activity when he acts alone. They have limited their recognition of this type of concerted activity, however, to two situations: (1) that in which the lone employee intends to induce group activity, and (2) that in which the employee acts as a representative of at least one other employee. The disagreement over the *Interboro* doctrine, therefore, merely reflects differing views regarding the nature of the relationship that must exist between the action of the individual employee and the actions of the group in order for § 7 to apply. We cannot say that the Board's view of that relationship, as applied in the *Interboro* doctrine, is unreasonable.

The invocation of a right rooted in a collective-bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement. That process — beginning with the organization of a union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement — is a single, collective activity. Obviously, an employee could not invoke a right grounded in a collective-bargaining agreement were it not for the prior negotiating activities of his fellow employees. Nor would it make sense for a union to negotiate a collective-bargaining agreement if individual employees could not invoke the rights thereby created against their employer. Moreover, when an employee invokes a right grounded in the collective-bargaining agreement, he does not stand alone. Instead, he brings to bear on his employer the power and resolve of all his fellow employees. When, for instance, James Brown refused to drive a truck he believed to be unsafe, he was in effect reminding his employer that he and his fellow employees, at the time their collective-bargaining agreement was signed, had extracted a promise from City Disposal that they would not be asked to drive unsafe trucks. He was also reminding his employer that if it persisted in ordering him to drive an unsafe truck, he could reharness the power of that group to ensure the enforcement of that promise. It was just as though James Brown was reassembling his fellow union members to reenact their decision not to drive unsafe trucks. A lone employee's invocation of a right grounded in his collective-bargaining agreement is, therefore, a concerted activity in a very real sense.

Furthermore, the acts of joining and assisting a labor organization, which § 7 explicitly recognizes as concerted, are related to collective action in essentially the same way that the invocation of a collectively bargained right is related to collective action. When an employee joins or assists a labor organization, his actions may be divorced in time, and in location as well, from the actions of fellow employees. Because of the integral relationship among the employees' actions, however, Congress viewed each employee as engaged in concerted activity. The lone employee could not join or assist a labor organization were it not for the related organizing activities of his fellow employees. Conversely, there would be limited utility in forming a labor organization if other employees could not join or assist the organization once it is formed. Thus, the formation of a labor organization is integrally related to the activity of joining or assisting such an organization in the same sense that the negotiation of a collective-bargaining agreement is integrally related to the invocation of a right provided for in the agreement. In each case, neither the individual activity nor the group activity would be complete without the other.

The *Interboro* doctrine is also entirely consistent with the purposes of the Act, which explicitly include the encouragement of collective bargaining and other "practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions." 29 U. S. C. § 151. Although, as we have said, there is nothing in the legislative history of § 7 that specifically expresses the understanding of Congress in enacting the "concerted activities" language, the general history of § 7 reveals no inconsistency between the *Interboro* doctrine and congressional intent. That history begins in the early days of the labor movement, when employers invoked the common-law doctrines of criminal conspiracy and restraint of trade to thwart workers' attempts to unionize. As this Court recognized in *NLRB v. Jones & Laughlin Steel Corp.,* 301 U. S. 1, 33 (1937), a single employee at that time "was helpless in dealing with an employer; he was dependent ordinarily on his daily wage for the maintenance of himself and family; if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; union was essential to give laborers opportunity to deal on an equality with their employer."

Congress' first attempt to equalize the bargaining power of management and labor, and its first use of the term "concert" in this context, came in 1914 with the enactment of §§ 6 and 20 of the Clayton Act, which exempted from the antitrust laws certain types of peaceful union activities. There followed, in 1932, the Norris-La Guardia Act, which declared that "the individual worker shall be free from the interference, restraint, or coercion, of employers in self-organization or in *other concerted activities for the purpose of collective bargaining or other mutual aid or protection.*" 29 U. S. C. § 102 (emphasis added). This was the source of the language enacted in § 7. It was adopted first in § 7(a) of the National Industrial Recovery Act and then, in 1935, in § 7 of the NLRA.

Against this background, it is evident that, in enacting § 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment. There is no indication that Congress intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way. Nor, more specifically, does it appear that Congress intended to have this general protection withdrawn in situations in which a single employee, acting alone, participates in an integral aspect of a collective process. Instead, what emerges from the general background of § 7 — and what is consistent with the Act's statement of purpose — is a congressional intent to create an equality in bargaining power between the employee and the employer throughout the entire process of labor organizing, collective bargaining and enforcement of collective-bargaining agreements.

The Board's *Interboro* doctrine, based on a recognition that the potential inequality in the relationship between the employee and the employer continues beyond the point at which a collective-bargaining agreement is signed, mitigates that inequality throughout the duration of the employment relationship, and is, therefore, fully consistent with congressional intent. Moreover, by applying § 7 to the actions of individual employees invoking their rights under a collective-bargaining agreement, the *Interboro* doctrine preserves the integrity of the entire collective-bargaining process; for by invoking a right grounded in a collective-bargaining agreement, the employee makes that right a reality, and breathes life, not only into the promises contained in the collective-bargaining agreement, but also into the entire process envisioned by Congress as the means by which to achieve industrial peace.

To be sure, the principal tool by which an employee invokes the rights granted him in a collective-bargaining agreement is the processing of a grievance according to whatever procedures his collective-bargaining agreement establishes. No one doubts that the processing of a grievance in such a manner is concerted activity within the meaning of § 7. Indeed, it would make little sense for § 7 to cover an employee's conduct while negotiating a collective-bargaining agreement, including a grievance mechanism by which to protect the rights created by the agreement, but not to cover an employee's attempt to utilize that mechanism to enforce the agreement.

In practice, however, there is unlikely to be a bright-line distinction between an incipient grievance, a complaint to an employer, and perhaps even an employee's initial refusal to perform a certain job that he believes he has no duty to perform. It is reasonable to expect that an employee's first response to a situation that he believes violates his collective-bargaining agreement will be a protest to his employer. Whether he files a grievance will depend in part on his employer's reaction and in part upon the nature of the right at issue. In addition, certain rights might not be susceptible of enforcement by the filing of a grievance. In such a case, the collective-bargaining agreement might provide for an alternative method of enforcement, as did the agreement involved in this case, or the agreement might be silent on the matter. Thus, for a variety of reasons, an employee's initial statement to an employer to the effect that he believes a collectively bargained right is being violated, or the employee's initial refusal to do that which he believes he is not obligated to do, might serve as both a natural prelude to, and an efficient substitute for, the filing of a formal grievance. As long as the employee's statement or action is based on a reasonable and honest belief that he is being, or has been, asked to perform a task that he is not required to perform under his collective-bargaining agreement, and the statement or action is reasonably directed toward the enforcement of a collectively bargained right, there is no justification for overturning the Board's judgment that the employee is engaged in concerted activity, just as he would have been had he filed a formal grievance.

The fact that an activity is concerted, however, does not necessarily mean that an employee can engage in the activity with impunity. An employee may engage in concerted activity in such an abusive manner that he loses the protection of § 7. Furthermore, if an employer does not wish to tolerate certain methods by which employees invoke their collectively bargained rights, he is free to negotiate a provision in his collective-bargaining agreement that limits the availability of such methods. No-strike provisions, for instance, are a common mechanism by which employers and employees agree that the latter will not invoke their rights by refusing to work. In general, if an employee violates such a provision, his activity is unprotected even though it may be concerted. Whether Brown's action in this case was unprotected, however, is not before us.

B

Respondent argues that the *Interboro* doctrine undermines the arbitration process by providing employees with the possibility of provoking a discharge and then filing an unfair labor practice claim. This argument, however, misses the mark for several reasons. First, an employee who purposefully follows this route would run the risk that the Board would find his actions concerted but nonetheless unprotected, as discussed above.

Second, the *Interboro* doctrine does not shift dispute resolution from the grievance and arbitration process to NLRB adjudication in any way that is different from the alternative position adopted by the Court of Appeals, and pressed upon us by respondent. As stated above, the Court of Appeals would allow a finding of concerted activity if two employees together invoke a collectively bargained right, if a lone employee represents another employee in addition to himself when he invokes the right, or if the lone employee invokes the right in a manner that is intended to induce at least one other employee to join him. In each of these situations, however, the underlying substance of the dispute between the employees and the employer is the same as when a single employee invokes a collectively bargained right by himself. In each case the employees are claiming that their employer violated their collective-bargaining agreement, and if the complaining employee or employees in those situations are discharged, their unfair labor practice action would be identical to an action brought by an employee who has been discharged for invoking a collectively bargained right by himself. Because the employees in each of these situations are equally well positioned to go through the grievance and arbitration process, there is no basis for singling out the *Interboro* doctrine as undermining that process any more than would the approach of respondent and the Courts of Appeals that have rejected the doctrine.

Finally, and most importantly, to the extent that the factual issues raised in an unfair labor practice action have been, or can be, addressed through the grievance process, the Board may defer to that process. There is no reason, therefore, for the Board's interpretation of "concerted activity" in § 7 to be constrained by a concern for maintaining the integrity of the grievance and arbitration process.

III

In this case, the Board found that James Brown's refusal to drive truck No. 244 was based on an honest and reasonable belief that the brakes on the truck were faulty. Brown explained to each of his supervisors his reason for refusing to drive the truck. Although he did not refer to his collective-bargaining agreement in either of these confrontations, the agreement provided not only that "the Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition," but also that "it shall not be a violation of this Agreement where employees refuse to operate such equipment, unless such refusal is unjustified." There is no doubt, therefore, nor could there have been any doubt during Brown's confrontations with his supervisors, that by refusing to drive truck No. 244, Brown was invoking the right granted him in his collective-bargaining agreement to be free of the obligation to drive unsafe trucks. Moreover, there can be no question but that Brown's refusal to drive the truck was reasonably well directed toward the enforcement of that right. Indeed, it would appear that there were no other means available by which Brown could have enforced the right. If he had gone ahead and driven truck No. 244, the issue may have been moot.

Respondent argues that Brown's action was not concerted because he did not explicitly refer to the collective-bargaining agreement as a basis for his refusal to drive the truck. The Board, however, has never held that an employee must make such an explicit reference for his actions to be covered by the *Interboro* doctrine, and we find that position reasonable. We have often recognized the importance of "the Board's special function of applying the general provisions of the Act to the complexities of industrial life." As long as the nature of the employee's complaint is reasonably clear to the person to whom it is communicated, and the complaint does, in fact, refer to a reasonably perceived violation of the collective-bargaining agreement, the complaining employee is engaged in the process of enforcing that agreement. In the context of a workplace dispute, where the participants are likely to be unsophisticated in collective-bargaining matters, a requirement that the employee explicitly refer to the collective-bargaining agreement is likely to serve as nothing more than a trap for the unwary.

Respondent further argues that the Board erred in finding Brown's action concerted based only on Brown's reasonable and honest belief that truck No. 244 was unsafe. Respondent bases its argument on the language of the collective-bargaining agreement, which provides that an employee may refuse to drive an unsafe truck "unless such refusal is unjustified." In the view of respondent, this language allows a driver to refuse to drive a truck only if the truck is objectively unsafe. Regardless of whether respondent's interpretation of the agreement is correct, a question as to which we express no view, this argument confuses the threshold question whether Brown's conduct was concerted with the ultimate question whether that conduct was protected. The rationale of the *Interboro* doctrine compels the conclusion that an honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated. No one would suggest, for instance, that the filing of a grievance is concerted only if the grievance turns out to be meritorious. As long as the grievance is based on an honest and reasonable belief that a right had been violated, its filing is a concerted activity because it is an integral part of the process by which the collective-bargaining agreement is enforced. The same is true of other methods by which an employee enforces the agreement. On the other hand, if the collective-bargaining agreement imposes a limitation on the means by which a right may be invoked, the concerted activity would be unprotected if it went beyond that limitation.

In this case, because Brown reasonably and honestly invoked his right to avoid driving unsafe trucks, his action was concerted. It may be that the collective-bargaining agreement prohibits an employee from refusing to drive a truck that he reasonably believes to be unsafe, but that is, in fact, perfectly safe. If so, Brown's action was concerted but unprotected. As stated above, however, the only issue before this Court and the only issue passed upon by the Board or the Court of Appeals is whether Brown's action was concerted, not whether it was protected.

Chapter 3: Establishing an Employment Relationship

1. Identifying Employees

1.1 The Legal Significance of Employee Status

Lemmerman v. A.T. Williams Oil Co., 350 S.E.2d 83 (N.C. 1986)

FRYE, Justice.

The sole issue on this appeal is whether the Court of Appeals correctly affirmed the trial court's conclusion that plaintiff Shane Tucker was an employee of the defendant, A.T. Williams Oil Company. For the reasons set forth in this opinion, we conclude that the Court of Appeals was correct in so affirming.

On 1 December 1982, plaintiff Shane Tucker, then aged eight, slipped on a sidewalk on defendant's property and fell, cutting his hand. He and his mother, plaintiff Sylvia Tucker, filed this action against defendant on 26 June 1984. In their complaint, plaintiffs alleged in essence that Shane Tucker's injuries were proximately caused by defendant's negligence. They sought damages for medical expenses, lost wages, and pain and suffering. R. Douglas Lemmerman was appointed *guardian ad litem* for the minor plaintiff Shane.

Defendant filed an answer and raised as one of its defenses lack of subject matter jurisdiction. It asserted that the child Shane was its employee as defined by the Workers' Compensation Act and that the Industrial Commission accordingly had exclusive jurisdiction over plaintiffs' claim. Following preliminary discovery, defendant moved to dismiss for lack of subject matter jurisdiction. Upon the parties' stipulation that the trial judge find jurisdictional facts, Judge DeRamus made findings and concluded that Shane was an employee injured within the course and scope of his employment with defendant as defined in the Workers' Compensation Act. The judge therefore dismissed plaintiffs' action for lack of subject matter jurisdiction. Plaintiffs appealed to the Court of Appeals, which affirmed with a dissent by Webb, J., on the question of whether the evidence supported the conclusion that plaintiff Shane was an employee of defendant.

"By statute the Superior Court is divested of original jurisdiction of all actions which come within the provisions of the Workmen's Compensation Act." The Act provides that its remedies shall be an employee's only remedies against his or her employer for claims covered by the Act. Remedies available at common law are specifically excluded. Therefore, the question of whether plaintiff Shane Tucker was defendant's employee as defined by the Act is clearly jurisdictional. This issue is not affected by the fact that the minor may have been illegally employed because the Act specifically includes within its provisions illegally employed minors.

The trial judge made the following findings of facts pertinent to this issue:

> 3. Prior to the incident referred to in the complaint, Ken Schneiderman was employed as the manager of the defendant's place of business on Wendover Avenue in Greensboro, North Carolina. As manager, Schneiderman had the authority to hire and fire such employees as he deemed necessary to assist him in the operation of the business, and all wages paid to any of the employees which he hired were deducted from the commission which he received from the defendant.
>
> 4. Ken Schneiderman employed the minor plaintiff, and paid him varying amounts to perform duties at the defendant's service station—convenience store, including putting up cigarettes, picking up trash, stocking bottles in the cooler, and other odd jobs from time to time while the minor's mother, Sylvia A. Tucker, worked as a cashier for the store.

> EXCEPTION NO. 1
>
> 5. At the time the minor plaintiff was injured in the accident referred to in the complaint, the minor plaintiff had been performing chores of stocking cigarettes, picking up trash, and other work which was in the course of the trade or business of defendant A.T. Williams Oil Company.
>
> EXCEPTION NO. 2
>
> 6. At the time of the incident described in the complaint, the minor plaintiff Jonathan Shane Tucker was a casual employee of defendant A.T. Williams Oil Company, and was performing duties within the course of the trade and business of A.T. Williams Oil Company in the operation of the gas station and convenience store on Wendover Avenue in Greensboro, North Carolina.
>
> EXCEPTION NO. 3
>
> 7. Defendant A.T. Williams Oil Company employs more than four persons, and is subject to the provisions of the North Carolina Workers Compensation Act.

Our review of the record shows that there is ample evidence to support each disputed finding.

Plaintiff Shane testified at his deposition that he routinely accompanied his mother to her job as part-time cashier at defendant's store and service station, a Wilco. According to his description, he ordinarily did his homework, ate a snack, and performed odd jobs about the station. These jobs consisted of picking up trash in the store, taking out the garbage, and stocking cigarettes and drinks. He had been doing these jobs for almost a month at the time of the accident. The child said that the jobs generally took him between half an hour and one hour to complete. In return, the store manager, Ken Schneiderman, would pay him a dollar, occasionally more depending on the amount of work he had done. A fair reading of the child's testimony discloses that he clearly expected to be paid for his efforts.

The child also testified that on the day of the accident he had nearly finished his tasks and was on his way to ask Schneiderman if there was anything else Schneiderman wanted him to do when he slipped and fell. He said at one point that he believed that Schneiderman did later give him his dollar, although he was not clear on this point.

The child's mother, Sylvia Tucker, corroborated Shane's account. She testified that at the time of the accident, she was working from 4 p.m. to 7 p.m. as a part-time cashier at Wilco. Schneiderman had Shane "put up stock, straighten the shelves up and pick up trash inside the building" and occasionally outside as well. Mrs. Tucker testified that her understanding was that the child was going to be paid for what he did. Although she told Schneiderman originally that Shane would work without being paid, he rejected this offer and told both her and the child that he would pay Shane for his work. She believed that Schneiderman paid Shane a dollar a day.

Schneiderman signed an affidavit, introduced into evidence, stating that he had hired Shane Tucker for a few dollars to put up cigarettes but with no set hours or wages.

Also before the judge was plaintiffs' verified complaint, which describes plaintiff Shane as defendant's employee and says that he was "casually hired and paid $1.00 a day by the manager of defendant's station, Ken Schneiderman, to put up cigarettes and to do other odd jobs on defendant's premises whenever assistance was needed."

We believe that this evidence amply supports the trial judge's findings that Schneiderman, who had the authority to hire and fire employees, hired the minor plaintiff to do odd jobs as needed in defendant's service station/convenience store business. Specifically, these tasks included stocking cigarettes and drinks, and picking up trash. At the time of the accident, Shane was engaged in doing these tasks.

We also agree with the trial judge's conclusion that plaintiff Shane was defendant's employee at the time of the accident. Once the underlying facts are established, the nature of the relationship is a question of law and fully reviewable on appeal. This Court has previously defined an employee as follows:

> An employee is one who works for another for wages or salary, and the right to demand pay for his services from his employer would seem to be essential to his right to receive compensation under the Workmen's Compensation Act.

The statutory definition (N.C.G.S. § 97-2(2)) adds nothing to the common law definition. The trial judge found that Schneiderman had hired the child, that he had authority to hire and fire employees for defendant, and that the jobs Shane did were in the course of defendant's business and

N.C.G.S. § 97-2(2): "The term 'employee' means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession, or occupation of his employer."

that he was engaged in doing them when he fell. We believe these facts, taken together, will support the conclusion that the plaintiff Shane was an employee of defendant at the time of the accident.

Plaintiffs, however, contend that the evidence does not support the facts and the facts do not support the conclusion.

First, they argue that none of the parties considered Shane to be defendant's employee. They note that Shane at one point said that his employment was "not exactly" a job. Furthermore, in his deposition testimony, Schneiderman explicitly denied hiring Shane, retracting the statement in his affidavit.

We do not find plaintiffs' argument on this point persuasive.

Initially, we note that the parties' own conclusion about their legal relationship is not binding on the court. Moreover, immediately after Shane said that his employment was "not exactly" a job, he described the relationship as helping in the store and getting paid for it. He repeated this description in a later portion of his testimony.

Nor do we believe that Schneiderman's denial of hiring Shane was binding upon the trial judge. Schneiderman essentially gave inconsistent testimony. Initially, in his affidavit, he said that he had hired Shane. Later, in his deposition, he denied hiring him. His deposition testimony contradicted that of Shane and Mrs. Tucker on some points—most notably on the frequency of the child's presence at the Wilco. The trial judge resolved these contradictions and declined to adopt Schneiderman's version. His findings are not vitiated merely by the presence of conflicting evidence. We also note on this issue that Schneiderman repeatedly said that he could not remember details and was evasive on important points. Furthermore, at one point in his deposition, he said, "He [Shane] wasn't an employee. Did you ever hear of child labor? You know, I'm smart enough to know that."[16]

16. (n.4 in opinion) Schneiderman testified that he hired his own children to work at the Wilco and that defendant promoted this arrangement because "you could work your kids for less money."

Moreover, we note that Mrs. Tucker was unsure of her own status. She testified that she did not know whether she herself was a "real employee."

Second, plaintiffs argue that Shane could not have been an employee because Schneiderman did not comply with certain procedural formalities. He did not take an application from Shane or report him on the list of employees he turned into his supervisor for withholding purposes. His normal practice was to pay employees from the cash register;[17] he paid Shane from his pocket.

17. (n.5 in opinion) He paid their net pay out of the register and submitted their names and pay records to his supervisor for payment of payroll taxes.

We do not believe that any of these factors is dispositive. Our Court of Appeals has held that failure to follow technical procedures such as withholding F.I.C.A. and income taxes is not controlling on the issue of whether an employer-employee relationship exists. We also do not think that Schneiderman's method of paying Shane was as significant under the facts of this case as it might otherwise be, because all wages came out of Schneiderman's commission. He therefore paid all of the employees at Wilco out of his own money.

Third, plaintiffs contend that Shane was not an employee but instead performed gratuitous services. In addition to Schneiderman's testimony denying that he hired Shane, rejected by the trial judge, plaintiffs cite Mrs. Tucker's original statement to Schneiderman that he did not have to pay the child. However, this evidence in fact supports the opposite conclusion, that Shane was an employee. Schneiderman was offered the chance to avail himself of Shane's gratuitous services, but he specifically rejected it and said that he wanted to pay the child for his work. The evidence shows, and the judge found, that he did so.

Finally, plaintiffs contend that if Shane was an employee, he was Schneiderman's personal employee. We disagree. Schneiderman had the authority to hire employees for defendant, and the evidence shows and the trial judge found that the tasks the child performed were in the course of defendant's business, not Schneiderman's personal affairs. We find the facts of this case similar to those of *Michaux v. Bottling Co.,* 205 N.C. 786 (1934). In *Michaux*, defendant company gave its truck drivers permission to hire and fire helpers as needed to assist them in the distribution of defendant's products. The drivers paid the helpers out of their own wages or commissions. Plaintiff's intestate, a minor, was such a helper who was killed while assisting in a delivery. This Court, noting that the deceased minor's services had been "necessary to the proper and efficient distribution" of defendant's products, essentially found that the deceased was defendant's employee at the time of his death.

For all of the foregoing reasons, the decision of the Court of Appeals is affirmed.

MARTIN, Justice, dissenting.

I must respectfully dissent. First, the majority opinion allows the defendant corporation to profit from its own illegal act. Here, defendant corporation claims that it hired plaintiff Shane, an eight-year-old child, as an employee. Defendant's act would be a direct violation of N.C.G.S. § 95-25.5(d), punishable by imposition of civil penalties. This statute establishes the public policy of this state that it is unlawful for employers to employ children thirteen years of age or less.

The public policy of North Carolina also will not permit a wrongdoer to take advantage of or enrich itself as a result of its own wrong. "It is a basic principle of law and equity that no man shall be permitted to take advantage of his own wrong." Further citation of authority is not necessary for this basic principle of law. The principle is especially applicable where, as here, the power of the parties is so disparate—an eight-year-old child versus a large corporation! The inequity of defendant's plea in bar is thus magnified by the relationship of the parties.

Defendant corporation seeks to defeat the infant plaintiff's cause for personal injuries resulting from the negligence of defendant by using as a shield its own unlawful act of employing the child. This case is not like *McNair v. Ward*, 240 N.C. 330 (1954), where plaintiff's own evidence established that he was an employee of defendant. In *McNair* the defendant did not present any evidence. To the contrary, here defendant affirmatively attempted to prove that plaintiff child was its employee. Defendant's unlawful employment of the child was one of the direct causes of his injuries, and defendant now seeks to use that unlawful employment to avoid responsibility for those injuries. This will not do, and this Court should not in all good conscience permit defendant to take advantage of its own wrongful act.

Even if this Court allows defendant to rely upon an inequitable defense, the evidence fails, in at least one respect, to support a finding that plaintiff child was defendant's employee. We must not overlook that defendant has the burden of proof to sustain its plea in bar. As the majority states, the right to demand payment from the *employer*, A.T. Williams Oil Company, is an essential element of the employment status. Defendant has failed to carry its burden as to this element.

The evidence in many respects is in conflict. However, defendant has failed to produce a shred of evidence that the eight-year-old child had a right to demand payment for his services from A.T. Williams Oil Company. Also, there is no evidence that plaintiff child could have made such a demand from Schneiderman, albeit defendant argues that plaintiff was its employee and not Schneiderman's. All of the testimony showed that the infrequent payment of amounts ranging from twenty-five cents to a dollar came out of Schneiderman's own money, out of his own pocket. The payments were not made from the cash register, as were payments to defendant's employees. Thus, the record is simply devoid of any evidence that the child could have demanded payment from the corporate defendant for services he rendered to Schneiderman.

On the other hand, the record is replete with evidence that plaintiff child was *not* an employee of defendant's. Shane was not a listed employee for workers' compensation purposes; his name was not reported to the defendant corporation for tax withholding purposes; Schneiderman testified explicitly that Shane was not an employee.

The majority relies upon *Michaux v. Bottling Co.*. The status of plaintiff as an employee was not at issue in *Michaux.* The Industrial Commission made no finding with respect to whether plaintiff was an employee of defendant's, nor did this Court in its opinion. The issue decided in *Michaux* was whether the accident arose out of and in the course of employment, not whether plaintiff was an employee.

I submit that the more analogous case is *Lucas v. Stores*, 289 N.C. 212 (1976). Lucas had been discharged as an employee of defendant's. His wife also worked for defendant on a double shift from 7:00 a.m. to 11:00 p.m. After Lucas was discharged, he would go with Mrs. Lucas to work and assist her in managing the convenience store. Defendant's district manager knew that Lucas was at the store and told Mrs. Lucas to let Lucas run the cash register "as long as the ABC law didn't catch him." He also worked on the books and made bank deposits. Mrs. Lucas paid Lucas $2.00 an hour for his work out of her own paycheck. During the course of a robbery of the store, Lucas was shot and killed, and his widow brought a claim for compensation under the Act. The Industrial Commission found that he was an employee at the time in question. The Court of Appeals reversed the Commission, and this Court affirmed. The Court stated that the acts of Lucas in going with his wife to the store and helping out in the work were entirely consistent with the desire of an unemployed husband to be with his wife at her work and to assist her in the performance of her duties, especially where the work location was likely to attract armed robbers at night. This Court found no contract of employment existed.

Likewise, here defendant desired to employ Sylvia Tucker, plaintiff child's mother, to work in the convenience store. She could not do so unless defendant agreed to let her eight-year-old son come to the store after school and remain until she completed her work. Defendant agreed to this plan. While on the premises the child from time to time performed menial tasks for Schneiderman, who sometimes would give the boy payments ranging from twenty-five cents to a dollar for his work. This is entirely consistent with the problem of a working mother who needs employment but must also supervise her young child. Shane was on the premises not as an employee of the corporate defendant, but because it was necessary in order for his mother to work. Such are the demands of our modern society. As in *Lucas,* plaintiff child was not an employee of defendant's.

Assuming arguendo that defendant may rely upon its plea in bar and that there is sufficient evidence to support a finding that Shane was an employee of defendant's, the trial court erred in sustaining defendant's plea in bar. If it is true, as defendant insists, that there was a contract of employment between Shane and the defendant, it was a contract with an infant and voidable at the option of the infant, Shane. Upon disaffirmance of a contract by an infant, the contract is void ab initio. The status of the parties is as if there had never been a contract between them.

By bringing this common law action against defendant, the infant plaintiff has disavowed the former contract between the parties and relinquished any rights he may have had under the Workers' Compensation Act by virtue of the contract. By disavowing the contract, he has elected to pursue his common law remedy. That Shane avoided the contract by instituting the action is of no moment; it is just as effective as writing a letter of disaffirmance to defendant prior to commencing the action. The lawsuit and the evidence and contentions by plaintiff Shane clearly notified defendant that the contract was avoided. Upon plaintiff infant's disaffirmance of the contract, it was void ab initio and defendant could not rely upon a nonexisting contract to defeat plaintiff infant's action.

For the above reasons I vote to allow the infant plaintiff to pursue his common law action against defendant.

1.2 Distinguishing Employees from Independent Contractors

Razak v. Uber Technologies, Inc., 951 F.3d 137 (3d Cir. 2020)

GREENAWAY, JR., Circuit Judge.

This case is an appeal from a grant of summary judgment on the question of whether drivers for UberBLACK are employees or independent contractors within the meaning of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, and similar Pennsylvania state laws. For the following reasons, we will vacate the District Court's grant of summary judgment and remand for further proceedings.

I. Facts

Plaintiffs Ali Razak, Kenan Sabani, and Khaldoun Cherdoud are Pennsylvania drivers who utilize Defendant Uber Technologies' ride-sharing mobile phone application ("Driver App"). Plaintiffs bring this action on behalf of a putative class of all persons who provide limousine services, now known as UberBLACK, through Defendant's Driver App in Philadelphia, Pennsylvania.Plaintiffs bring individual and representative claims against Uber Technologies, Inc. and its wholly-owned subsidiary, Gegen, LLC, ("Gegen," and collectively, "Uber") for violations of the federal minimum wage and overtime requirements under the FLSA, the Pennsylvania Minimum Wage Act ("PMWA"), and the Pennsylvania Wage Payment and Collection Law ("WPCL").

Plaintiffs Razak, Sabani, and Cherdoud each own and operate independent transportation companies ("ITCs") Luxe Limousine Services, Inc. ("Luxe"), Freemo Limo, LLC ("Freemo"), and Milano Limo, Inc. ("Milano"), respectively. In order for drivers to contract to drive for Uber-BLACK, they must form ITCs. Each ITC, in turn, enters into a Technology Services Agreement with Uber. The Technology Services

Agreement includes a Software License and Online Services Agreement that allows UberBLACK drivers to utilize the technology service Uber provides to generate leads, as well as outlines the relationship between ITCs and Uber riders, ITCs and Uber, and ITCs and their drivers. Additionally, it describes driver requirements, vehicle requirements, financial terms, and contains an arbitration clause for dispute resolution between ITCs and Uber.

Uber also requires that drivers sign a Driver Addendum, which is a legal agreement between the ITC and the for-hire driver, before a driver can utilize the Driver App. The Driver Addendum allows a driver to receive "lead generation and related services" through Uber's Driver App. App. 409. The Addendum also outlines driver requirements (such as maintaining a valid driver's license), insurance requirements, dispute resolution, and the "Driver's Relationship with Uber," in which Uber uses clear language to attempt to establish the parameters of the Driver's working relationship with Uber.[18] For UberBLACK, Uber holds a certificate of public convenience from, and is licensed by, the Philadelphia Parking Authority ("PPA") to operate a limousine company. Transportation companies and individual transportation providers who provide Black car services in Philadelphia are required to hold a PPA certificate of public convenience or associate with an entity that holds such a certificate. Some Uber-BLACK transportation providers operate under the PPA certificate held by Uber. Luxe, an ITC owned by Razak, operates under its own PPA certificate. Additionally, approximately 75% of UberBLACK drivers use Uber's automobile insurance.

Plaintiffs claim that they are employees, and sue Uber for violations of minimum wage and overtime requirements under federal and state laws. Under the FLSA, employers must pay employees the applicable minimum wage for each hour worked, and, if an employee works more than forty hours in a given week, the employer must pay one and a half (1½) times the regular rate for each hour subsequently worked. Plaintiffs contend that time spent online on the Uber Driver App qualifies as compensable time under the FLSA. Principal among Plaintiffs' arguments is that Uber controls the access and use of the Driver App.

18. (n.6 in opinion) Boilerplate language in the Driver Addendum to the Technology Services Agreement sets forth, among other things, that ITCs "acknowledge and agree that Uber is a technology services provider" that "does not provide transportation services, function as a transportation carrier, nor operates as a broker for transportation of passengers." App. 13. "ITCs shall provide all necessary equipment; Uber does not direct or control ITCs or their drivers generally or in their performance." "ITCs and their drivers retain the sole right to determine when, where, and for how long each of them will utilize the Driver App or the Uber Service, and ITCs agree to pay Uber a service fee on a per transportation services transaction basis." ITCs must also "maintain during the term of this Agreement workers' compensation insurance for itself and any of its subcontractors." The Driver Addendum also sets forth and requires that the relationship between the ITCs and their drivers is "contractual or an employment arrangement."

To access Uber services, drivers open the Driver App on a mobile device, log in, and tap a button to be online. Once online, a driver can choose to accept a trip, but if the driver does not accept the trip within fifteen seconds of the trip request, it is deemed rejected by the driver. The Driver App will automatically route the trip request to the next closest driver, and if no other driver accepts the trip, the trip request goes unfulfilled, as Uber cannot require any driver to accept a trip. Uber-BLACK drivers are free to reject trips for any reason, aside from unlawful discrimination. However, if a driver ignores three trip requests in a row, the Uber Driver App will automatically move the driver from online to offline, such that he cannot accept additional trip requests.

Uber sets the financial terms of all UberBLACK fares, and riders pay by having their credit cards linked to the App. After a ride is completed, Uber charges the rider's credit card for the fare. Uber then deposits the money into the transportation company's Uber account with a commission taken out by Uber. The transportation company then distributes the payment to the driver who provided the ride.

Uber also has regulations under which it logs off drivers for a period of six hours if the driver reaches Uber's twelve-hour driving limit. Trip requests are generally sent to the driver closest in proximity to the requesting rider, and drivers have no way of knowing from the Uber Driver App what the demand for drivers is at any given time (and thus, how much their earnings will be based on that demand). Drivers also do not know where a rider's final destination is prior to accepting the ride.

There is one exception affecting a driver's ability to accept trip requests from anywhere in Philadelphia. If a driver is at one of Philadelphia's major transportation hubs: 30th Street Train Station or Philadelphia International Airport, he must utilize a "queue" system that routes trips to the next driver in the queue, and the driver can only enter, or advance in, the queue while physically located inside a designated zone.

On appeal, Uber reasserts that Plaintiffs are not employees as a matter of law, and therefore, their putative class action should be subject to summary judgment. To support this contention, Uber portrays UberBLACK drivers as entrepreneurs who utilize Uber as a software platform to acquire trip requests. Uber asserts that Plaintiffs are not restricted from working for other companies, pay their own expenses, and on some occasions, engage workers for their own ITCs. They can use

UberBLACK as little or as much as they want or choose not to work for Uber-BLACK and instead work for competitors such as Blacklane and Lyft.

Uber asserts that it places no restrictions on drivers' ability to engage in personal activities while online. Plaintiffs in this matter engaged in a range of personal activities, including accepting rides from private clients, accepting rides from other rideshare programs, sleeping, running personal errands, smoking cigarettes, taking personal phone calls, rejecting Uber-BLACK trips because they were tired, and conducting personal business.

Alternatively, Plaintiffs claim that they are "employees" under the FLSA because they are controlled by Uber when they are online and perform an integral role for Uber's business. The District Court agreed with Uber's position, and granted Uber's Motion for Summary Judgment on the question of whether Plaintiffs qualify as "employees" of Uber under the FLSA and PMWA. Plaintiffs now appeal from the summary judgment order.

III. Applicable Law: *Donovan v. DialAmerica Marketing, Inc.*

The minimum wage and overtime wage provisions at issue all require that Plaintiffs prove that they are "employees." Although Plaintiffs' case includes claims under the PMWA, Pennsylvania state courts have looked to federal law regarding the FLSA for guidance in applying the PMWA. The FLSA defines "employer" as "including any person acting directly or indirectly in the interest of an employer in relation to an employee," and "employee" as "any individual employed by an employer." 29 U.S.C. §§ 203(d), (e)(1). Given the circularity of the definitions, federal courts, with guidance from the Department of Labor, have established standards to determine how to define employee and employer.

The Third Circuit utilizes the test out-lined in *Donovan v. DialAmerica Marketing, Inc.,* 757 F.2d 1376 (3d Cir. 1985), to determine employee status under the FLSA. This seminal case acknowledges that when Congress promulgated the FLSA, it intended it to have the "broadest definition of 'employee.'" In *DialAmerica,* we used six factors—and indeed adopted the

Ninth Circuit's test—to determine whether a worker is an employee under the FLSA:

> 1) the degree of the alleged employer's right to control the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered required a special skill; 5) the degree of permanence of the working relationship; and 6) whether the service rendered is an integral part of the alleged employer's business.

Our decision in *DialAmerica* is consistent with the Supreme Court's general guidance in *Rutherford Food Corp. v. McComb,* 331 U.S. 722 (1947). In *Rutherford,* the Supreme Court first determined "employee" status under the FLSA. And in *DialAmerica,* we agreed with *Sureway Cleaners* that "neither the presence nor absence of any particular factor is dispositive." Therefore, "courts should examine the circumstances of the whole activity," determining whether, "as a matter of economic reality, the individuals are dependent upon the business to which they render service." The burden lies with Plaintiffs to prove that they are employees.

IV. The District Court Opinion

The District Court granted summary judgment to Uber ruling that drivers for UberBLACK are independent contractors within the meaning of the FLSA and similar Pennsylvania laws. The District Court, in applying the six factors, relied heavily on the analysis in *DialAmerica* and other cases that had examined the use of internet or app-based programs for acquiring work.

The District Court applied all six factors in *DialAmerica,* and on balance, found that Plaintiffs were independent contractors. There were four factors the Court applied that were interpreted in favor of independent contractor status. The District Court analyzed the employer's right to control the manner in which the work is to be performed and noted that the written agreements entered into by the Plaintiffs and their transportation companies, in addition to the ability of Plaintiffs to hire sub-contractors and work for competing companies, point to a lack of control by Uber. Next, the District Court analyzed the alleged employees' opportunity for profit or loss and found that this also supports independent contractor status. The District Court found that Plaintiffs can work as much or as little as they would like and choose not to accept trip requests where the opportunity for profit was greater to work for themselves or competitors. Because the "profit-loss" factor does not require that Plaintiffs be solely in control of their profits or losses, Plaintiffs were unsuccessful in convincing the District Court that they were employees despite the fact that Uber retains the right to determine how much to charge passengers and which driver receives which trip request. UberBLACK drivers must purchase or lease their own expensive vehicle to drive for UberBLACK, demonstrating independent status as well. And the "relationship permanence" can be as long or non-existent as the driver desires, again illustrating the impermanent working relationships often found with independent contractors.

The District Court determined that only two factors militated in Plaintiffs' favor. As limousine drivers, the service they render does not really require a special skill. Second, the limousine driving service rendered to Uber by UberBLACK drivers is an essential part of Uber's business as a transportation company. The District Court held that the movant demonstrated that there was no genuine dispute as to any material fact, and that a majority of the *DialAmerica* factors leaned against employment status. The District Court granted Uber's motion for summary judgment and determined that Plaintiffs were independent contractors.

VI. Analysis

A. Genuine Disputes of Material Fact Exist

For summary judgment to have been appropriate, there must have been no genuine disputes as to any material facts on the record, entitling Uber to judgment as a matter of law. As such, if there is a genuine dispute of material fact, the question of which *DialAmerica* factors favor employee status is a question of fact that should go to a fact-finder. Here, the ultimate question of law is whether Plaintiffs are employees or independent contractors, which is for a judge to decide. But, if a court finds that there are any issues of material fact that remain in genuine dispute, it must resolve those disputes prior to granting summary judgment. In *DialAmerica,* the parties stipulated to some facts and reserved the right to present testimony on any remaining disputed issues. Then, the district court held an evidentiary hearing on the remaining disputed issues of fact:

> (1) the extent to which home researchers and distributors were dependent on DialAmerica;
>
> (2) the extent to which they had an opportunity for profit or loss;
>
> (3) the extent to which they exercised initiative, business judgment, or foresight in their activities;
>
> (4) the extent of any financial investment in conjunction with their work for DialAmerica; and
>
> (5) the extent to which the services provided by the home researchers and distributors were an integral part of DialAmerica's business.

These factual issues refer directly to the factors which determine whether someone is an employee or independent contractor. The district court resolved these disputes and granted DialAmerica's motion for summary judgment. We reviewed the district court's decision in *DialAmerica* and determined that summary judgment was a mischaracterization, but the proper outcome, as all the factual disputes were resolved prior to adjudication on the merits.

DialAmerica teaches that where there are genuine questions of material fact that need resolution, these questions must go to a fact-finder. This case presents such genuine disputes of material facts. Uber submitted a Statement of Undisputed Material Facts to which Plaintiffs responded with almost a hundred pages of disputes. For example, disputed facts include whether Plaintiffs are operating within Uber's system and under Uber's rules, and whether Plaintiffs or their corporations contracted directly with Uber. Although the District Court states that its decision derived from undisputed facts, the disputes presented by the parties go to the core of the *DialAmerica* factors and present a genuine dispute of material facts. Accordingly, we will remand to the District Court as summary judgment was inappropriate.

B. The "Right to Control" Factor

To illustrate that there are genuine disputes remaining, we look to the first *DialAmerica* factor: "the degree of the alleged employer's right to control the manner in which the work is to be performed." While not dispositive, this factor is highly relevant to the FLSA analysis. The District Court in this case held that the first factor supported a finding of independent contractor status. Actual control of the manner of work is not essential; rather, it is the right to control which is determinative.

The parties contest whether Uber exercises control over drivers. While Uber categorizes drivers as using the Uber App to "connect with riders using the Uber-BLACK product," which may imply that drivers independently contract with riders through the platform, Plaintiffs contend that this is not so. Uber also contends that drivers can drive for other services while driving for Uber, however Plaintiffs contend that while "online" for Uber, they cannot also accept rides through other platforms. Plaintiffs reference Uber's Driver Deactivation Policy that establishes that "soliciting payment of fares outside the Uber system leads to deactivation" and "activities conducted outside of Uber's system—like anonymous pickups—are prohibited."

Uber also asserts that it does not control the "schedule start or stop times" for drivers or "require them to work for a set number of hours." Again, Plaintiffs dispute this, stating that the Uber Owner/Operator Agreement states, "the frequency with which Uber offers Requests to the driver under this Agreement shall be in the sole discretion of the Company" and "the number of trip requests available to Plaintiffs is largely driven by Uber."

The above factual disputes all go to whether Uber retains the right to control the Plaintiffs' work. The District Court in its analysis acknowledged what the Plaintiffs asserted, but assigned little value to their assertions in light of Uber's contractual agreement with Plaintiffs, Uber's assertion that Plaintiffs are permitted to hire sub-contractors, and that "plaintiffs and their helpers are permitted to work for competing companies." However, whether Plaintiffs are considered to "work" for a competing company while being "online" on the Uber Driver App is also a disputed factual issue. This illustrates why summary judgment was inappropriate at this stage.

Further, these and other disputed facts regarding control demonstrate why this case was not ripe for summary judgment. For example, Plaintiffs assert that "Uber does punish drivers for cancelling trips," and "Uber coerces UberBLACK drivers to go online and accept trips by making automatic weekly deductions against their account." Plaintiffs additionally assert that they derived all of their income for their respective businesses from Uber in certain years, which Uber disputes.

Although both parties argue that there are no genuine disputes regarding control, the facts adduced show otherwise. While Uber determines what drivers are paid and directs drivers where to drop off passengers, it lacks the right to control when drivers must drive. UberBLACK drivers exercise a high level of control, as they can drive as little or as much as they desire, without losing their ability to drive for UberBLACK. However, Uber deactivates drivers who fall short of the 4.7-star Uber-BLACK driver rating and limits the number of consecutive hours that a driver may work.

C. Opportunity for Profit or Loss Depending on Managerial Skill

As with the right to control, the District Court held that there was no genuine dispute as to another factor—the opportunity for profit or loss depending on managerial skill. Again, we disagree with the District Court's conclusion. The District Court, in this case, ruled that this factor strongly favored independent contractor status because drivers could be strategic in determining when, where, and how to utilize the Driver App to obtain more lucrative trip requests and to generate more profits. Plaintiffs could also work for competitors and transport private clients.[19]

However, other material facts reveal that there was and still is a genuine dispute. For example, Uber decides (1) the fare; (2) which driver receives a trip request; (3) whether to refund or cancel a passenger's fare; and (4) a driver's territory, which is subject to change without notice. Moreover, Plaintiffs can drive for competitors, but Uber may attempt to frustrate those who try, and most of the factors that determine an UberBLACK driver's Uber-profit, like advertising and price setting, are also controlled by Uber.[20] Under the circumstances, we believe that a reasonable fact-finder could rule in favor of Plaintiffs.[21] Thus, summary judgment was inappropriate.

19. (n.9 in opinion) Indeed, the District Court stressed Plaintiffs' ability "to make money elsewhere." Yet, based on our precedent, it is unclear whether this factor looks only toward opportunity for profit or loss *within* the alleged employment relationship or whether it also contemplates one's ability to make money elsewhere—as such, external factors, such as the ability to earn outside revenue without terminating the Uber-driver relationship, may be irrelevant to the analysis. As this argument was not able to be developed by the parties, this, along with other material factual disputes, is ripe to be developed at trial.

20. (n.10 in opinion) The District Court also considered "Plaintiffs investments in their own companies" as "relevant to the 'profit and loss' factor," as weighing "heavily in favor of 'independent contractor' status." But, as stated earlier, parties frame this issue differently and assert different facts—again showing that summary judgment was inappropriate. For example, Uber asserts that Plaintiff Razak's ITC Luxe Limousine Services, Inc. invested in up to sixteen vehicles and had as many as fourteen to seventeen drivers. And while Plaintiffs do not deny that they invested in their personal vehicles, which they use to provide UberBLACK rides, as discussed already, there is an inherent dispute regarding whether drivers are allowed to exercise judgment and select the farthest rides for the largest payment, as Uber determines which driver is given which rider.

D. Remaining DialAmerica Factor Analysis

Of the remaining factors, some do not require further factfinding, while others still do. The fifth factor, degree of permanence of the working relationship, has genuine disputes of material fact. On one hand, Uber can take drivers offline, and on the other hand, Plaintiffs can drive whenever they choose to turn on the Driver App, with no minimum amount of driving time required.

21. (n.11 in opinion) We also note that the District Court did not interpret whether Plaintiffs could in actuality exercise any managerial skill while being "online" to increase their profits, only that they could potentially choose to perform other jobs to make a greater profit.

Alternatively, the fourth factor, whether the service rendered requires a special skill, is clearer. It is generally accepted that "driving" is not itself a "special skill." Although there may be a distinction between "driving" and "replicating the limousine experience," as noted by the District Court, it is not enough to overcome the presumption that driving is not a special skill. This fourth factor certainly weighs in favor of finding that Plaintiffs are employees.[22]

22. (n.12 in opinion) Lastly, the District Court found that the work UberBLACK drivers provide is integral to the service Uber renders under the sixth *DialAmerica* factor. Simply put by the District Court, "it seems beyond dispute that if Uber could not find drivers, Uber would not be able to function." We acknowledge that Uber strenuously disputes this finding, insisting instead that it is a technology company that supports drivers' transportation businesses, and not a transportation company that employs drivers. We also believe this could be a disputed material fact that should be resolved by a fact-finder.

VII. Conclusion

In reviewing the District Court decision *de novo,* we determine summary judgment was inappropriate because genuine disputes of material facts remained. For the foregoing reasons, we will remand the matter for further proceedings.

1.3 Distinguishing Employees from Interns or Students

Wang v. Hearst Corp., 877 F.3d 69 (2d Cir. 2017)

DENNIS JACOBS, Circuit Judge.

Five participants in internship programs offered by defendant Hearst Corporation ("Hearst") sue for minimum wage under the Fair Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL"). At issue is whether the unpaid interns were "employees" of Hearst for the purposes of the FLSA under Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528 (2d

Cir. 2016). We affirm the judgment of the United States District Court for the Southern District of New York, for the reasons stated in Judge Oetken's thorough opinion.

I

The question is whether Hearst furnishes bona fide for-credit internships or whether it exploits student-interns to avoid hiring and compensating entry-level employees. The factual record is voluminous and advances multiple narratives, some of them contradictory; but the following essentials are undisputed.

Hearst maintained dozens of internship programs with its various print magazines. Each of five named appellants worked at one time as interns in one of these programs. These internships were unpaid, carried no expectation of eventual full-time employment, and required intern candidates to receive prior approval for college credit to participate. No intern alleges that Hearst promised compensation or a future job.

The interns' individual experiences varied, but there are groupings. Four of the appellants-Alexandra Rappaport, Erin Spencer, Matthew Wagster, and Sarah Wheels-were enrolled in college during their internships. Rappaport, Spencer, and Wheels completed their internships during the summer between academic years, and Wagster interned (with *Esquire*) during his fall semester. Lead plaintiff Xuedan Wang interned for one semester between her graduation from college and the start of her graduate program in the Fashion Marketing program at Parsons School of Design. Each intern received prior approval for college credit, although not all of them ultimately received credit from their degree-awarding institution: Wang had received permission for continuing education credit but ultimately did not pursue it, Wagster was denied credit from his institution because his internship was not applicable to his major, and Wheels received credit from a local community college.

Each student had an academic or aspiring professional connection to fashion. Wang and Spencer studied fashion in college, and Spencer's internship satisfied a graduation requirement (the Fieldwork course) for his major; Rappaport and Wagster were majoring in the social sciences, but hoped to break into the fashion industry; Wheels was an English major who interned in the editorial department of *Cosmopolitan* to advance her writing career. All of them testified or declared that they performed a range of tasks related to their professional pursuits in the Hearst internship programs, and gained valuable knowledge and skills.

At the same time, the interns share common complaints. They describe many tasks in Hearst's fashion closets as menial and repetitive. Several claim that they did not receive close supervision or guidance and that the internships offered little formal training—in contrast to their academic experiences in school. One common grievance was that the interns mastered most of their tasks within a couple weeks, but did the same work for the duration of the internship.

In February 2012, lead plaintiff Xuedan Wang filed suit alleging that she and a putative class of interns across Hearst's magazine departments were deprived of wages in violation of the FLSA and NYLL. Seven other interns opted in after the district court granted the case collective certification. The district court's denial of plaintiffs' motion for partial summary judgment was vacated in this Court for reconsideration in light of Glatt v. Fox Searchlight Pictures, Inc., which was heard in tandem with Wang.

Hearst moved for summary judgment against the six remaining plaintiffs under the Glatt test. The district court granted the motion, and five plaintiffs filed a timely appeal.

II

The FLSA defines "employee" by tautology: an "individual employed by an employer." 29 U.S.C. § 203(e)(1). The standard for "employee" is broad, but the Supreme Court has long recognized that not every individual who performs a service for an employer qualifies as an "employee" under the FLSA. "Employee" status depends upon the "economic reality" of the relationship between the putative employer and employee.

Last year in Glatt, we recognized the "primary beneficiary" test as the way to distinguish employees from bona fide interns. To guide our "flexible" analysis, we provided seven non-exhaustive considerations specific to the context of unpaid internships:

> 1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa;
>
> 2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions;
>
> 3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit;
>
> 4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar;
>
> 5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning;
>
> 6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern;
>
> 7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

The court applies these considerations by weighing and balancing the totality of the circumstances. "No one factor is dispositive and every factor need not point in the same direction for the court to conclude that the intern is not an employee."

The totality of the circumstances should be considered in view of the "purpose of a bona fide internship to integrate classroom learning with practical skill development in a real-world setting." In a break from previous tests, courts applying Glatt have acknowledged that the internship may provide a direct benefit to the employer so long as the intern receives identifiable educational or vocational benefits in return.

Judge Oetken analyzed each Glatt factor and determined that all of them except the sixth (displacement of paid employees) either favored Hearst to some degree or were neutral. In assessing the totality of the circumstances, the court concluded that the "Plaintiffs were interns rather than employees as a matter of law."

III

A. Factors One and Seven

The appellants concede that factors one and seven (expectation of payment and entitlement to a job, respectively) favor Hearst. They argue, however, that these factors bear little weight because FLSA rights cannot be waived. The interns' reading of these factors defies the clear mandate of Glatt, which explained that "any promise of compensation, express or implied, suggests that the intern is an employee—*and vice versa.*". These factors are crucial to understanding the "economic reality" of the internship relationship; where, as here, the programs were described specifically as unpaid internships for students—and students applied to the internships with that unambiguous understanding—the relationship is far less likely to take on an abusive quality.

B. Factors Two and Five

The second factor (training) is at the heart of the dispute on appeal. The interns argue forcefully that Judge Oetken misconstrued this factor by broadening the ambit of "training" to include "practical skills." Wagster contends that the experience of having "sat in on marketing meetings" should have been discounted by his assignment to "take meeting minutes." Similarly, appellants argue that we should disregard Spencer's experience "learning about photo shoots" because she already knew how to use a camera. The interns would thus limit the discussion of beneficial training under the second factor to education that resembles university pedagogy to the exclusion of tasks that apply specific skills to the professional environment.

Appellants' interpretation ignores our instruction in Glatt that a key element of the intern relationship is "the expectation of receiving educational *or vocational benefits.*" Glatt clearly contemplates that training opportunities offered to the intern include "products of experiences on the job." The appellants' tacit assumption is that professions, trades, and arts are or should be just like school; but many useful internships are designed to correct that impression.

The interns argue that the district court "ignored" evidence that Hearst's internships were a poor substitute for classroom learning. In fact, the court accepted the complaints as true, and for that reason, concluded that the factor weighed only "slightly" in favor of Hearst. At the same time, it recognized that those complaints do not wholly offset the undisputed fact that the internships *did* provide beneficial training. For this reason, the appellants also misread the closely related fifth Glatt factor (valuable duration) in arguing that the interns were not receiving "beneficial learning" when they performed repetitive or similar tasks they had already "learned." As exemplified by the meeting minutes and photoshoots, practical skill may entail practice, and an intern gains familiarity with an industry by day to day professional experience.

C. Factors Three and Four

The third and fourth Glatt factors relate to the integration of the internship to the student-intern's academic program and academic calendar, respectively. Both parties and the district court acknowledge that the interns' experiences diverge with respect to these factors. In general, however, the internships were arranged to fit the academic calendar and required academic credit as a prerequisite.

Factor three (academic integration) clearly favors Hearst for all interns except Wagster. For some interns, the connection is straightforward. Spencer's internship was a graduation requirement for his major. Wheels' internship with the editorial department of a magazine meshed with her academic major in English and professional interest in writing. And while Rappaport's internship did not "integrate" with "coursework" from her international relations major, she discussed the internship with her college faculty, wrote a paper about it, and received class credit for it: her college thus treated the internship as a course.

It is argued that “there was no connection between a formal education program and Wang’s internship” in the fashion industry. Appellants’ Br. at 37. But Wang interned between the completion of her undergraduate degree in fashion and the start of her graduate degree, also in fashion. She intentionally deferred her start date for graduate school and took a full time internship at a Hearst magazine to gain professional experience. A jury is not necessary to infer from these undisputed facts that Wang’s internship “is tied to her formal education.” That Wang did not receive credit does not undermine the connection between her formal education program and her internship; she did not receive credit because she did not pursue it. As a matter of law, the (undisputed) fact that the program required a student to earn approval from an accredited university for the “receipt of academic credit” generally is more telling than whether credit was actually awarded in that individual’s case.

For the majority of the interns here, the undisputed evidence also favors Hearst with respect to the fourth factor (academic calendar). Rappaport, Spencer, and Wheels interned during their college summer breaks in accordance with the school calendar. Wang had deferred her studies to intern between school years, and Wagster was not an active student during his internship. Hearst did not fail to accommodate their academic schedules when they had no schedules to accommodate.

D. Factor Six

The sixth factor (displacement) considers the extent to which an intern’s work complements the work of paid employees or displaces it. An intern’s work is complementary if it requires some level of oversight or involvement by an employee, who may still bear primary responsibility. The district court considered that the sixth factor favored the interns because the interns completed some work regularly performed by paid employees.

This factor alone is not dispositive. An intern may perform complementary tasks and in doing so confer tangible benefits on supervisors. The Glatt factors intentionally omitted a criteria that had been advanced by the Department of Labor that the alleged employer derive no immediate advantage from the activities of the intern. It is no longer a problem that an intern was useful or productive.

IV

The facts of this case permit inferences that support Hearst with respect to certain Glatt factors, and inferences that support particular interns with respect to other factors. The interns and amici urge that such mixed inferences foreclose a ruling on summary judgment. We disagree, for the reasons explained by the district court, which weighed all factors under the totality of the circumstances, and concluded that the interns are not "employees" for the purposes of the FLSA.

As the interns observe, these cases do involve a "fact specific" and case-by-case analysis. But "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Status as an "employee" for the purposes of the FLSA is a matter of law, and under our summary judgment standard, a district court can strike a balance on the totality of the circumstances to rule for one side or the other.

There are contested issues that bear on the quality of each intern's experience. The crucial point is that a district court may rule on summary judgment if it can weigh the Glatt factors on the basis of facts that are not in dispute. As the district court recognized, the internships "involved varying amounts of rote work and could have been more ideally structured to maximize their educational potential," but concluded that these critiques did not give rise to a material factual dispute.

Dawson v. NCAA, 932 F.3d 905 (9th Cir. 2019)

THOMAS, Judge:

We consider whether Lamar Dawson and Division I Football Bowl Subdivision ("FBS") Football Players are employees of the National Collegiate Athletic Association ("NCAA") and PAC-12 Conference ("PAC-12") within the meaning of the Fair Labor Standards Act ("FLSA") and California labor law. Because the claims fail as a matter of law, we affirm the judgment of the district court.

I

Dawson played football for the University of Southern California ("USC"), a Division I FBS member of the NCAA's PAC-12 Conference. In this putative class action case, Dawson does not allege that he was an employee of USC, so the pure question of employment is not before us, and we need not consider whether he had employment status as a football player, nor whether USC was an employer. That question is left, if at all, for another day. Rather, the only issue before us is whether the NCAA and PAC-12 were his employers under federal and state law.

The NCAA is an "unincorporated not-for-profit educational organization" comprised of more than 1,100 colleges and universities throughout the United States. NCAA member schools are organized into three Divisions based on the number and quality of opportunities that the schools provide to participate in intercollegiate athletics. Division I consists of approximately 351 schools. Approximately 253 Division I schools have Division I football programs, of which approximately 128 fall within the FBS. The PAC-12 is an unincorporated association which operates a multi-sport collegiate athletic conference, and is a formal conference member of the NCAA Division I FBS.

NCAA member schools "agree to administer their athletics programs in accordance with the constitution, bylaws, and other legislation of the NCAA." The NCAA's constitution and bylaws establish academic eligibility requirements, provide guidelines and restrictions for recruitment, impose limits on the number and size of athletic scholarships, and regulate the scheduling and conditions of practice and games.

The NCAA bylaws also govern financial aid and prohibit compensation for student-athletes. Bylaw 15.1 provides that student-athletes may receive financial aid on the basis of athletic ability, but that the amount of aid must not exceed "the value of his or her cost of attendance." Student-athletes receiving aid in excess of the cost of attendance limitation "shall not be eligible to participate in intercollegiate athletics."

NCAA Bylaw 12.1.4 provides that financial aid is "not considered to be pay or the promise of pay for athletics skill." Bylaw 12.1.2 further prohibits any payment to a student-athlete for athletic services. Student-athletes who accept payments may be subject to revocation of their amateur status and eligibility under seven conditions.

In his complaint, Dawson alleged that the NCAA and the PAC-12 acted as an employer of the class members by "prescribing the terms and conditions under which student-athletes perform services." Dawson claims that the NCAA and PAC-12, as joint employers, failed to pay wages, including overtime pay, to Dawson and to class members in violation of federal and state labor laws.

The NCAA and the PAC-12 moved to dismiss Dawson's complaint for failure to state a claim upon which relief can be granted. The district court granted the motion, and dismissed the complaint without leave to amend.

II

The district court properly concluded that Division I FBS Football Players are not employees of the NCAA or PAC-12 as a matter of federal law.

A

The FLSA provides that "employers" must pay their "employees" a minimum wage and overtime pay for hours worked in excess of the statutory workweek. The statute defines an "employee" as "any individual employed by an employer." To "employ" means "to suffer or permit to work."

The FLSA definition of employee is "exceedingly broad," but "does have its limits." "An individual may work for a covered enterprise and nevertheless not be an 'employee.'" For example, an individual "who, 'without any express or implied compensation agreement, might work for their own advantage on the premises of another'" falls outside the FLSA definition of employee.

Ultimately, "the test of employment under the FLSA is one of 'economic reality.'" Economic reality accounts for "the circumstances of the whole activity" rather than considering "isolated factors" determinative.

The Supreme Court has found a number of circumstances relevant in evaluating economic reality, including: (1) expectation of compensation; (2) the power to hire and fire; (3) and evidence that an arrangement was "conceived or carried out" to evade the law. We apply these guiding principles in our analysis, and conclude that the economic reality of the relationship between the NCAA/PAC-12 and student-athletes does not reflect an employment relationship.

1

We need not address whether Dawson's scholarship engendered an "expectation of compensation" or whether his scholarship amounted to compensation because he did not receive the scholarship from the NCAA or the PAC-12. The NCAA Bylaws reveal that member schools themselves award and distribute the financial aid Dawson alleges constitutes expected compensation.

Dawson's theory is that NCAA regulations prohibit NCAA student-athletes from accepting compensation beyond scholarships limited to cost of attendance. He does not claim that the defendants provide scholarships; whether "compensation" or not, scholarship funding comes from his school. The limitation on scholarships does not, as a matter of law, create any expectation of compensation from the NCAA/PAC-12.

Thus, on the undisputed facts, neither the NCAA nor PAC-12 provided Dawson with a scholarship or any expectation of a scholarship.

2

Similarly, on this record, Dawson cannot demonstrate that the NCAA or the PAC-12 had the power to fire or hire him. Dawson alleges that the NCAA/PAC-12 assert complete control over the lives of student-athletes, on and off campus, including a student-athlete's: "(a) living arrangements; (b) athletic eligibility; (c) permissible compensation; (d) allowable behavior; (e) academic performance; (f) use of alcohol and drugs; and (g) gambling." Dawson alleges that the penalties for violating these rules include "loss of financial aid and eligibility for sports." Dawson also alleges that the NCAA/PAC-12 control and regulate student-athletes' "training and game schedules, academic schedules, and other collegiate activities."

The NCAA Bylaws pervasively regulate college athletics. The complaint, however, does not allege that the NCAA/PAC-12 "hire and fire," or exercise any other analogous control, over student-athletes. The complaint does not allege, and moreover, the record does not demonstrate, that the NCAA and PAC-12 choose the players on any Division I football team, nor that they engage in the actual supervision of the players' performance. Rather, the allegations of the complaint, taken as true, demonstrate that the NCAA functions as a regulator, and that the NCAA member schools, for whom the student-athletes allegedly render services, enforce regulations.

In sum, on this record, Dawson cannot demonstrate that the NCAA or the PAC-12 had the power to fire or hire him.

3

Finally, there is no evidence tendered by Dawson that the NCAA rules were "conceived or carried out" to evade the law. The relevant rules were first promulgated in the early 1920's, and some version of them has "existed for a long time." In contrast, Congress enacted the FLSA in 1938. Even though "economic reality" in college sports is much different today, there is no evidence on this record that the NCAA rules were "conceived or carried out" to evade the law.

4

The Supreme Court has also considered more specific factors when helpful to probe the economic reality of a particular situation. In this context, Dawson argues that the labor of student-athletes generates substantial revenue for the NCAA and PAC-12, and that this "economic reality" alters the analysis.

However, precedent demonstrates that revenue does not automatically engender or foreclose the existence of an employment relationship under the FLSA. The Supreme Court has held self-proclaimed volunteers to be employees of a nonprofit religious organization. Conversely, we recently held that cosmetology students were not employees entitled to minimum wage despite the fact that they performed services for paying customers at salons run by their schools. Therefore, in the context of our preceding analysis, the revenue generated by college sports does not unilaterally convert the relationship between student-athletes and the NCAA into an employment relationship.

B

Bonnette v. California Health and Welfare Agency, 704 F.2d 1465 (9th Cir. 1983), does not compel a contrary conclusion, as Dawson contends. In *Bonnette,* we applied a four-factor test to probe the economic reality of the relationship between state agencies and chore workers hired to perform in-home care for disabled public service recipients.

The *Bonnette* factors ask "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." These factors prove "particularly appropriate where (as in *Bonnette* itself) it is clear that some entity is an 'employer' and the question is which one." Under the *Bonnette* test, however, the NCAA and PAC-12 are clearly not Dawson's employers. They do not admit him to the school or pick him for the team; they cannot remove him from the team; they do not supervise his schedules or activities in practices or games; they do not maintain his scholastic records; and, although they put caps on what he may receive as a scholarship, they do not determine whether he gets a scholarship or in what amount.

Similarly, *Benjamin* does not alter our conclusion. In *Benjamin,* we applied a seven-factor "primary beneficiary test" to evaluate economic reality in the vocational student-employee context. The primary beneficiary test looks to "seven non-exhaustive factors for courts to weigh and balance."

Benjamin is not useful in determining whether an employment relationship exists between Dawson and the defendants. *Benjamin* involved vocational students earning academic credit necessary to take a state licensing exam.In contrast, student-athletes are participating in highly regulated extra-curricular activities. Thus, *Benjamin's* "primary beneficiary test" fails to "capture the true nature" of the relationship at issue here.

C

In sum, the district court correctly held that the NCAA and the PAC-12 were not Dawson's employers. Within the analytical framework established by the Supreme Court, the NCAA and PAC-12 are regulatory bodies, not employers of student-athletes under the FLSA. The district court properly dismissed the FLSA claims.

Johnson v. NCAA (I), 556 F.Supp.3d 491 (E.D. Pa. 2021)

Padova, District Judge.

Plaintiffs, student athletes at five of the Defendant colleges and universities, contend that student athletes who engage in interscholastic athletic activity for their colleges and universities are employees who should be paid for the time they spend related to those athletic activities. Plaintiffs, Ralph "Trey" Johnson, Stephanie Kerkeles, Nicholas Labella, Claudia Ruiz, Jacob Willebeek-Lemair, and Alexa Cooke, assert claims on behalf of themselves, a Fair Labor Standards Act ("FLSA") collective, and three state classes against the colleges and universities they attend (or attended) (the "Attended Schools Defendants," or "ASD"), the National Collegiate Athletic Association ("NCAA"), twenty additional named universities that are members of the NCAA Division I ("D1"), and a putative Defendant class made up of 125 NCAA D1 colleges and universities. The First Amended Complaint ("Complaint") asserts claims for violations of the FLSA and state law. The ASD have moved to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground that they do not employ Plaintiffs.[23] For the reasons that follow, the Motion is denied.

23. (n.1 in opinion) The NCAA and the other named Defendant universities have also filed a Motion to Dismiss pursuant to Rule 12(b)(6) on the ground that the Complaint does not plausibly allege that they were joint employers of Plaintiffs. That motion will be addressed separately.

I. Factual Background

The Complaint alleges the following facts. The NCAA is an association that regulates intercollegiate sports and has jurisdiction over approximately 1,100 schools and nearly 500,000 student athletes. The NCAA has entered into multi-year, multi-billion-dollar contracts with broadcasters ESPN, CBS, and Turner Sports to show athletic competitions between NCAA D1 member schools, and it distributes shares of those broadcasting fees to its member schools. In addition to shares of broadcasting fees, NCAA D1 member schools also receive fees from multi-year, multi-million-dollar agreements with television and radio networks that they have entered into, either individually or as part of an NCAA conference, to broadcast athletic competitions between NCAA D1 member schools.

Plaintiff Johnson was a student athlete on the Villanova University NCAA football team from June 2013 until November 18, 2017. Plaintiff Kerkeles has been a student athlete on Fordham University's NCAA swimming and diving team since 2016. Plaintiff Labella was a student athlete on Fordham University's NCAA baseball team during the 2018 and 2019 baseball practice and competition seasons. Plaintiff Ruiz was a student athlete on Sacred Heart University's NCAA tennis team from 2014 to 2018. Plaintiff Willebeek-Lemair was a student athlete on Cornell University's NCAA soccer team during the 2017 and 2018 practice and playing seasons. Plaintiff Cooke has been a student athlete on Lafayette College's NCAA tennis team since 2017.

The Defendants are the NCAA and 25 NCAA D1 member schools (the "University Defendants"). The ASD are: Villanova University, Fordham University, Sacred Heart University, Cornell University, and Lafayette College. The remaining University Defendants, none of which were attended by the named Plaintiffs, are: Bucknell University, Drexel University, Duquesne University, Fairleigh Dickinson University, La Salle University, Lehigh University, Monmouth University, Princeton University, Rider University, Robert Morris University, Seton Hall University, Saint Francis University, Saint Joseph's University, Saint Peter's University, the University of Delaware, Pennsylvania State University, the University of Pennsylvania, the University of Pittsburgh, Rutgers State University of New Jersey, and Temple University. The Complaint also alleges claims against a putative Defendant class made up of the named University Defendants and 100 additional universities that are members of the NCAA D1. According to the Complaint, these Defendants jointly employed Plaintiffs and similarly situated persons who are members of the putative FLSA Collective.

Student athletes do not have the option to play NCAA sports for wages at any NCAA D1 school. All member schools in the NCAA have agreed not to pay students to participate in intercollegiate varsity sports. The NCAA's Bylaws prohibit schools from offering wages and prohibit student athletes from accepting wages. A student athlete who participates in NCAA sports can only receive payment based on athletic performance through the U.S. Olympic Committee's ("USOC") Operation Gold program, which pays NCAA-eligible student athletes for winning medals. The USOC Operation Gold program also permits NCAA-eligible student athletes to receive additional pay through USA sport governing bodies and organizations, such as USA Swimming and US Wrestling.

Student athletes at NCAA D1 schools must schedule classes around their required NCAA athletic activities and cannot reschedule their NCAA athletic activities around their academic programs. As a result, Villanova University only excuses a student athlete from participating in required athletic activities if there is a conflict between practice and a mandatory core class. For example, when Plaintiff Johnson played football at Villanova University he was required to participate in NCAA athletically related activities on weekdays between 5:45 a.m. and 11:30 a.m. and could not enroll in a non-core class during that time, including classes that were prerequisites for academic degree programs. In addition, NCAA D1 member schools require student athletes to participate in Countable Athletically Related Activities ("CARA"), which are recorded on timesheets under an NCAA D1 Bylaw. NCAA Bylaws also require student athletes to participate in Required Athletically Related Activities like fundraising and community service. A student athlete who fails to attend meetings, participate in practice, or participate in scheduled competitions can be disciplined, including suspension or dismissal from the team. Because student athletes have to schedule their classes around their required athletic activities, many student athletes have reported that participation in NCAA D1 sports have prevented them from taking classes that they wanted to take. Many student athletes have also reported that their participation in NCAA D1 sports has prevented them from majoring in their preferred major. Student athletes at Villanova University are also required to participate in activities like meals, physical rehabilitation, dressing, showering, and travel that are not considered CARA. They are also encouraged to engage in additional workouts and consultations with coaches that are not counted in CARA. Student athletes have reported spending more than 30 hours per week on athletically related activities, both CARA and non-CARA, and football players who attend schools in the NCAA bowl and championship subdivisions report spending more than 40 hours per week on these activities.

At the same time, the NCAA procures substantial revenues from sports. In the 2018 fiscal year, the NCAA reported total revenues of $1,064,403,240. These revenues came from fees collected for television and marketing rights, championships, tournaments, and sales. In their 2016 fiscal year, NCAA D1 schools in the football power five subdivision had median total revenues related to NCAA sports of $97,276,000; schools in the football bowl subdivision reported median total revenues related to NCAA sports of $33,470,000; schools in the football championship subdivision had median total revenues related to NCAA sports of $17,409,000; and schools that did not have NCAA football teams reported median total revenues from NCAA sports of $16,018,000. Villanova University in particular had total revenues from NCAA sports of $48,977,278 in its 2018 fiscal year. While student athletes do not receive wages, the NCAA and Villanova University claim that they acquire intangible educational benefits from participating in NCAA sports, including "discipline, work ethic, strategic thinking, time management, leadership, goal setting, and teamwork."

The NCAA D1 member schools exercise significant control over their student athletes. The NCAA Bylaws apply to all student athletes who participate in NCAA sports and they address "recruitment, eligibility, hours of participation, duration of eligibility and discipline." Student athletes who participate in NCAA sports are supervised by coaching and training staff. NCAA D1 member schools are required to have adult supervisors maintain timesheets for participants. They also have handbooks that contain standards for controlling student athletes' performance and conduct. NCAA D1 member schools impose discipline, including suspension and dismissal from a team, in instances of specified misconduct. NCAA D1 member schools also publish supplemental handbooks with standards that are used to control the performance and conduct of student athletes both on and off the field. These handbooks contain rules regarding agents, prohibiting certain categories of legal gambling, and restricting social media use, including restrictions on making derogatory comments about other teams. NCAA D1 member schools also have NCAA team policies that restrict the legal consumption of alcohol and legal use of nicotine products by student athletes.

Based upon these factual allegations, the Complaint asserts that Plaintiffs are the employees of Defendants, including the ASD, and it asserts eight claims for relief, seeking payment of wages for the time Plaintiffs spent engaged in activities connected to NCAA sports. Count I asserts claims pursuant to the FLSA on behalf of Plaintiffs and the proposed FLSA collective against all Defendants and the proposed Defendant class for failure to pay them minimum wages as employees. Plaintiffs and the members of the proposed FLSA Collective seek unpaid minimum wages, an equal amount as liquidated damages, attorneys' fees, and costs in connection with Count I.

The Attended Schools Defendants have moved to dismiss all claims against them pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground that it does not plausibly allege that Plaintiffs are their employees.

III. Discussion

The ASD argue that the Complaint fails to state any claims against them because it does not allege facts that would establish that Plaintiffs are their employees, which is a requirement for bringing a claim under the FLSA. The FLSA defines the term "employee" as "any individual employed by an employer." The United States Court of Appeals for the Third Circuit has explained that "this statutory definition is 'necessarily broad to effectuate the remedial purposes of the Act.'" "In accordance with this 'expansive definition,' courts must 'look to the economic realities of the relationship in determining employee status under the FLSA.'" The ASD assert three reasons why Plaintiffs cannot be their employees: (1) student athletes such as Plaintiffs are amateurs; (2) the Department of Labor has determined that interscholastic athletes are not employees for purposes of the FLSA; and (3) the Complaint does not plausibly allege that Plaintiffs are employees pursuant to a multi-factor test used to determine whether individuals are employees.

A. Amateurism

The ASD maintain that Plaintiffs are not employees of the schools they attend, and for which they compete in interscholastic athletics, because they are amateurs and the Supreme Court has recognized that "college athletics in the United States is defined by its century-old 'revered tradition of amateurism.'" The ASD rely both on the Supreme Court's decision in National Collegiate Athletic Association v. Board of Regents and on Berger v. National Collegiate Athletic Association, in which the United States Court of Appeals for the Seventh Circuit rejected a lawsuit brought pursuant to the FLSA by former student athletes against the NCAA and more than 120 of its D1 member schools. The Berger Court relied on the Supreme Court's recognition of the tradition of amateurism in college sports in Board of Regents to find that this "long-standing tradition defines the economic reality of the relationship between student athletes and their schools." The ASD maintain that the NCAA member schools' history of "'not paying student-athletes is *precisely what makes them amateurs.*'" Thus, the ASD engage in the circular reasoning that they should not be required to pay Plaintiffs a minimum wage under the FLSA because Plaintiffs are amateurs, and that Plaintiffs are amateurs because the ASD and the other NCAA member schools have a long history of not paying student athletes like Plaintiffs.

The Supreme Court did, indeed, note in Board of Regents that "the NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports." However, it recently rejected the NCAA's argument that Board of Regents "expressly approved its limits on student-athlete compensation—and that this approval forecloses any meaningful review of those limits today." Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021). The Supreme Court explained in Alston that:

> Board of Regents may suggest that courts should take care when assessing the NCAA's restraints on student-athlete compensation, sensitive to their procompetitive possibilities. But these remarks do not suggest that courts must reflexively reject *all* challenges to the NCAA's compensation restrictions. Student-athlete compensation rules were not even at issue in Board of Regents.

As Justice Kavanaugh noted in his concurring opinion in Alston, the argument "that colleges may decline to pay student athletes because the defining feature of college sports is that the student athletes are not paid. is circular and unpersuasive." Accordingly, we reject the ASD's argument that Plaintiffs are not employees entitled to minimum wages pursuant to the FLSA because there is a long-standing tradition of amateurism in NCAA interscholastic athletics that defines the economic reality of the relationship between Plaintiffs and the ASD.[24]

24. (n.7 in opinion) The ASD also argue that student athletes who play intercollegiate sports cannot be "employees" under the FLSA because the common usage of the terms "employment" and "work" do not encompass students playing sports. The ASD rely on the following comment in Berger: "simply put, student-athletic 'play' is not 'work.'" However, athletic "play" is "work" when the athletes are paid, which is evident from the number of individuals who are employed to "play" for professional teams competing in football, baseball, basketball, and ice hockey, among other sports. We also note that many students are "employed" to do paid work, such as students who have work-study positions with their respective universities. Accordingly, we reject the ASD's contention that student athletes who play intercollegiate sports cannot be "employees" under the FLSA because the common usage of the terms "employment" and "work" do not encompass students playing sports.

C. The Economic Reality of the Relationship Between Plaintiffs and the ASD

1. Expectation of compensation

As we mentioned above, we "look to the economic realities of the relationship in determining employee status under the FLSA." The ASD argue that Plaintiffs and other student athletes cannot be employees of the schools they attend because they participate in interscholastic athletics for those schools without any expectation of payment and this amateurism "defines the economic reality of the relationship between student athletes and their schools." The ASD maintain that, while the FLSA's definition of employee is exceedingly broad, it does not include an individual who works for a covered enterprise without any express or implied compensation agreement. The ASD rely on Walling v. Portland Terminal Co., in which the Supreme Court noted that the definition of employee in Section 3(g) of the FLSA "was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another." In Portland Terminal, the Supreme Court determined that individuals who participated in a railroad company's training session for prospective brakemen were not employees of the railroad entitled to minimum and overtime wages under the FLSA, even though they were required to complete the training session before the railroad would hire them. The Court noted that the definitions of employer and employee in the FLSA, while broad, "cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction." Thus, since the record in Portland Terminal showed "that the railroads receive no 'immediate advantage' from any work done by the trainees," the Supreme Court held that those trainees were not employees within the meaning of the FLSA. In contrast, the Complaint in this action alleges that the ASD receive considerable financial advantage from Plaintiffs' participation in interscholastic athletics. We conclude, accordingly, that Portland Terminal is not controlling here.

The ASD also rely on Tony & Susan Alamo Foundation, in which the Supreme Court determined that some individuals who believed themselves to be volunteers for the Foundation, but who relied on non-wage benefits they received from the Foundation, were employees under the FLSA. The Tony and Susan Alamo Foundation was a nonprofit religious organization that derived its income from commercial businesses staffed by individuals associated with the Foundation, many of whom had been drug addicts before being rehabilitated by the Foundation. The Foundation provided its associates with room and board but did not pay them salaries. The Secretary of Labor filed an action against the Foundation, asserting that the Foundation violated the minimum wage, overtime, and recordkeeping provisions of the FLSA by not paying the associates wages. Some Foundation associates testified at the trial and "vigorously protested the payment of wages, asserting that they considered themselves volunteers who were working only for religious and evangelical reasons." Nonetheless, the Supreme Court affirmed the lower court's determination that the associates were employees even though they considered themselves to be volunteers and did not seek wages under the FLSA. The Supreme Court explained that "the purposes of the Act require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act." Consequently, we cannot dismiss Plaintiffs' claims simply because they commenced their careers as student athletes for the ASD without an express or implied compensation agreement, as in this regard, they are like the Tony and Susan Alamo Foundation associates who had no expectation that they would be paid wages and yet were found to be employees.

When we consider whether Plaintiffs are employees of the ASD, we are mindful "that the determination of the relationship does not depend on isolated factors but rather upon the circumstances of the whole activity." Thus, "'when determining whether someone is an employee under the FLSA, economic reality rather than technical concepts is to be the test of employment.'" "'Under this theory, the FLSA defines employer 'expansively,' and with 'striking breadth.' The Supreme Court has even gone so far as to acknowledge that the FLSA's definition of an employer is 'the broadest definition that has ever been included in any one act.'"

Courts have, accordingly, developed multifactor tests to be used in determining, based on the circumstances of the whole relationship between the parties, whether individuals are employees or independent contractors, whether entities are joint employers, and whether individuals are employees or interns. The ASD ask us to reject the use of any existing multifactor tests because they fail to "account for the 'revered tradition of amateurism in college sports.'" As we have rejected the ASD's argument that Plaintiffs cannot be their employees because of the "revered tradition of amateurism in college sports," we also reject their argument that we should not use existing multifactor tests because they fail to account for this "revered tradition."

2. The Glatt multi-factor test

The ASD suggest in the alternative, that, of the three multifactor tests mentioned above, the Glatt test would be the best for analyzing the economic reality of the relationship between student athletes and their schools. In Glatt, the United States Court of Appeals for the Second Circuit considered "the broad question of under what circumstances an unpaid intern must be deemed an 'employee' under the FLSA and therefore compensated for his work." The Second Circuit determined that "the proper question is whether the intern or the employer is the primary beneficiary of the relationship." According to Glatt, the "primary beneficiary test" has three important features: (1) "it focuses on what the intern receives in exchange for his work;" (2) "it also accords courts the flexibility to examine the economic reality as it exists between the intern and the employer;" and (3) "it acknowledges that the intern-employer relationship should not be analyzed in the same manner as the standard employer-employee relationship because the intern enters into the relationship with the expectation of receiving educational or vocational benefits that are not necessarily expected with all forms of employment." Additionally, the United States Court of Appeals for the Ninth Circuit has commented that "that the primary beneficiary test best captures the Supreme Court's economic realities test in the student/employee context and that it is therefore the most appropriate test for deciding whether students should be regarded as employees under the FLSA." The primary beneficiary test described in Glatt utilizes the following seven factors:

> 1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
>
> 2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
>
> 3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
>
> 4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
>
> 5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
>
> 6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
>
> 7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

"Applying these considerations requires weighing and balancing all of the circumstances. No one factor is dispositive and every factor need not point in the same direction for the court to conclude that the intern is not an employee entitled to the minimum wage." Moreover, these factors "are non-exhaustive—courts may consider relevant evidence beyond the specified factors in appropriate cases."

The ASD argue that the allegations of the Complaint demonstrate that the Glatt factors either weigh in favor of finding that Plaintiffs are not their employees or are neutral, so that the application of these factors to the facts alleged in the Complaint demonstrate that Plaintiffs are not their employees. The ASD maintain that the factual allegations of the Complaint clearly allege that the first Glatt factor, whether there is an "expectation of compensation" between the Plaintiffs and the ASD, favors a determination that Plaintiffs are not employees of the ASD. Pertinent to this factor, the Complaint alleges that "Student Athletes do not have any options to choose any opportunities to play NCAA sports for wages at any NCAA D1 member school. Student Athletes also do not have any options to bargain for such wages with any such school." It also alleges that all NCAA member schools "have mutually agreed not to offer wages for participation in intercollegiate Varsity sports, and they have adopted bylaws prohibiting schools from offering wages and Student Athletes from accepting wages." Upon consideration of these allegations, we conclude that the facts alleged in the Complaint with respect to the first Glatt factor weigh in favor of finding that Plaintiffs are not the employees of the ASD.

The ASD also contend that the facts alleged in the Complaint demonstrate that the second, third and fifth Glatt factors, "the extent to which the internship provides training that would be similar to that which would be given in an educational environment," "the extent to which the internship is tied to the intern's formal education program," and "the extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning," all weigh in favor of finding that Plaintiffs are not their employees because the Complaint alleges that student athletes derive some educational benefit from participation in NCAA athletics. The ASD specifically rely on the allegation that the NCAA and Villanova University have contended, in connection with a different lawsuit, that "learning benefits from participation in NCAA athletics include, but are not limited to: discipline, work ethic, strategic thinking, time management, leadership, goal-setting, and teamwork."

The Complaint does not contain any factual allegations that specifically pertain to whether student athletes' participation in interscholastic athletics "provides training that would be similar to that which would be given in an educational environment" or whether student athletes' participation in NCAA D1 sports in their respective universities is limited in time to the period in which their participation provides them with "beneficial learning." Accordingly, we conclude that the facts alleged in the Complaint with respect to the second and fifth Glatt factors are neutral with respect to whether Plaintiffs are employees of the ASD. The Complaint alleges, in connection with the third Glatt factor, that "the NCAA and Villanova University admit in connection with another lawsuit that NCAA sports are not tied to the student's formal education program by integrated coursework or receipt of academic credit." We conclude, accordingly, that the facts alleged in the Complaint with respect to the third Glatt factor, "the extent to which the position is tied to the intern's formal education program," weigh in favor of a finding that Plaintiffs are employees of the ASD.

The ASD further argue that the Complaint alleges facts that would demonstrate that the fourth Glatt factor, "the extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar," weighs in favor of finding that Plaintiffs are not their employees even though there is an "arguably-imperfect correspondence between some athletic seasons and the academic calendar," because the Complaint alleges that the ASD and other NCAA D1 member schools support student athletes in the classroom. The ASD rely on allegations that they track the time that student athletes devote to their sports, that some NCAA D1 conferences have approved proposals to require time management plans for each sport and to prohibit athletically related activities during some time periods, and that Villanova University provides academic support for students. On the other hand, Plaintiffs maintain that the facts alleged in the Complaint demonstrate that this factor weighs in favors of finding that they are employees because the Complaint alleges that they are required to participate in athletically related activities that take in excess of 30 hours per week and interfere with their academic commitments by preventing them from taking classes they wish to take and from majoring in the subjects they wish to major in. We conclude that the Complaint alleges facts that demonstrate that Plaintiffs' participation in NCAA athletic activities for the ASD interferes with their academic pursuits and, thus, that the facts alleged with respect to the fourth Glatt factor weigh in favor of finding that Plaintiffs are employees of the ASD.

The ASD also argue that the facts alleged in the Complaint with respect to the sixth Glatt factor, "the extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern," weighs in favor of finding that Plaintiffs are not their employees, because student athletes are not alleged to displace the work of any paid employees. Plaintiffs do not contend that their participation in interscholastic athletics displaces any paid employees but maintain that the allegations of the Complaint demonstrate that this factor weighs in favor of finding that they are employees because the Complaint alleges that they gain no educational benefits from being student athletes. The Complaint alleges that the

NCAA and Villanova University have admitted that student athletes do not receive any academic credit for participating in NCAA sports and that "NCAA sports are not tied to the student's formal education program by integrated coursework." As we discussed above, the Complaint also alleges that the amount of time that student athletes spend in connection with their participation in NCAA D1 athletics interferes with their ability to take the classes that they want to take and major in the fields they prefer and inhibits their ability to keep up with the classes they do take. We therefore conclude that the Complaint plainly alleges that Plaintiffs' participation in interscholastic athletics for the ASD does not provide them with significant educational benefits and we further conclude, accordingly, that the facts alleged in the Complaint with respect to the sixth Glatt factor weigh in favor of a finding that Plaintiffs are the employees of the ASD, even though they are not alleged to displace other paid employees.

With respect to the seventh Glatt factor, "the extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship," the ASD also assert that the facts alleged in the Complaint weigh in favor of a finding that Plaintiffs are not their employees because the Complaint alleges that student athletes are not entitled to paid jobs at their respective NCAA D1 schools after graduation. We agree and conclude that the facts alleged in the Complaint with respect to the seventh Glatt factor weigh in favor of a finding that Plaintiffs are not the employees of the ASD.

In sum, we have found that the facts alleged in the Complaint would, if proven, support conclusions that the first and seventh Glatt factors weigh in favor of finding that the Plaintiffs are not employees of the ASD, that the second and fifth Glatt factors would be neutral, and that the third, fourth, and sixth Glatt factors would weigh in favor of finding that Plaintiffs are employees of the ASD. Balancing all of these factors, and mindful that none of these "factors is dispositive and that every factor need not point in the same direction," we conclude that the Complaint plausibly alleges that Plaintiffs are employees of the ASD under the Glatt test. [25]

25. (n.11 in opinion) The parties also disagree regarding whether the Complaint plausibly alleges that Plaintiffs are employees of the ASD using the test outlined in DialAmerica. Since we have determined that the Complaint plausibly alleges that Plaintiffs are employees of the ASD for purposes of the FLSA under the Glatt test, we need not address whether the Complaint also alleges that Plaintiffs are employees of the ASD under the DialAmerica test.

2. Identifying Employers

Ries v. McDonald's USA, LLC, No. 1:20-cv-2 (W.D. Mich. Dec. 6, 2021)

HALA Y. JARBOU, District Judge.

Plaintiffs bring this action against Defendants for sexual harassment in violation of Title VII of the Civil Rights Act of 1964, and Michigan's Elliot-Larsen Civil Rights Act (ELCRA). Plaintiffs sue McDonald's, LLC and McDonald's Corporation (collectively, "McDonald's") as well as two entities operating a McDonald's franchise in Michigan: MLMLM Corporation and M.A.A.K.S., Inc. (collectively, "Franchisee"). Plaintiffs are former employees of a McDonald's restaurant in Mason, Michigan, operated by Franchisee. They allege that a manager at that location repeatedly harassed them, both physically and verbally. Before the Court is a motion for summary judgment by McDonald's Because no reasonable juror could find that McDonald's acted as an employer or agent subject to liability under Title VII or the ELCRA, the Court will grant the motion.

II. ANALYSIS

A. Title VII

Title VII prohibits an "employer" from engaging in certain "unlawful employment practices." The term "employer" means "a person engaged in an industry affecting commerce who has fifteen or more employees and any agent of such a person."

McDonald's argues that it is not liable because it did not employ Plaintiffs or control employment matters at the restaurant where Plaintiffs worked. McDonald's argues that it is simply a franchisor; Franchisee controlled the conditions of Plaintiffs' employment, not McDonald's. Plaintiffs respond that McDonald's is liable for two reasons: (1) it retained sufficient control over their employment conditions to qualify as a “joint employer”; and (2) McDonald’s caused Plaintiffs to believe that Franchisee was an agent of McDonald’s.

1. Joint Employer

“Under the ‘joint-employer’ theory, ‘an entity that is not the plaintiff’s formal employer may be treated under these doctrines as if it were the employer for purposes of employment laws such as Title VII.’” “Entities are joint employers if they ‘share or co-determine those matters governing essential terms and conditions of employment.’”

In determining whether an entity is the plaintiff’s joint employer, “the major factors include the ‘entity’s ability to hire, fire or discipline employees, affect their compensation and benefits, and direct and supervise their performance.’” Put simply, McDonald’s can be liable as a joint employer if it has “retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by Franchisee.”

Here, a franchise agreement between McDonald’s and Michael Dickerson (the owner of MLMLM and M.A.A.K.S.) governed the relationship between McDonald’s and Franchisee. The agreement, which had a 20-year term, expressly states that “Franchisee shall have no authority, express or implied to act as an agent of McDonald’s” and that “Franchisee and McDonald’s are not and do not intend to be partners, associates, or joint employers in any way.”

More importantly, the agreement did not give McDonald’s the ability to hire, fire, discipline, or affect the compensation or benefits of Franchisee’s employees. Dickerson testified that he and Nanette Bitner, his operations manager and the senior supervisor of the Mason restaurant, had authority to hire and fire employees. No one from McDonald’s played a role in hiring, firing, promoting, disciplining, or setting wages for employees at his restaurants. Nor did they play a role in assigning individual employees to their positions or in supervising their day-to-day activities. Plaintiffs offer no evidence to the contrary.

To be sure, the Franchise Agreement requires Franchisee to abide by a particular method of operating and maintaining a restaurant, called the “McDonald’s System.” This system details

> the retailing of a limited menu of uniform and quality food products, emphasizing prompt and courteous service in a clean, wholesome atmosphere which is intended to be attractive to children and families and includes proprietary rights in certain valuable trade names, service marks, and trademarks, including the trade names "McDonald's" and "McDonald's Hamburgers," designs and color schemes for restaurant buildings, signs, equipment layouts, formulas and specifications for certain food products, methods of inventory and operation control, bookkeeping and accounting, and manuals covering business practices and policies.

But that system does not set the terms of the relationships between Franchisee and its employees. It is instead a set of prescriptions for branding, operations, and quality control that is common for franchise relationships.

Plaintiffs point to the requirement that Franchisee operate the restaurant in a "good, clean, wholesome manner", but Plaintiffs do not point to any evidence that any party to the Franchise Agreement construed this requirement to mean an absence of sexual discrimination and harassment among Franchisee's employees. And even if that is what this requirement means, there is no evidence that it gave McDonald's the ability to do anything other than find Franchisee in breach of the Franchisee Agreement and terminate that agreement. Although such a termination would have impeded Franchisee's ability to continue operating, control over Franchisee's ability to continue business does not amount to control over Franchisee's relationship with its individual employees.

Plaintiffs also rely on the fact that McDonald's periodically assessed Franchisee according to its "National Franchising Standards" ("NFS"). McDonald's used these assessments to "identify those franchisees with whom McDonald's desires to grow and/or enter into new franchise relationships." Before the term of a franchise agreement expires, McDonald's will review the assessments to determine whether to award a new term to the franchisee. But these standards were not part of the Franchise Agreement; indeed, the standards themselves expressly state that they "do not create or modify any contract rights or obligations" and "do not necessarily address whether" the franchisee is complying with its franchise agreement. McDonald's plays a "consulting role" with respect to its franchisee's compliance with the standards; it cannot require the franchisee to comply with them.

Plaintiffs argue that the NFS gave McDonald's substantial control because McDonald's frequently assessed Franchisee's compliance with the NFS and then used those assessments to determine whether to renew a franchise at the end of its term. But gathering data every few weeks or months from each restaurant for the purpose of deciding whether to continue a business relationship with Franchisee at the end of a multi-year term is a far cry from exercising day-to-day supervision and control over Franchisee's employees. Plaintiffs do not point to any instance in which McDonald's used its assessments to dictate the discipline, promotion, or any other change in the terms or conditions of employment for any particular employee of Franchisee. Although several Franchisee employees testified that scores on these assessments were considered *by Franchisee* during employee performance reviews, or were used *by Franchisee* as the basis for awarding employee perks or bonuses, there is no evidence that McDonald's required Franchisee to use the assessments in this manner. The fact that Franchisee took these assessments into account when exercising *its own control* does not mean that McDonald's codetermined the essential conditions of Plaintiffs' employment. Thus, Plaintiffs have not shown that the NFS standards gave McDonald's any significant control over Franchisee's employees.

McDonald's also provided an operations and training manual to its franchisees. Among other things, that manual contains a list of duties and procedures for opening the restaurant and starting a shift. The Franchise Agreement provides that Franchisee must "promptly adopt and use exclusively the formulas, methods, and policies contained in the business manuals." However, the manual itself states that franchisees can "choose to apply or implement any portion" of it, and that franchisees are "exclusively responsible for complying with all statutes, laws, and regulations applicable to their restaurants." A more recent version of the manual does not contain these disclaimers, but it repeatedly instructs employees to "contact your Owner/Operator for advice" about "practices at your restaurant." Thus, the manual makes clear that practices will vary according to choices made by the franchisee. Importantly, nothing in the manual excerpts provided by the parties gave McDonald's the ability to control the Franchisee's relationship with its employees.

Plaintiffs also point to a variety of templates and resources that McDonald's provided to Franchisee, including: an "Employee Resources" poster describing employee rights and a sexual harassment policy; a personality test for screening candidates; a website for job postings; job interview guidelines and application templates; software to track employee time and generate disciplinary reports; guidelines for the number and type of employees necessary to run a restaurant; and training programs for certain employees. However, there is no evidence that any of these resources or programs gave McDonald's control over the essential terms of employment for Franchisee's employees. To the contrary, the evidence shows that Franchisee alone possessed and exercised that control.

Plaintiffs put stock in the fact that McDonald's purportedly required Franchisee to display the Employee Resources poster. Plaintiffs apparently argue that McDonald's effectively required Franchisee to adopt the McDonald's policy described on the poster for reporting sexual harassment. However, displaying a policy is one thing. Implementing it is another. There is no evidence that McDonald's played any role in implementing or enforcing such a policy. Indeed, the poster states that any harassment is to be reported to employees of Franchisee (e.g., the "Restaurant/General Manager" or the "Owner Operator"). The poster also contains a blank space for contact information for the manager or owner of the restaurant. The poster provides no information or guidance about reporting misconduct to McDonald's. Thus, the poster does not create a genuine issue of fact about whether McDonald's retained sufficient control over Franchisee's employees to qualify as a joint employer.

Finally, Plaintiffs rely on an April 14, 2021, press release by McDonald's announcing that, "beginning in January 2022," it would be applying "new Global Brand Standards" to all of its restaurants; these new standards will apparently "prioritize actions" in "harassment, discrimination and retaliation prevention." According to the press release, McDonald's intends to assess its restaurants and "hold them accountable in accordance with applicable McDonald's market's business evaluation processes."

McDonald's rightly notes that the press release has limited relevance to this case because it is forward-looking. It does not apply to the time period at issue in the complaint. Plaintiffs respond that the press release is evidence that McDonald's has always had the right to impose personnel policies on its franchisees. But neither the details of the new policy, nor its mechanism of enforcement are laid out in the press release. Nothing in the press release itself indicates that McDonald's has had, or will have, control over the conduct of an individual employee of a franchisee. Indeed, the references to McDonald's "brand standards" and "business evaluation processes" suggest that McDonald's will implement its new policies in the same manner that it implements the NFS. As discussed above, periodic assessments and the power to terminate the franchise relationship are not equivalent to day-to-day supervision and control over the working conditions of a franchisee's employees.

In short, construing the evidence in a light most favorable to Plaintiffs, there is no genuine dispute that McDonald's did not meaningfully participate in employment decisions or possess sufficient control over the terms of Plaintiffs' employment to qualify as a joint employer. The control that McDonald's did have in its relationship with Franchisee was "control over conformity to standard operational details inherent in many franchise settings" and "the power to terminate the franchises." As other courts have concluded, that level of involvement in a franchisee's business does not suffice to give rise to employer liability under Title VII.

Plaintiffs rely on cases in which courts denied a franchisor's attempt to dismiss similar claims against it because the franchisor was involved in creating personnel policies or provided training to the franchisee's employees. Those cases are distinguishable. There, courts concluded that the plaintiffs had alleged sufficient facts in their complaints to state a plausible claim against the franchisor and proceed to discovery. The question facing this Court is a different one. The Court is not assessing the allegations in Plaintiffs' complaint. At this stage, Plaintiffs must support their allegations with evidence sufficient to demonstrate that they can proceed to trial against McDonald's. They have not done so. They have not shown that there is a genuine dispute of fact about whether McDonald's was a joint employer with Franchisee.

Johnson v. NCAA (II), 561 F.Supp.3d 490 (E.D. Pa. Sept. 21, 2021)

PADOVA, District Judge.

Plaintiffs, student athletes at five of the Defendant colleges and universities, contend that student athletes who engage in NCAA Division 1 ("D1") interscholastic athletic activity for their colleges and universities are employees who should be paid for the time they spend related to those athletic activities. Plaintiffs, Ralph "Trey" Johnson, Stephanie Kerkeles, Nicholas Labella, Claudia Ruiz, Jacob Willebeek-Lemair, and Alexa Cooke, assert claims on behalf of themselves, a Fair Labor Standards Act ("FLSA") collective, and three state classes against the colleges and universities they attend (or attended) (the "Attended Schools Defendants" or "ASD"), the National Collegiate Athletic Association ("NCAA"), twenty additional named D1 universities (the "Non Attended School Defendants" or "NASD"), and a putative Defendant class made up of 125 NCAA D1 colleges and universities. The First Amended Complaint ("Complaint") asserts claims for violations of the FLSA; the Pennsylvania Minimum Wage Act (the "PMWA"); the New York Labor Law ("NYLL"); and the Connecticut Minimum Wage Act ("CMWA"). The Complaint also asserts three common law unjust enrichment claims. The NCAA and NASD (together the "Moving Defendants") have moved to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) on the ground that Plaintiffs lack standing to sue them under Article III because they are not joint employers of Plaintiffs. For the reasons that follow, the Motion is granted in part and denied in part.

I. Factual Background

The Complaint alleges the following facts. The NCAA is an association that regulates intercollegiate sports and has jurisdiction over approximately 1,100 schools and nearly 500,000 student athletes. The NCAA has entered into multi-year, multi-billion-dollar contracts with broadcasters ESPN, CBS, and Turner Sports to show athletic competitions between NCAA D1 member schools, and it distributes shares of those broadcasting fees to its member schools. In addition to shares of those broadcasting fees, NCAA D1 member schools also receive fees from multi-year, multi-million-dollar agreements with television and radio networks that they have entered into, either individually or as part of an NCAA conference, to broadcast athletic competitions between NCAA D1 member schools.

The named Plaintiffs in this case are or were student athletes at Villanova University, Fordham University, Sacred Heart University, Cornell University, and Lafayette College. The NASD are: Bucknell University, Drexel University, Duquesne University, Fairleigh Dickinson University, La Salle University, Lehigh University, Monmouth University, Princeton University, Rider University, Robert Morris University, Seton Hall University, Saint Francis University, Saint Joseph's University, Saint Peter's University, the University of Delaware, Pennsylvania State University, the University of Pennsylvania, the University of Pittsburgh, Rutgers State University of New Jersey, and Temple University. According to the Complaint, all of the Defendants jointly employed Plaintiffs and similarly situated persons.

Student athletes do not have the option to play NCAA sports for wages at any NCAA D1 school. All member schools in the NCAA have agreed not to pay students to participate in intercollegiate varsity sports. The NCAA's Bylaws prohibit schools from offering wages and prohibit student athletes from accepting wages. A student athlete who participates in NCAA sports can only receive payment based on athletic performance in limited circumstances connected with competing in the Olympics.

NCAA D1 member schools require student athletes to participate in Countable Athletically Related Activities ("CARA"), which are recorded on timesheets under an NCAA D1 Bylaw. NCAA Bylaws also require student athletes to participate in Required Athletically Related Activities like recruiting, fundraising and community service. A student athlete who fails to attend meetings, participate in practices, or participate in scheduled competitions can be disciplined, including suspension or dismissal from the team. Student athletes have reported spending more than 30 hours per week on athletically related activities, both CARA and non-CARA, and football players who attend schools in the NCAA football bowl and championship subdivisions report spending more than 40 hours per week on these activities.

The NCAA D1 member schools exercise significant control over their student athletes. The NCAA Bylaws apply to all student athletes who participate in NCAA sports and they address "recruitment, eligibility, hours of participation, duration of eligibility and discipline." Student athletes who participate in NCAA sports are supervised by coaching and training staff. NCAA D1 member schools are required to have adult supervisors maintain timesheets for participants. NCAA D1 member schools impose discipline on student athletes, including suspension and dismissal from a team, in instances of specified misconduct. They also have handbooks that contain standards for controlling student athletes' performance and conduct both on and off the field. These handbooks contain rules regarding agents, prohibiting certain categories of legal gambling, and restricting social media use, including restrictions on making derogatory comments about other teams. NCAA D1 member schools also have NCAA team policies that restrict the legal consumption of alcohol and legal use of nicotine products by student athletes.

Based upon these factual allegations, the Complaint asserts that Plaintiffs are the employees of Defendants, including the NCAA and NASD, and it asserts eight claims for relief, seeking payment of wages for the time Plaintiffs spent engaged in activities connected to NCAA sports. Count I asserts claims pursuant to the FLSA on behalf of Plaintiffs and the proposed FLSA collective against all Defendants and the proposed Defendant class for failure to pay them minimum wages as employees. Plaintiffs and the members of the proposed FLSA Collective seek unpaid minimum wages, an equal amount as liquidated damages, attorneys' fees, and costs in connection with Count I.

The Attended Schools Defendants brought a Motion to Dismiss the Complaint as against them on the ground that it did not plausibly allege that they employed Plaintiffs, a requirement for liability under the FLSA. We denied that Motion on August 25, 2021, concluding that the Complaint plausibly alleges that Plaintiffs are employees of the ASD for purposes of the FLSA. The NCAA and the Non-Attended Schools Defendants have moved to dismiss all claims against them for lack of Article III standing on the ground that the Complaint does not plausibly allege that they are also employers of Plaintiffs, specifically that the Complaint does not plausibly allege that they are joint employers of Plaintiffs with the ASD.

III. Discussion

In Count I of the Complaint, Plaintiffs seek the payment of minimum wages from Defendants, including the NCAA and the NASD, for the hours they spent in connection with NCAA D1 intercollegiate athletics pursuant to Section 206 of the FLSA. "The minimum wage provision at issue requires that Plaintiffs prove that they are 'employees.'" The Moving Defendants argue in their Motion to Dismiss that Plaintiffs have failed to meet their burden of establishing "'the irreducible constitutional minimum' of Article III standing" because they are not employees of the Moving Defendants. To establish standing under Article 3, the Plaintiffs must establish the following three elements:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

The Moving Defendants argue that any injury suffered by Plaintiffs is not "fairly traceable" to them because they are not Plaintiffs' employers.

The FLSA defines the term "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). The Third Circuit has noted that "this statutory definition is 'necessarily broad to effectuate the remedial purposes of the Act.'" Two different entities can be joint employers of the same individual if they both have significant control over that employee:

> where two or more employers exert significant control over the same employees— whether from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment— they constitute "joint employers" under the FLSA. This is consistent with the FLSA regulations regarding joint employment, which state that a joint employment relationship will generally be considered to exist where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with another employer. Ultimate control is not

> necessarily required to find an employer-employee relationship under the FLSA, and even "indirect" control may be sufficient. In other words, the alleged employer must exercise "significant control."

Thus, we can grant the Moving Defendants' Motion to Dismiss for lack of subject matter jurisdiction only if the Complaint does not plausibly allege that the Moving Defendants are Plaintiffs' joint employers.

A. The NCAA as a Regulatory Body

The Moving Defendants argue that the NCAA cannot be a joint employer of Plaintiffs because it merely regulates Plaintiffs' participation in intercollegiate athletics. The Moving Defendants rely on *Dawson v. National Collegiate Athletic Association*, 932 F.3d 905 (9th Cir. 2019), in which the United States Court of Appeals for the Ninth Circuit affirmed a lower court decision holding that college student athletes who play football for schools in the NCAA D1 Football Bowl Subdivision are not employees of the NCAA and the PAC-12 Conference for purposes of the FLSA and California labor law. In *Dawson*, the Ninth Circuit considered three factors: (1) whether the plaintiff expected to be paid by the NCAA or the PAC-12 Conference, (2) whether the NCAA and the PAC-12 Conference had the power to hire or fire the plaintiff; and (3) whether there was "evidence that an arrangement was conceived or carried out to evade the law." The *Dawson* court found that the plaintiff had no expectation of a scholarship or other compensation from the NCAA or the PAC-12 Conference and that "there was no evidence that the NCAA rules were 'conceived or carried out' to evade the law." The *Dawson* court also determined that the complaint in that case alleged that the NCAA functioned solely as a regulator and not as an employer because, while the complaint alleged that "the NCAA Bylaws pervasively regulate college athletics," it did not allege that the NCAA hired or fired "or exercised any other analogous control, over student-athletes," or that the NCAA "chose the players on any Division I football team," or "engaged in the actual supervision of the players' performance." Rather, the complaint merely alleged that "the NCAA functions as a regulator, and that the NCAA member schools, for whom the student-athletes allegedly render services, enforce regulations." While the Moving Defendants urge us to simply adopt and apply *Dawson*'s analysis and conclusion in the instant case, the complaint in *Dawson* is not identical to the Complaint in this case and, accordingly, we must engage in our own independent analysis of the instant Complaint.

The Moving Defendants also rely on *Callahan v. City of Chicago*, 813 F.3d 658 (7th Cir. 2016). The plaintiff in *Callahan* was a taxi driver who brought FLSA claims against the City of Chicago, under the theory "that the City's regulations are so extensive that Chicago must be treated as her employer." Noting that the FLSA "says that 'employ' includes 'suffer or permit to work,'" the plaintiff argued that because "the City of Chicago permitted her to drive a cab, it thus became her employer." The Seventh Circuit rejected this argument as follows:

> The contention that the government permits to work, and thus employs, everyone it does not *forbid* to work has nothing to recommend it. The theory would produce multiple employers for every worker—for the United States, the State of Illinois, Cook County, and other governmental bodies permit taxi drivers to work in the same sense as Chicago does. The Occupational Safety and Health Administration and the National Highway Traffic Safety Administration have not adopted safety rules so onerous that the taxi business must shut down. Yet the goal of the Fair Labor Standards Act is to regulate employers, not the many governmental bodies that permit employers to operate.

However, as the Moving Defendants recognize, the NCAA, unlike the City of Chicago, is not a governmental entity. Moreover, *Callahan*, as a Seventh Circuit case, is not controlling authority in this district and, in any event, concerns a different set of factual allegations than are at issue in the instant case. Accordingly, instead of relying on either *Dawson* or *Callahan*, we will analyze the Complaint using the factors developed by the Third Circuit to determine whether an entity is a joint employer.

B. The Joint Employer Test

The Moving Defendants argue that the Complaint fails to plausibly allege that the NCAA and the NASD are joint employers of Plaintiffs under the four-factor test originally developed by the Ninth Circuit in *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), and subsequently adopted in part by the Third Circuit in *In re Enterprise Rent-A-Car*, 683 F.3d 462 (3d Cir. 2012). The Third Circuit announced in Enterprise Rent-A-Car that courts should use the following four factors, referred to as the *Enterprise* test, when determining whether two entities are joint employers of the same individual or individuals:

> 1) the alleged employer's authority to hire and fire the relevant employees; 2) the alleged employer's authority to promulgate work rules and assignments and to set the employees' conditions of employment: compensation, benefits, and work schedules, including the rate and method of payment; 3) the alleged employer's involvement in day-to-day employee supervision, including employee discipline; and 4) the alleged employer's actual control of employee records, such as payroll, insurance, or taxes.

We thus review the factual allegations in the Complaint to determine whether they satisfy these factors with respect to both the NCAA and the NASD.

1. The NCAA's and NASD's authority to hire and fire Plaintiffs

The Complaint alleges the following facts with respect to the NCAA's ability to "hire and fire" Plaintiffs. The NCAA's Bylaws restrict the means by which NCAA D1 member schools may recruit prospective athletes, including limiting face to face encounters with student athletes and their family members; limiting off-campus activities intended to assess the academic and athletic qualifications of a prospective student-athlete; limiting the number of telephone calls that can be made to a prospective student athlete during a defined period of time; and limiting contacts with student athletes to specified periods of time. NCAA Bylaws also prohibit D1 member schools from offering certain inducements to recruit student athletes. NCAA Bylaws limit the total number and value of the athletic scholarships that D1 member schools can offer to student athletes. NCAA Bylaws also make D1 member schools responsible for certifying the eligibility of student athletes before they can allow the student athletes to represent the school in intercollegiate competitions. Failure to comply with these Bylaws constitutes a Level III violation, for which NCAA Enforcement Staff could seek the following penalties: precluding recruitment of the student athlete and prohibiting the student-athlete from competing for the school until his or her eligibility is restored. Multiple violations could result in stronger penalties. In addition, the NCAA Bylaws require member schools to suspend or fire student athletes who are determined to be ineligible to play by NCAA Enforcement Staff. The Complaint thus alleges that the NCAA does more than just impose rules regarding the recruitment of intercollegiate athletes; it also investigates violations of those rules and imposes penalties, including the firing of student athletes, for those violations. We thus conclude that the Complaint plausibly alleges that the NCAA exercises significant control over the hiring and firing of student athletes, including Plaintiffs, such that the Complaint satisfies the first factor of the Enterprise test with respect to the NCAA.

The Complaint alleges the following facts with respect to the NASD's ability to "hire and fire" Plaintiffs. NCAA D1 member schools have representatives on committees that decide what rules to adopt; the "NCAA rules apply to all Student Athletes in NCAA sports on an equal basis; and these bylaws address, among other subjects, Student Athlete recruitment, eligibility, hours of participation, duration of eligibility and discipline." We conclude that these allegations are not sufficient to plausibly allege that the NASD exercise significant control over the hiring and firing of student athletes, including Plaintiffs. We therefore conclude that the factual allegations of the Complaint fail to satisfy the first factor of the Enterprise test with respect to the NASD.

2. The NCAA's and NASD's authority to promulgate work rules and set Plaintiffs' compensation, benefits, and work schedules

The Complaint alleges the following facts with respect to the NCAA's "authority to promulgate work rules and assignments and to set Plaintiffs' conditions of employment: compensation, benefits, and work schedules, including the rate and method of payment." The NCAA Bylaws govern amateurism, eligibility, awards, benefits, expenses, and each sport's playing and practice seasons. NCAA D1 Bylaw 12 prohibits D1 member schools from paying student athletes. NCAA D1 Bylaw 16 governs permissible benefits and non-permissible benefits for student athletes, as well as mandatory benefits for the athletes. NCAA D1 Bylaw 17 lists "Required Athletically Related Activities" that student athletes must participate in, limits the number hours that student athletes may be required to participate in CARA, and requires that CARA hours be recorded by school staff. NCAA D1 Bylaw 12 limits the number of seasons a student athlete may compete for a school in a specific sport and limits the time frame in which those seasons may occur. A school's failure to comply with these rules can constitute a Level II or III violation. The NCAA D1 Bylaws make payment to a student athlete by a coach or other school representative a Severe Breach of Conduct and a Level I violation. The Complaint thus alleges that the NCAA, through its Bylaws, issues work rules that apply to Plaintiffs and imposes conditions not only on the payment of compensation and other benefits to Plaintiffs but also on how much time Plaintiffs may spend in connection with NCAA intercollegiate athletic activities. We thus conclude that the Complaint plausibly alleges that the NCAA has the "authority to promulgate work rules and assignments and to set Plaintiffs' conditions of employment," such that the Complaint satisfies the second factor of the Enterprise test with respect to the NCAA.

The Complaint alleges the following facts with respect to the NASD's "authority to promulgate work rules and assignments and to set Plaintiffs' conditions of employment: compensation, benefits, and work schedules, including the rate and method of payment." The Complaint alleges that the NCAA D1 council has 40 members, including one from each conference, and the Board of Directors has 24 members, made up of one member from each Football Bowl Subdivision conference and 10 seats that rotate among the remaining conferences. Each active D1 member has voting privileges in the NCAA. The Complaint also alleges that "All schools in the NCAA have mutually agreed not to offer wages for participation in intercollegiate Varsity sports, and they have adopted bylaws prohibiting schools from offering wages and Student Athletes from accepting wages." All schools in the NCAA have also adopted bylaws with sanctions for infractions of the rules prohibiting schools from paying student athletes. The NCAA Enforcement Staff investigates potential NCAA violations and brings charges. The NCAA D1 Committee on Infractions decides cases brought by the Enforcement Staff. The NCAA D1 Committee on Infractions is composed of as many as 24 representatives from members schools, conferences, and the public. The D1 Infractions Appeal Committee is composed of five representatives from member schools, conferences, and the public. NCAA member schools have "'Shared Responsibility'" to report possible violations regarding student athletes and to cooperate in the investigation of student athletes. Failure to cooperate in an NCAA enforcement investigation is a "Severe Breach of Conduct" that can result in post-season bans, financial penalties, scholarship reductions, recruiting restrictions, and head coach restrictions. While the Complaint alleges that some colleges and universities have representatives on NCAA committees that create rules with respect to student athletes, and impose discipline on student athletes, the Complaint does not allege that any of the NASD have representatives that sit on any of these committees. We conclude that these allegations, which pertain solely to the agreement of the NCAA member schools not to pay wages to student athletes, those schools' obligations with respect to the enforcement of that agreement, and the possibility that a school could be involved in investigating and imposing discipline with respect to the violation of that agreement and other infractions of the D1 Bylaws, are not sufficient to plausibly allege that the NASD themselves promulgate work rules and assignments and/or set the conditions of participation for student athletes in NCAA intercollegiate athletics. We therefore conclude that the Complaint fails to satisfy the second factor of the Enterprise test with respect to the NASD.

3. The NCAA's and NASD's involvement in the day-to-day supervision of Plaintiffs

The Complaint alleges the following facts regarding the NCAA's involvement in the day-to-day supervision, including discipline, of student athletes who participate in NCAA sports. The NCAA Bylaws control the ability of the D1 member schools to discipline their student athletes as follows:

> (i) by restricting the grounds for a school to reduce or cancel an athletic scholarship during the period of its award to only disciplinary reasons;
>
> (ii) by requiring suspension or firing of a Student Athlete if s/he has violated any bylaw related to eligibility; and
>
> (iii) by subjecting a school's "home team" Student Athletes to discipline meted out by NCAA Enforcement Staff and/or panels of the peer-review NCAA D1 Committees on Infractions and Infractions Appeals composed of representatives from competing schools.

The NCAA, through its Bylaws, also prohibits NCAA D1 member schools from "reducing or canceling an athletic scholarship during the period of its award on the basis of the Student Athlete's athletic ability, performance or contribution to a team's success." If NCAA Enforcement Staff find that a student athlete is ineligible, the attended school is required to suspend or terminate that athlete. Viewing the allegations of the Complaint in the light most favorable to Plaintiffs, the Complaint alleges that the NCAA promulgates rules used in disciplining student athletes, has some involvement in the discipline of student athletes, can instigate investigations that result in discipline, and has some control over what discipline is issued to student athletes. We conclude, accordingly, that the Complaint plausibly alleges that the NCAA is involved in the day-to-day supervision, including discipline, of student athletes who participate in NCAA sports, including Plaintiffs. We further conclude that the factual allegations of the Complaint satisfy the third factor of the Enterprise test with respect to the NCAA.

The Complaint alleges the following facts with respect to the NASD's involvement in the day-to-day supervision, including discipline, of student athletes who participate in NCAA sports. The NCAA D1 Committee on Infractions, which can impose discipline on student athletes, is made up of as many as 24 representatives from member schools, conferences, and the public. The D1 Infractions Appeal Committee is composed of five representatives from member schools, conferences, and the public. All of the D1 member schools have a "'Shared Responsibility' to report all potential violations regarding any Student Athlete." Failure to cooperate in an NCAA enforcement investigation is a Level I Violation which could result in postseason bans, financial penalties, scholarship reductions, head coach restrictions, and recruiting restrictions. However, the Complaint does not allege that representatives of any of the NASD are members of the Committee on Infractions or of the Infractions Appeal Committee. We conclude that these allegations, which pertain to the participation of some NCAA D1 member schools in the NCAA D1 Committee on Infractions and the D1 Infractions Appeal Committee, and the obligation of D1 member schools to cooperate in NCAA enforcement investigations, are not sufficient to plausibly allege that the NASD are involved in the day-to-day supervision, including discipline, of student athletes, including Plaintiffs, who participate in NCAA sports. We thus conclude that the factual allegations of the Complaint fail to satisfy the third factor of the Enterprise test with respect to the NASD.

4. The NCAA's and NASD's control of Plaintiffs' records

The Complaint alleges the following facts regarding the NCAA's control of the records of student athletes who participate in NCAA sports. "The NCAA Eligibility Center maintains all records related to the initial determination of Student Athlete eligibility," and D1 member schools are required to provide the Eligibility Center with additional information if they "have cause to believe that a prospective student-athlete's amateur status has been jeopardized" and to report any discrepancies to the Eligibility Center. The NCAA also receives and maintains records regarding student athletes' injuries, illnesses and medical treatment in connection with their training for and participation in NCAA sports. D1 member schools are also required to make each student athlete's statement, drug testing consent form, and squad list available to the NCAA. D1 member schools are also required to produce student athletes' records to the NCAA upon request in connection with investigations conducted by the NCAA Enforcement Staff or the NCAA Committee on Infractions. We conclude, accordingly, that the Complaint plausibly alleges that the NCAA controls records of student athletes involved in NCAA sports, including Plaintiffs, such that the factual allegations of the Complaint satisfy the fourth factor of the Enterprise test with respect to the NCAA.

The Amended Complaint does not allege that the NASD individually maintain any records of student athletes that do not attend their schools. Moreover, Plaintiffs do not argue that the Complaint satisfies the fourth factor of the Enterprise test with respect to the NASD. We conclude, accordingly, that the Complaint fails to satisfy the fourth factor of the Enterprise test with respect to the NASD.

As we have concluded that the facts alleged in the Complaint satisfy all four factors of the Enterprise test as to the NCAA, we further conclude that the Complaint plausibly alleges that the NCAA is a joint employer of Plaintiffs for purposes of the FLSA and, accordingly, that Plaintiffs have standing to sue the NCAA. Therefore, we deny the Motion to Dismiss as to the NCAA.

In contrast, we have concluded that the facts alleged in the Complaint do not satisfy any of the four factors of the Enterprise test as to the NASD. Accordingly, application of that test does not support a conclusion that the NASD are joint employers of Plaintiffs. Plaintiffs also argue, however, that the Complaint plausibly alleges that the NASD are joint employers of Plaintiffs under a "Sports League Joint Employment" theory that was developed and applied by the United States Court of Appeals for the Fifth Circuit in *North American Soccer League v. NLRB*, 613 F.2d 1379 (5th Cir. 1980). We will therefore consider whether the NASD can be considered joint employers under this alternative theory.

C. The Sports League Joint Employment Theory

In *North American Soccer League*, the Fifth Circuit examined whether the *North American Soccer League* (the "League") and all of its member clubs were joint employers of all of the soccer players who played for clubs in the League in order to determine the "correct collective bargaining unit for the players in the League." The National Labor Relations Board ("NLRB") had concluded that the League and its member clubs were joint employers of the players and the Fifth Circuit determined that the record contained sufficient evidence to support that conclusion. The Fifth Circuit began its analysis with the proposition that "the existence of a joint employer relationship depends on the control which one employer exercises, or potentially exercises, over the labor relations policy of the other." The Fifth Circuit based its determination that the NLRB had properly deemed the League and the clubs to be joint employers on the following facts: (1) the League exercised "a significant degree of control over essential aspects of the clubs' labor relations, including but not limited to the selection, retention, and termination of the players, the terms of individual player contracts, dispute resolution and player discipline;" (2) "each club granted the League authority over not only its own labor relations but also, on its behalf, authority over the labor relations of the other member clubs;" (3) the clubs' activities were governed by the League's constitution and regulations, the commissioner was selected and compensated by the clubs, and the League's board of directors was made up of one representative of each club; (4) the League's regulations governed interclub trades and allowed the commissioner "to void trades not deemed to be in the best interest of the League;" (5) the League's regulations governed the termination of player contracts; (6) all player contracts were submitted to the League and the commissioner could "disapprove a contract deemed not in the best interest of the League;" (7) "disputes between a club and a player were required to be submitted to the commissioner for final and binding arbitration;" and (8) "control over player discipline was divided between the League and the clubs."

Plaintiffs argue that the Complaint alleges that the NCAA and its member schools operate sufficiently similarly to the League and its member clubs that it plausibly alleges that the NASD are joint employers of Plaintiffs. They argue that the Complaint alleges that NCAA D1 member schools grant enforcement authority to the NCAA over a wide range of subjects that directly impact student athletes' working conditions and that active D1 member schools have voting privileges to make the NCAA's rules. Plaintiffs also assert that the NCAA's Bylaws address "recruitment, eligibility, hours of participation, duration of eligibility and discipline." Plaintiffs also rely on the allegations that as many as 24 NCAA D1 member schools may have representatives on the D1 Committee on Infractions and that five D1 member schools may have representatives on the D1 Infractions Appeal Committee (along with members of the public and representatives from conferences).

The district court rejected a similar argument in *Livers v. National Collegiate Athletic Association*, (E.D. Pa. May 17, 2018). The plaintiff in Livers contended that the NCAA, Villanova University (for which he played football), "and dozens of other NCAA member schools, violated his right to be paid as an employee of the Defendants, acting jointly, for his participation on the Villanova football team as a Scholarship Athlete." The *Livers* court granted a motion to dismiss brought by the NCAA member schools that were not attended by the Plaintiff. While the complaint in *Livers*, like the Complaint in the instant proceeding, alleged that the NCAA member schools had agreed to impose restrictions on student athlete recruitment, eligibility, compensation, and the number of hours that student athletes could spend in connection with NCAA intercollegiate athletics, and to subject student athletes to discipline by the NCAA Committee on Infractions, the *Livers* court concluded that the complaint in that case did not plausibly allege that the NCAA member schools that Livers did not attend were his joint employers under either the Enterprise test or *North American Soccer League*. After first noting that the Fifth's Circuit's decision in *North American Soccer League* is not controlling in the Eastern District of Pennsylvania, the *Livers* court rejected the plaintiff's argument that *North American Soccer League* demanded a conclusion that the NCAA member schools that he did not attend were his joint employers, observing that *North American Soccer League* was not an FLSA case, did not involve student athletes, and, most importantly, involved facts that "demonstrated a more significant management role for each individual soccer team in the management of the League as a whole, by virtue of their membership in the League, than Plaintiff alleges with respect to NCAA member schools."

We conclude that the same is true in the case before us. In *North American Soccer League*, the commissioner was selected and compensated by the clubs, and the League's board of directors was made up of one representative of each club. In contrast, the Complaint in this case does not allege that the president of the NCAA is selected by and paid by the member schools, that any of the NASD are members of the NCAA D1 Committee on Infractions or the D1 Infractions Appeal Committee, or that any of the NASD are involved in day-to-day decision making in the NCAA D1. We conclude, accordingly, that the Complaint does not plausibly allege that the NASD are joint employers of Plaintiffs under the "Sports League Joint Employment Theory" described in *North American Soccer League*. Based on this conclusion and our prior analysis under the Enterprise test, we further conclude that the Complaint does not plausibly allege that the NASD are joint employers of Plaintiffs and, accordingly, that Plaintiffs lack standing to sue the NASD for violations of the FLSA. We thus grant the instant Motion to Dismiss as to Plaintiffs' FLSA claim in Count I of the Complaint as against the NASD.

NLRB, Standard for Determining Joint-Employer Status, 87 FR 54641 (Oct. 27, 2023)

Final Rule

The joint-employer doctrine plays an important role in the administration of the Act. The doctrine determines when an entity that exercises control over particular employees' essential terms and conditions of employment has a duty to bargain with those employees' representative. It also determines such an entity's potential liability for unfair labor practices. The joint-employer analysis set forth in this final rule is based on common-law agency principles as applied in the particular context of the Act. In our considered view, the joint-employer standard that we adopt today removes artificial control-based restrictions with no foundation in the common law that the Board has previously imposed in cases beginning in the mid-1980s discussed above, and in the 2020 rule. By incorporating common-law agency principles, as the Act requires, the final rule appropriately aligns employers' responsibilities with respect to their employees with their authority to control those employees' essential terms and conditions of employment and so promotes the policy of the United States, as articulated in Section 1 of the Act, to encourage the practice and procedure of collective bargaining and to protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

A. Definition of an Employer of Particular Employees

Section 103.40(a) of the final rule provides that an employer, as defined by Section 2(2) of the Act, is an employer of particular employees, as defined by Section 2(3) of the Act, if the employer has an employment relationship with those employees under common-law agency principles. This provision expressly recognizes the Supreme Court's conclusion that Congress's use of the terms "employer" and "employee" in the NLRA was intended to describe the conventional employer-employee relationship under the common law.

Because "Congress has tasked the courts, and not the Board, with defining the common-law scope of 'employer,'" the Board—in evaluating whether a common-law employment relationship exists—looks for guidance from the judiciary, including primary articulations of relevant principles by judges applying the common law, as well as secondary compendiums, reports, and restatements of these common law decisions, focusing "first and foremost [on] the 'established' common-law definitions at the time Congress enacted the National Labor Relations Act in 1935 and the Taft-Hartley Amendments in 1947."

By explicitly grounding the Board's joint-employer analysis in common-law agency principles, this provision recognizes that the existence of a common-law employment relationship is a necessary prerequisite to a finding that an entity is a joint employer of particular employees.

B. Definition of Joint Employers

Section 103.40(b) provides that, for all purposes under the Act, two or more employers of the same particular employees are joint employers of those employees if the employers share or codetermine those matters governing employees' essential terms and conditions of employment. The provision thus first recognizes, as did the 2020 rule, that joint-employer issues may arise (and the same test will apply) in various contexts under the Act, including both representation and unfair labor practice case contexts.

The provision goes on to codify the longstanding core of the joint-employer test, consistent with the formulation of the standard that several Courts of Appeals (notably, the Third Circuit and the District of Columbia Circuit) have endorsed.

By providing that a common-law employer of particular employees must also share or codetermine those matters governing the employees' essential terms and conditions of employment in order to be considered a joint employer, the provision recognizes and incorporates the principle from BFI that "the existence of a common-law employment relationship is necessary, but not sufficient, to find joint-employer status."

C. Definition of "share or codetermine"

Section 103.40(c) of the final rule provides that to "share or codetermine those matters governing employees' essential terms and conditions of employment" means for an employer to possess the authority to control (whether directly, indirectly, or both) or to exercise the power to control (whether directly, indirectly, or both) one or more of the employees' essential terms and conditions of employment. This provision incorporates the view of the Board and the District of Columbia Circuit in BFI that evidence of the authority or reserved right to control, as well as evidence of the exercise of control (whether direct or indirect, including control through an intermediary, as discussed further below) is probative evidence of the type of control over employees' essential terms and conditions of employment that is necessary to establish joint-employer status. After careful consideration of comments, as reflected above, the Board has concluded that this definition of "share or codetermine" is consistent with common-law agency principles and best serves the policy of the United States, embodied in the Act, to encourage the practice and procedure of collective bargaining by ensuring that employees have the ability to negotiate the terms and conditions of their employment, through representatives of their own choosing, with all of their employers that possess the authority to control or exercise the power to control those terms and conditions.

D. Definition of "essential terms and conditions of employment"

Section 103.40(d) defines "essential terms and conditions of employment" as (1) wages, benefits, and other compensation; (2) hours of work and scheduling; (3) the assignment of duties to be performed; (4) the supervision of the performance of duties; (5) work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline; (6) the tenure of employment, including hiring and discharge; and (7) working conditions related to the safety and health of employees. The Board has decided, after careful consideration of comments as reflected above, to modify the proposed rule's definition of "essential terms and conditions of employment" by setting forth an exclusive, closed list of terms and conditions of employment that may serve as the objects of control necessary to establish joint-employer status.

Terms and conditions of employment falling in these seven categories are not simply common across employment relationships, they represent the core subjects of collective bargaining contemplated by the Act, as illuminated by the Board's administrative experience. Thus, Section 8(d) of the Act expressly provides that the collective-bargaining obligation encompasses a duty to confer with respect to wages and hours, subjects falling within categories (1) and (2). Categories (3), (4), and (5) similarly include terms involving the assignment, supervision, and detailed control of employees' performance of work duties—and the grounds for discipline of employees who fail to perform as required—all common across employment relationships and subjects of central concern to employees seeking to improve their terms and conditions of employment through collective bargaining. Terms and conditions in Category (6), addressing the conditions for the formation and dissolution of the employment relationship itself, are clearly essential conditions of employment. Finally, as many commenters have observed, terms setting working conditions related to the safety and health of employees—encompassed in category (7)—are basic to the employment relationship and lie at or near the core of issues about which employees would reasonably seek to bargain. By providing that a common-law employer of particular employees will be considered a joint employer of those employees only if it possesses the authority to control or exercises the power to control one or more terms and conditions of employment falling into one of these seven categories, this provision ensures that such an employer will be in a position to engage in meaningful bargaining over an issue of core concern to the employees involved. This provision thus effectively incorporates the second step of the Board's joint-employer test set forth in BFI, above, as described by the District of Columbia Circuit in BFI v. NLRB, and addresses that court's concern that the Board had failed, in BFI, adequately to delineate what terms and conditions are "essential" to make collective bargaining "meaningful."

E. Control Sufficient To Establish Joint-Employer Status

Section 103.40(e) provides, consistent with § 103.40(a) and (c), that whether an employer possesses the authority to control or exercises the power to control one or more of the employees' essential terms and conditions of employment is determined under common law-agency principles. Thus, this provision explains that, subject to the terms of the preceding provisions, (1) possessing the authority to control one or more essential terms and conditions of employment is sufficient to establish status as a joint employer regardless of whether the control is exercised; and (2) exercising the power to control indirectly (including through an intermediary) one or more essential terms and conditions of employment is sufficient to establish status as a joint employer, regardless of whether the control is exercised directly.

As discussed above, the Board has modified this provision from the version set forth in the NPRM by clarifying that, in every case, the object of a common-law employer's control that is relevant to the question of whether it is also a joint employer under the Act must be an essential term and condition of employment as defined in § 103.40(d). In combination with the Board's limitation of "essential" terms and conditions of employment to matters that lie near the core of the collective-bargaining process, this change is intended to address the concerns of commenters (discussed above) that the standard should not require the Board to find a joint-employer relationship based on an entity's attenuated, insubstantial, or unexercised control over matters that—while they may be mandatory subjects of bargaining—are actually peripheral to the employment relationship or to employees' terms and conditions of employment. The version of § 103.40(e) that appears in the final rule is reformatted to include two subsections and has been streamlined to avoid surplusage.

F. Control Immaterial to Joint-Employer Status

Section 103.40(f) provides that evidence of an entity's control over matters that are immaterial to the existence of an employment relationship under common-law agency principles and that do not bear on the employees essential terms and conditions of employment is not relevant to the determination of whether the employer is a joint employer.

As discussed above, many commenters have expressed a concern that the proposed rule could result in the Board finding joint-employer relationships based on kinds of control that are not indicative of a common-law employment relationship or that do not form a proper foundation for collective bargaining or unfair-labor practice liability. Similarly, the District of Columbia Circuit in BFI v. NLRB criticized the Board's BFI decision for failing, in its articulation and application of the indirect-control element of the standard, to distinguish between indirect control that the common law of agency considers intrinsic to ordinary third-party contracting relationships and indirect control over essential terms and conditions of employment.

This provision addresses these concerns by expressly recognizing that some kinds of control, including some of those commonly embodied in a contract for the provision of goods or services by a true independent contractor, are not relevant to the determination of whether the entity possessing such control is a common-law employer of the workers producing or delivering the goods or services, and that an entity's control over matters that do not bear on workers' essential terms and conditions of employment are not relevant to the determination of whether that entity is a joint employer.

G. Burden of Proof

Section 103.40(g) provides that a party asserting that an employer is a joint employer of particular employees has the burden of establishing, by a preponderance of the evidence, that the entity meets the requirements set forth above. This allocation of the burden of proof is consistent with the 2020 Rule, BFI, and pre-BFI precedent.

H. Bargaining Obligations of a Joint Employer

Section 103.40(h) provides that a joint employer of particular employees must bargain collectively with the representative of those employees with respect to any term and condition of employment that it possesses the authority to control or exercises the power to control, regardless of whether that term and condition is deemed to be an essential term and condition of employment under the definition above, but is not required to bargain with respect to any term and condition of employment that it does not possess the authority to control or exercise the power to control.

As discussed above, some commenters have requested that the Board provide a concise statement of joint employers' bargaining obligations in order to clarify both that a joint employer—like any other employer—must bargain over any mandatory subject of bargaining that is subject to its control, and that a joint employer—again, like any other employer—is not required to bargain about workplace conditions that are not subject to its control. Particularly in light of the Board's determination, discussed above, to adopt a closed list of "essential terms and conditions of employment," as objects of control relevant to the joint-employer determination, the Board has concluded, after careful consideration of the comments, that it is desirable to expressly provide that a joint employer's bargaining obligations are not limited to those "essential terms and conditions" of employment that it controls, but extend to any ordinary mandatory subject of bargaining that is also subject to its control. Clarifying a joint employer's bargaining obligation in this way further ensures that collective bargaining involving the joint employer will be meaningful, because such bargaining will be able to address not only the core workplace issues the control of which establishes the employer's status as a joint employer but also any other matters subject to the joint employer's control that sufficiently affect the terms and conditions of employees' employment to permit or require collective bargaining under section 8(d) of the Act.

On the other hand, the Board has also concluded that it serves a useful clarifying purpose to expressly provide, consistent with extant Board precedent not affected by the final rule, that where two or more entities each control terms and conditions of employment of particular employees, an employer is not required to bargain over any such terms and conditions which are in no way subject to its own control.

I. Severability

Section 103.40(i) provides that the provisions and subprovisions of the final rule are intended to be severable, and that if any part of the rule is held to be unlawful, the remainder of the rule is intended to remain in effect to the fullest extent permitted by law. The Board believes, on careful consideration, that the final rule in its entirety flows from and is consistent with common-law principles as we have received them from judicial authority; reflects a permissible exercise of the Board's congressionally delegated authority to interpret the Act; and best effectuates the Board's statutory responsibility to prevent unfair labor practices and to encourage the practice and procedure of collective bargaining. However, the Board necessarily acknowledges the possibility that a reviewing body might disagree with our conclusion in some respect, and, in that event, the Board desires to preserve so much of the rule as such a body approves. Separately, as noted above, the Board intends the action of rescinding the 2020 Rule in itself to be severable from any of the terms of the final rule, so that if a reviewing body were to disapprove the final rule in its entirety, the Board's action in rescinding the 2020 Rule should still be given effect.

3. Recruitment & Hiring

3.1 Background Checks & Testing

Pham v. Aeva Specialty Pharmacy, No. 21-cv-00703-NYW-STV (D. Colo. Dec. 8, 2022)

NINA Y. WANG, District Judge.

This matter is before the Court on Aeva Specialty Pharmacy's Motion for Summary Judgment. For the reasons set forth below, the Motion for Summary Judgment is respectfully DENIED.

Background

Plaintiff Khanh Pham ("Plaintiff" or "Mr. Pham") alleges that in 2020, he applied for an open pharmacist employment position at Aeva Specialty Pharmacy ("Defendant" or "Aeva"), and received a conditional offer of employment. According to Plaintiff, Aeva submitted Plaintiff's information to Clear Screening Technologies LLC ("Clear Screening"), a former defendant in this case, for a routine background check. Mr. Pham asserts that the background screening report erroneously reported that he had been charged with a federal crime in 2018, though he had never been charged with a federal crime. He also alleges that as a result of the incorrect Clear Screening report, Aeva revoked its conditional offer of employment.

Mr. Pham initiated this civil action on March 9, 2021, raising three claims under the Fair Credit Reporting Act ("FCRA"): two claims against Clear Screening for negligent and willful violations, respectively, of the FCRA, and one claim against Aeva for willful violations of the FCRA. Mr. Pham voluntarily dismissed his claims against Clear Screening with prejudice on August 5, 2021.

Aeva filed the instant Motion for Summary Judgment on February 10, 2022, seeking judgment in its favor on Plaintiff's FCRA claim.

Undisputed Material Facts

The below material facts are drawn from the Parties' briefing and are undisputed unless otherwise noted.

1. Mr. Pham is a licensed pharmacist.

2. In 2020, Mr. Pham applied for employment as a pharmacist with Aeva.

3. Prior to interviewing with Aeva, Mr. Pham worked for CVS Pharmacy. Mr. Pham's employment with CVS ended in September 2019.

4. Mr. Pham "interacted with" Brooke Pendergrass, Aeva's Manager of Human Resources, during the process of interviewing with Aeva.

5. After Mr. Pham's interview with Aeva, Ms. Pendergrass presented Mr. Pham with a verbal conditional offer of employment.

6. Mr. Pham did not receive a written offer of employment from Aeva.

7. At some point after Mr. Pham submitted to a background check, Aeva decided not to hire Mr. Pham.

Analysis

The Fair Credit Reporting Act was enacted "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." 15 U.S.C. § 1681(b). The FCRA "enables consumers to protect their reputations, and to protect themselves against the dissemination of false or misleading credit information." "The FCRA places distinct obligations on three types of entities: (1) consumer reporting agencies; (2) users of consumer reports; and (3) furnishers of information."

Under the FCRA, users of consumer reports—like Aeva—must, "in using a consumer report for employment purposes," and "before taking any adverse action based in whole or in part on the report, provide to the consumer to whom the report relates (i) a copy of the report; and (ii) a description in writing of the rights of the consumer under this subchapter." "Congress intended applicants to have a real opportunity to contest an adverse employment decision based on a consumer report," and an applicant "must have enough time between the notice and the final decision to meaningfully contest or explain the contents of the report."

I. The Applicability of the FCRA

In its Motion for Summary Judgment, Aeva first argues that the FCRA is not applicable to this case because its decision to not hire Plaintiff was unrelated to and did not rely upon Plaintiff's background check. Aeva states that it is undisputed that "at no time was Mr. Pham told he was not hired based on the background report's improper red flag regarding a felony criminal case on an interim background check." Instead, Aeva asserts, Mr. Pham testified that he has "no evidence" that Aeva made its hiring decision based on the background report. Aeva supports its position by citing evidence to Ms. Deinet's deposition testimony, wherein Ms. Deinet testified that the decision to not hire Plaintiff was unrelated to the background report and that Ms. Deinet, "who made the hiring decision," never saw the background report until this lawsuit was filed.

But Mr. Pham *has* submitted evidence, in the form of his own testimony, that Ms. Pendergrass called him to revoke his conditional offer of employment and informed him at the time that the revocation was based on the background check results. While Defendant implicitly asks the Court to accept its employees' testimony as true and to discredit Plaintiff's testimony as untrue, the Court cannot make credibility determinations in ruling on a motion for summary judgment.

The fact that Mr. Pham testified that he has "no evidence" that the hiring decision was based on his background check does not change the Court's conclusion. Mr. Pham, a non-lawyer, simply could have meant that he has no tangible evidence of the reasoning for the decision, i.e., a recording of the telephone call with Ms. Pendergrass. But Mr. Pham's testimony is evidence, and the Court must draw all reasonable inferences from that evidence in Mr. Pham's favor. Because a reasonable jury could conclude, based on Mr. Pham's testimony, that Aeva's decision to not hire Mr. Pham was based on the results of the background check, genuine issues of material fact preclude summary judgment on this basis.

II. Actual Damages

In the alternative, Aeva argues that Plaintiff cannot establish that he was actually damaged by Aeva's actions, which necessitates summary judgment in its favor. The FCRA establishes separate categories of damages for willful and negligent violations of the FCRA. A company that willfully fails to comply with FCRA requirements may be held liable for "any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000," as well as punitive damages and attorney's fees and costs. Therefore, a "consumer need not prove actual damages if the FCRA violation is willful, but may recover punitive damages and statutory damages ranging from $100 to $1,000." Meanwhile, an employer who negligently fails to comply with the FCRA may be liable for "any actual damages sustained by the consumer as a result of the failure" and fees and costs. Mr. Pham seeks "actual damages, statutory damages, costs, and attorney's fees," as well as punitive damages, pursuant to 15 U.S.C. § 1681n.

Aeva argues that Mr. Pham has failed to submit any evidence of actual damages suffered by him as a result of Aeva's purported FCRA violations. In addition, it argues that because Mr. Pham "admitted" a lack of actual damages, this "mandatees dismissal of" Plaintiff's claim. In support of its argument, Aeva cites to deposition testimony wherein Mr. Pham was asked to explain "whether or not he had been harmed by Aeva Pharmacy and whether he had lost money." Plaintiff responded, "No, I have not been harmed." On this basis, Aeva asserts that "Plaintiff has failed to demonstrate that the alleged adverse credit action caused any damages." Aeva further asserts that Mr. Pham was hired by a different employer within 20 days of his interview with Aeva and that Plaintiff "received a settlement from the dismissed co-Defendant in this case of around $20,000," which "negates any possible FCRA claim as Mr. Pham made more money through the settlement than he would have if he had been employed by Aeva."

Aeva's arguments are insufficient to warrant summary judgment in its favor. First, Aeva did not mention Mr. Pham's new employment or the settlement in its Statement of Undisputed Facts, and thus, Mr. Pham was not required to rebut these assertions with record evidence. If Defendant intended to rely on these material assertions in arguing that it is entitled to judgment in its favor, it was required to include them in its Statement of Undisputed Facts. The Court thus cannot conclude that these assertions are undisputed for purposes of the pending Motion.

Second, Aeva has not cited any legal authority suggesting that a settlement with a former party to this lawsuit can "negate" any claim for damages asserted by Plaintiff as to Aeva. Through its independent research, the Court could find no support for Defendant's position. The Court declines to hold that Mr. Pham's settlement with Clear Screening "negates" any claim for damages against Aeva, as such a holding would disincentivize settlement of disputes.

Third, while Defendant suggests that Mr. Pham cannot demonstrate actual damages because he obtained alternative employment within 20 days of his interview with Aeva, the Court respectfully disagrees. Mr. Pham argues in his Response that he can establish actual damages because he "was unable to earn wages that he otherwise would have earned had he been permitted to begin working at Aeva." Indeed, Mr. Pham confirmed at his deposition that he "did not receive wages that he otherwise would have earned had he been offered employment with Aeva and begun working for Aeva." Although Plaintiff testified that he "had not been harmed" by Aeva's actions, which may contradict his statement, credibility determinations and resolution of conflicts in the evidence are issues reserved for the jury. Lost income is one type of actual damages available under the FCRA, and because Mr. Pham has produced evidence that of potentially lost income, the jury must assess its strength. But as Mr. Pham has already adduced evidence of actual damages, the Court is unpersuaded by Defendant's argument that Mr. Pham can produce no such evidence.

III. Willful Violation of the FCRA

Finally, Aeva argues that Plaintiff's request for statutory or punitive damages fails as a matter of law because he has presented no evidence that Aeva acted willfully or with reckless disregard in its purported FCRA violations. For this reason, it asserts that it is entitled to judgment in its favor on Plaintiff's FCRA claim.

"A showing of malice or evil motive is not required to prove willfulness under the FCRA." Instead, a willful violation of the FCRA is "either an intentional violation or a violation committed by an entity in reckless disregard of its duties under the FCRA." "Recklessness is measured by 'an objective standard: action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" "A company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." "Willfulness under the FCRA is generally a question of fact for the jury."

Aeva contends that "at most, Plaintiff believes, without the provision of one scintilla of corroborating evidence, that he was not hired because of an alleged felony conviction on an interim background check. However, Plaintiff's belief is simply inaccurate and wholly unsupported by the evidence — most importantly, his own testimony." Aeva defends its conduct related to the background check as "objectively reasonable" and reiterates its position that it declined to hire Mr. Pham for reasons outside of the background check report.

In his Response, Mr. Pham directs the Court to evidence that Aeva orders a background check for "every person it hires," and has requested "hundreds" of background checks. Aeva was on notice that it must comply with the FCRA when using background check reports for employment purposes. But despite its regular use of background checks, Aeva does not have any internal policies or procedures regarding the use of background reports for employment purposes, and it does not train its employees on FCRA compliance or on how to use background check reports. Mr. Pham argues that "by failing to take any steps to avoid violating the FCRA, Aeva acted with reckless disregard of its statutory duties" under the law.

Insofar as Defendant bases its argument on its position that there is no dispute that Aeva did not rely on the background check report in revoking the conditional offer of employment, the Court has already rejected this argument, having concluded that genuine disputes of fact exist as to Aeva's underlying purpose for revoking the conditional employment offer. In the alternative, Defendant asserts that Mr. Pham has presented "no evidence" that Aeva acted willfully or with reckless disregard in failing to comply with the FCRA. The Court disagrees. Mr. Pham has produced evidence demonstrating that although Aeva was on notice of its obligation to comply with the FCRA it had no policies or procedures governing FCRA compliance and that it did not train its employees on FCRA compliance. This is sufficient to create a genuine dispute of fact as to whether Aeva acted in reckless disregard of its FCRA obligations in its interactions with Plaintiff.

Aeva asserts in its Reply that Aeva's policies, or lack thereof, "have no relation to this lawsuit" because "Plaintiff failed to establish that the FCRA requirements were even the responsibility of Aeva." It states that "Aeva hired Clear Screening to run the background check," but Plaintiff "never inquired as to which party had the responsibility to send an adverse notice if the report were relied upon." Insofar as Defendant suggests a missing evidentiary link in this case between the FCRA and Aeva's duties thereunder, the Court is unpersuaded. First, Defendant failed to raise any argument in its Motion for Summary Judgment that it was Clear Screening, and not Aeva, that had a duty to disclose the background report results to Plaintiff; this argument was undoubtedly available to Defendant at the time it filed its Motion, and its failure to raise the argument renders it waived. Furthermore, Aeva has cited no legal authority demonstrating that, by hiring a third party to conduct a background check, a user of credit reports transfers its disclosure obligations under the FCRA to that third party. Inadequately supported arguments need not be considered by the Court. And in any event, the Court is unpersuaded by Defendant's argument. The FCRA provides that the duty to furnish a background report on a prospective employee lies with the party using the consumer report for employment purposes and intending to take an adverse action based on that report. By submitting evidence suggesting that Aeva purportedly rescinded Plaintiff's conditional offer based on the background report, Plaintiff has submitted sufficient evidence to establish a disclosure duty on the part of Aeva. For all of these reasons, the willfulness or recklessness of Aeva's actions must be assessed by the jury.

In sum, Mr. Pham has established genuine disputes of material fact concerning (1) whether Aeva rescinded his conditional offer of employment due to the background check results; (2) whether Mr. Pham was actually damaged by Aeva's actions; and (3) whether Aeva acted willfully or recklessly. Summary judgment is thus not appropriate at this juncture, and Defendant's Motion will be denied.

Franklin v. Vertex Global Solutions, Inc., No. 20 Civ. 10495 (KPF) (S.D.N.Y. Feb. 9, 2022)

KATHERINE POLK FAILLA, District Judge.

Plaintiff Henry Franklin, on behalf of himself and a putative class of similarly situated job applicants, has sued Defendants Vertex Global Solutions, Inc. ("Vertex") and Fresh Direct, LLC ("Fresh Direct," and collectively, "Defendants") for their alleged use of a pre-employment screening policy that discriminates against job applicants with criminal histories in violation of the New York City Human Rights Law (the "NYCHRL"), N.Y.C. Admin. Code §§ 8-101 to 8-131, as amended by the Fair Chance Act (the "FCA"), N.Y.C. Local Law 63 (2015). Vertex and Fresh Direct have each moved to dismiss Plaintiff's claims, contending that their hiring practices comply with New York City law and do not discriminate against individuals with criminal histories. Fresh Direct additionally argues that Plaintiff's claims should fail because he has not alleged Fresh Direct's participation in any facet of Plaintiff's employment application with Vertex. For the reasons outlined in the remainder of this Opinion, the Court denies Defendants' motions in full.

Background

A. Factual Background

1. The Parties

Plaintiff Henry Franklin is a citizen of New York and a man with a criminal record. Defendant Vertex Global Solutions is a staffing agency headquartered in New York. Defendant Fresh Direct is a Delaware corporation specializing in direct-to-consumer food delivery, with its principal place of business in New York.

2. Defendants' Hiring Process

On December 6, 2018, Plaintiff arrived at a Fresh Direct facility in the Bronx to participate in a job recruiting program with the company. Upon arriving at the facility that morning, Plaintiff received a nametag that contained his first and last name, the date, and the name "Samantha" clustered below the phrase "freshdirect Vertex." Plaintiff was then directed to a waiting area where dozens of other applicants were seated. After sitting in the waiting area for approximately forty-five minutes, the group of applicants was guided to another room, where a speaker gave a presentation about working for Fresh Direct. Following the presentation, and with no questions asked of them, the applicants in the room each received a document purporting to be a conditional offer of employment that they were told to sign. The Offer Form recited that Vertex was "pleased to offer you a conditional offer of employment," and provided that the applicant's hourly salary would be $13.00. (Offer Form). The form further explained that the employment offer was "contingent upon a satisfactory outcome of the pre-employment screening process, which includes but is not necessarily limited to a review of past employment, education records, verification of ability to work in the United States, history background check and in some cases a drug screen." Plaintiff signed and dated the Offer Form and noted that the time was 11:40 a.m.

Shortly after signing the Offer Form, at 11:46 a.m., Plaintiff received and signed another form, this time a release authorizing a background check. The release included the question "have you ever been convicted of a crime?" to which Plaintiff responded by checking the box that indicated "no." (Background Check Release). A banner at the top of the release read: "New York City, New York Applicants: DO NOT RESPOND TO THE QUESTIONS SEEKING CRIMINAL RECORD INFORMATION AT THIS TIME. You will only have to answer criminal history questions after you receive a conditional offer of employment. At that time, you will not have to identify arrests or criminal accusations that did not result in a conviction (unless the arrest or criminal accusation is pending)." The

Background Check Release makes no specific reference to the Offer Form that Plaintiff and the other applicants in the room had signed just moments earlier.

Once Plaintiff signed the Background Check Release, he was told that the recruiting process was complete and that he was free to leave the facility. Within approximately one to two weeks, Plaintiff received a letter from Vertex, notifying him that his background check had disclosed a criminal record. Plaintiff never heard from Defendants again. Following the rejection of his application, Plaintiff claims that the entire hiring process was "a transparent ruse" and that the "sole purpose of gathering at the Fresh Direct facility was to initiate background checks that would weed out applicants with conviction histories."

3. The Relationship Between Vertex and Fresh Direct

Plaintiff alleges that his employment application was for a job with both Vertex and Fresh Direct, even though he formally applied for a job only with Vertex. Plaintiff asserts that both Defendants participated in the hiring of Fresh Direct employees, as evidenced by the fact that Vertex held its recruiting event on Fresh Direct's premises. Moreover, applicants who were hired by Vertex to provide services to Fresh Direct would be formally employed by Vertex for the first few months, after which Fresh Direct would have the option to hire them directly. Even during the initial period where an individual was formally employed by Vertex, all workers providing services to Fresh Direct through Vertex were subject to Fresh Direct's control and supervision. In his Amended Complaint, Plaintiff includes several images of anonymous employee reviews of Vertex from the website Indeed.com; one of these reviews characterizes Vertex as a "temp agency that provides Full Time Job Opportunities." Another review describes working for Vertex as actually "a position for freshdirect" and explains that "if you do well you start working for freshdirect."

As further evidence of the symbiotic relationship between Defendants, Plaintiff contends that Vertex touts that it offers customized services tailored to the specific requirements of individual employers like Fresh Direct. According to its website, Vertex advertises to prospective employer-clients that it "strives to understand your business, culture, and needs, to ensure we deliver candidates that fit your unique requirements." Vertex describes the value it adds to its clients' hiring process by characterizing itself as "a partner and an extension of your Human

Resources Department." Notably, Vertex regularly conducted interviews for prospective Fresh Direct employees on-site at a Fresh Direct facility, as evidenced by an online job posting and Plaintiff's personal experience.

Discussion

A. Applicable Law

2. New York City's Fair Chance Act[26]

The FCA, which went into effect on October 27, 2015, amended the NYCHRL to provide additional protection from employment discrimination to individuals with criminal histories. *See* N.Y.C. Local Law 63 (2015); *see also* N.Y.C. Comm'n on Human Rights, Legal Enforcement Guidance on the Fair Chance Act ("Enforcement Guidance") at 1 (June 24, 2016) ("The FCA is intended to level the playing field so that New Yorkers who are part of the approximately 70 million adults residing in the United States who have been arrested or convicted of a crime are 'not overlooked during the hiring process simply because they have to check a box.'"). With the aim of preventing an applicant's criminal history from tainting initial hiring decisions, the FCA regulates precisely when in the hiring process an employer may seek and use information regarding an applicant's criminal background. To this end, the FCA deems it an "unlawful employment practice" for most employers to "make any inquiry or statement related to the pending arrest or criminal conviction record of any person who is in the process of applying for employment with such employer or agent thereof until after such employer or agent thereof has extended a conditional offer of employment to the applicant." The FCA defines "any inquiry" as "any question communicated to an applicant in writing or otherwise, or any searches of publicly available records or consumer reports that are conducted for the purpose of obtaining an applicant's criminal background information." The law further defines "any statement" as "a statement communicated in writing or otherwise to the applicant for purposes of obtaining an applicant's criminal background information regarding: (i) an arrest record; (ii) a conviction record; or (iii) a criminal background check." The NYCCHR defined "conditional offer of employment" in the Enforcement Guidance as:

26. (n. 5 in opinion) The FCA is one of a spate of so-called "ban the box" laws that have proliferated in jurisdictions across the United States; these laws generally prohibit the inclusion of questions related to conviction and arrest histories on job applications and delay criminal background checks until later in the hiring process. *See* Beth Avery & Han Lu, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, Nat'l Emp. L. Project (Oct. 1, 2021).

> An offer of employment that can only be revoked based on: i The results of a criminal background check; ii The results of a medical exam in situations in which such exams are permitted by the Americans with Disabilities Act; or iii Other information the employer could not have reasonably known before the conditional offer if, based on the information, the employer would not have made the offer and the employer can show the information is material to job performance.

After an employer extends a conditional offer of employment to an applicant, the FCA permits it to make inquiries into an applicant's criminal history, including by running a background check. However, if an employer wishes to rescind a conditional offer of employment following a criminal background check, the FCA outlines a legal process (the "Fair Chance Process"), pursuant to which an employer must first: (i) disclose to the applicant a written copy of any inquiry it conducted into the applicant's criminal history; (ii) perform an analysis of the applicant under Article 23-A and share a written copy of this analysis with the applicant; and (iii) hold the position open for the applicant for at least three business days from the applicant's receipt of the inquiry and analysis to permit the applicant to respond.

Pursuant to Article 23-A, an employer cannot withdraw a conditional offer because of the applicant's criminal record, unless the employer can: (i) draw a direct relationship between the applicant's criminal record and the prospective job; or (ii) show that employing the applicant "would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public." Before concluding that a direct relationship or unreasonable risk exists because of an applicant's criminal history, Article 23-A requires prospective employers to consider eight factors:

> i The public policy of New York to encourage the licensure and employment of persons previously convicted of one or more criminal offenses; ii The specific duties and responsibilities necessarily related to the license or employment sought or held by the person; iii The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities; iv The time which has elapsed since the occurrence of the criminal offense or offenses; v The age of the person at the time of occurrence of the criminal offense or offenses; vi The seriousness of the offense or offenses; vii Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and

> good conduct; and viii The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

NYCCHR regulations interpreting the NYCHRL, as amended by the FCA, outline six hiring practices that constitute *per se* violations of the FCA. These *per se* violations are: (i) "declaring, printing, or circulating any solicitation, advertisement, policy or publication that expresses, directly or indirectly, orally or in writing, any limitation or specification in employment regarding criminal history"; (ii) "using applications for employment that require applicants to either grant employers permission to run a background check or provide information regarding criminal history prior to a conditional offer"; (iii) "making any statement or inquiry relating to the applicant's pending arrest or criminal conviction before a conditional offer is extended"; (iv) "using within New York City a standard form, such as a boilerplate job application, intended to be used across multiple jurisdictions, that requests or refers to criminal history"; (v) "failing to engage in any step of the legal process outlined prior to rescinding a conditional offer of employment"; and (vi) "requiring applicants or employees to disclose an arrest that, at the time disclosure is required, has resulted in a non-conviction."

The NYCHRL affords a private right of action to "any person claiming to be a person aggrieved by an unlawful discriminatory practice as defined by the NYCHRL." The NYCHRL defines a "person aggrieved" to include one whose "only injury is the deprivation of a right granted or protected by this chapter." In light of this statutory directive, courts are to assess NYCHRL claims "broadly in favor of discrimination plaintiffs to the extent that such a construction is reasonably possible."

B. Plaintiff Has Plausibly Alleged a Violation of the NYCHRL, as Amended by the FCA

Plaintiff asserts that Defendants' hiring practices violated his rights under the NYCHRL, as amended by the FCA, because Defendants (i) conducted a background check prior to extending a conditional offer of employment; (ii) declared that a background check would be conducted without first making a conditional offer of employment; and (iii) denied him employment without adhering to the Fair Chance Process. Plaintiff's central allegation is that the document that Defendants labeled a “conditional offer of employment” was a contrivance designed to circumvent the FCA and permit Defendants to scrutinize applicants’ criminal histories prematurely in the hiring process. Defendants maintain the legitimacy of their conditional offer of employment and insist that their hiring practices accorded with the FCA. Defendants further argue that Franklin lost his right to an Article 23-A analysis before they rescinded their conditional offer because Franklin misrepresented his criminal history in executing the Background Check Release. The Court finds that Plaintiff has plausibly alleged that Defendants feigned a conditional offer of employment before inquiring into his criminal background. Accordingly, Plaintiff has stated a claim pursuant to the NYCHRL, as amended by the FCA.

Central to the parties’ dispute in these motions is the legal effect of the Offer Form, and, more specifically, whether Defendants extended to Plaintiff a genuine conditional offer of employment prior to inquiring into his criminal history. In Plaintiff’s estimation, the spurious nature of Defendants’ conditional offer is evinced by (i) the impersonal and cursory nature of the hiring process and (ii) the language of the Offer Form. Plaintiff argues that the superficial application process, combined with the express reservations outlined in the Offer Form, suggest that Defendants’ hiring practices were designed to frustrate the FCA’s legal framework, which obligates employers to consider job applicants’ qualifications and other positive attributes before investigating their criminal history. Defendants counter that their hiring practices abided by the letter of the law, as the FCA speaks only to the sequence of events that must occur before a prospective employer may inquire into an applicant’s criminal background, a sequence Defendants followed. In essence, Defendants ask the Court to probe no further than the formal document that, they maintain, memorializes a conditional offer of employment. On their view, because the FCA contains no requirement that a prospective employer individually assess a candidate before extending a conditional offer, Plaintiff’s allegations that Defendants’ hiring procedures wholly lacked the traditional markers of a considered application process — such as the pre-offer exchange of background information, an interview, or any other meaningful screening measure — are of no moment. The Court rejects Defendants’ suggestion that in pleading an NYCHRL claim, the form of the offer controls over its substance and context. Plaintiff’s allegations plausibly call into question whether the Offer Form memorialized a bona fide conditional offer of employment or was merely an artifice to allow premature inquiry into applicants' criminal histories. At this stage of the proceedings, this is all Plaintiff must show to state a claim pursuant to the NYCHRL, as amended by the FCA.

The Court credits both of Plaintiff's arguments suggesting the invalidity of Defendants' purported conditional offer of employment. *First,* Plaintiff alleges that Defendants expended virtually no effort assessing his (or anyone else's) candidacy before extending offers of employment. In Plaintiff's telling, he arrived at the Fresh Direct facility, sat through a presentation alongside numerous other applicants, reflexively signed an Offer Form, and immediately thereafter authorized a background check into his criminal history. Defendants' pre-offer procedures allegedly lacked any individualized questioning or assessment of any applicant. What is more, Plaintiff was told he could leave immediately after signing and returning his Background Check Release. At no point in the hiring process does Plaintiff allege that he faced individualized scrutiny; instead, he alleges an application process whereby Defendants automatically extended job offers to any candidate who remained present at the facility for the prescribed timeframe.

Furthering his point, Plaintiff notes that there was an approximately six-minute gap between when Plaintiff signed the Offer Form and when he signed the Background Check Release authorizing Defendants to investigate his criminal history. Plaintiff argues that this near-immediate turnaround suggests that the Offer Form functioned as "an unlawful demand that job applicants relinquish their rights under the FCA, because its singular purpose was to allow Defendants to proceed as though the law did not exist." While Defendants are correct to note that the FCA does not set forth the amount of time that must pass between a conditional offer of employment and a permissible inquiry into a person's criminal history, the Court does not understand Plaintiff to advocate for the imposition of any bright-line temporal limitation in the FCA. Rather, the Court credits Plaintiff's argument that the immediacy of Defendants' distribution of Background Check Release forms *en masse* to a room full of candidates who had, just moments before, been told they had secured conditional offers of employment, may betoken a hiring process specifically geared toward weeding out applicants with criminal backgrounds. This, combined with Plaintiff's other allegations about the nature of the hiring process, call into question whether the Offer Form can fairly be considered a "conditional offer of employment."

Defendants insist that they adhered to the formal sequence of events outlined by the FCA and that, as such, Plaintiff's claims fail as a matter of law. However, drawing this conclusion at the pleading stage in the present circumstances would effectively authorize employers to conduct the most perfunctory of assessments before opening the door to a candidate's criminal history. The Court admits of the possibility that discovery may bear out that the hiring process was more robust than that detailed in the Amended Complaint. But, taking Plaintiff's allegations as true on this motion, Defendants' conditional "offer" of employment appears to operate as a waiver of an applicant's rights under the FCA not to have their criminal history considered at the front end of the hiring process. In furtherance of the statutory directive to construe the NYCHRL "liberally for the accomplishment of its uniquely broad and remedial purposes," the Court will not interpret the FCA to permit employers to adopt hiring practices that undermine the statute's basic objective of limiting the role that an individual's criminal history plays in making hiring decisions.

Second, Plaintiff argues that the language of the Offer Form undercuts its validity because the offer is expressly conditioned "upon a satisfactory outcome of the pre-employment screening process, which includes but is not necessarily limited to a review of past employment, education records, verification of ability to work in the United States, history background check and in some cases a drug screen." In Plaintiff's view, that Defendants reserved the right to rescind the offer based on a review of basic background information that could have been made available earlier in the hiring process lends further support to the illegitimacy of the conditional offer of employment. Defendants dispute that the FCA dictates the permissible content of a conditional offer of employment and argue that the information Defendants considered post-offer were things they could not reasonably have known earlier in the application process.

In the enforcement guidance that was in effect at the time of Plaintiff's job application to work for Defendants, the NYCCHR defined a "conditional offer of employment" as an offer that can only be revoked based on: (i) the results of a criminal background check; (ii) the results of a medical exam; or (iii) *other information the employer could not have reasonably known before the conditional offer,* if this information would have caused the employer not to extend the offer in the first place. Matters such as an applicant's employment history, education record, and verification to work in the United States are attributes that an employer can be expected to inquire into at the threshold, prior to making a conditional offer of employment. Therefore, it would arguably violate the NYCHRL for an employer to rescind a conditional offer of employment based on the information outlined in the Offer Form. To be clear, the Court does not read the FCA to prohibit prospective employers from verifying an applicant's credentials and withdrawing an offer if they come to learn that an applicant misrepresented his credentials — indeed, such information is likely not attainable pre-offer. That said, such is not the issue here, and irrespective of Defendants' rationale for denying Plaintiff employment, the language of the Offer Form lends further support to Plaintiff's contention that Defendants' conditional offer of employment was a hollow formality.

Accordingly, the Court concludes that Plaintiff has plausibly alleged that Defendants failed to make him a genuine conditional offer of employment prior to inquiring into his criminal background, which constitutes an actionable violation of the NYCHRL, as amended by the FCA.

C. Plaintiff Has Plausibly Alleged that Fresh Direct Was a Joint Employer

Independent of whether Plaintiff has plausibly alleged a primary violation of the FCA, Fresh Direct asserts that Plaintiff has failed to allege a basis to hold Fresh Direct liable for the hiring practices instituted by Vertex. Fresh Direct argues that Plaintiff's theory of Fresh Direct's liability is premised entirely on speculation and that the Amended Complaint is bereft of factual allegations tying Fresh Direct to Plaintiff's application for employment with Vertex. Plaintiff rejoins that his allegations suggest that Fresh Direct facilitated Vertex's hiring of employees in an illegal manner and that Vertex employees were subject to Fresh Direct's control. Thus, Plaintiff contends, Fresh Direct may be held liable as either a joint employer or as an aider and abettor of Vertex's discriminatory conduct. The Court concludes that, at the pleading stage, Plaintiff has plausibly alleged that Fresh Direct both acted as Plaintiff's prospective joint employer and aided and abetted Vertex's discriminatory conduct.

For a corporate defendant to be liable for alleged discrimination under the NYCHRL, the defendant must qualify as the plaintiff's "employer," as defined by the statute. A corporate defendant need not be a plaintiff's direct employer for liability to flow under the NYCHRL. "Under the joint employer doctrine, 'an employee, formally employed by one entity, who has been assigned to work in circumstances that justify the conclusion that the employee is at the same time constructively employed by another entity, may impose liability for violations of employment law on the constructive employer, on the theory that this other entity is the employee's joint employer.'" In making the essentially factual determination as to whether two entities are joint employers, courts have considered factors such as "commonality of hiring, firing, discipline, pay, insurance, records, and supervision." An "essential element" of such a finding is "sufficient evidence of immediate control over the employees." "The joint employer doctrine has been applied to temporary employment or staffing agencies and their client entities; it has also been applied to contractors and subcontractors and other scenarios where two separate entities have control over an employee's employment."

Here, Plaintiff has set forth allegations giving rise to the plausible inference that Fresh Direct exercised sufficient control over Vertex employees to make it Plaintiff's prospective joint employer. In particular, Plaintiff has alleged that Vertex partnered with Fresh Direct to provide staffing services tailored to Fresh Direct's specific needs, going so far as to become "a partner and an extension of Fresh Direct's Human Resources Department." Vertex and Fresh Direct cooperated in the recruitment of job applicants, as shown by the fact that Vertex ran its hiring program at a Fresh Direct facility and that applicants were provided a nametag that included the logos of both Vertex and Fresh Direct. Plaintiff further alleges that individuals hired by Vertex worked under the direct supervision and control of Fresh Direct and sought "to carry out work in furtherance of" Fresh Direct's home grocery delivery business. Importantly for the purposes of the joint employer analysis, employment for Vertex functioned as a probationary period, after which employees who performed adequately could receive a full-time employment offer from Fresh Direct. To corroborate the pipeline between Vertex and Fresh Direct, Plaintiff included several anonymous employee reviews attesting to this arrangement.

Fresh Direct correctly notes that "application of the joint employer doctrine in the staffing agency context is plausible when the staffing agency has actually placed its employee with the third party, with whom it shared immediate control over the employee." However, the Court disagrees with Fresh Direct's conclusion that the joint employer doctrine is inappropriate in the present circumstances because Plaintiff was denied the opportunity for placement with Fresh Direct. It is true that Vertex rejected Plaintiff's job application, thus precluding the possibility that Plaintiff be placed with Fresh Direct. However, the fact that Vertex denied him this opportunity — on an ostensibly discriminatory basis — does not alter Plaintiff's allegations that he applied for a job that entailed providing services to Fresh Direct and being subject to Fresh Direct's supervision and control. Plaintiff's allegations detailing the relationship between Fresh Direct and Vertex — namely, the control that Fresh Direct exercised over individuals hired by Vertex and the foreseeability that Vertex employees would receive a formal job offer from Fresh Direct — suggest a sufficient degree of involvement and control by Fresh Direct to render it plausible that Plaintiff applied for a job in which he would have been "assigned to work in circumstances that justify the conclusion that he was at the same time constructively employed by Fresh Direct."

Fresh Direct also cites several cases for the proposition that "even when a plaintiff establishes an entity's status as part of a joint employer, the plaintiff must still show 'that the joint employer knew or should have known of the discriminatory conduct and failed to take corrective measures within its control.'" Fresh Direct claims that it cannot be deemed a joint employer because all of the paperwork associated with Plaintiff's application referred to Vertex, and Vertex was the entity that provided Plaintiff with an allegedly sham conditional offer, impermissibly sought authorization to check his criminal history, and rescinded his offer without engaging in the Fair Chance Process. Here too, the Court disagrees with Fresh Direct's conclusion, as Plaintiff has clearly and plausibly alleged that Fresh Direct "knew or should have known of the discriminatory conduct," yet "failed to take corrective measures within its control." For instance, Plaintiff alleges that Vertex advertised itself as a staffing agency offering customized services to meet the specific needs of individual employers. Given the individualized nature of the services Vertex provided to Fresh Direct, Plaintiff intuits that Fresh Direct was at least aware of — indeed, may even have approved of — Vertex's impermissible culling of applicants with criminal backgrounds. Underscoring this point, Vertex operated on Fresh Direct's premises, where Fresh Direct could readily observe how Vertex operated in service of Fresh Direct. These allegations give rise to the plausible inference that Fresh Direct had a measure of control over Vertex and was at the very least aware of how Vertex went about hiring employees on its premises.

Fresh Direct additionally cites *Yousef v. Al Jazeera Media Network* in support of its position that Plaintiff has not sufficiently alleged Fresh Direct's involvement in Vertex's discriminatory hiring practices. In *Yousef,* a plaintiff alleging claims of gender discrimination, sexual harassment, and retaliation sought to hold a staffing agency that "provided employer of record services to plaintiff's formal employer, including payroll and human resources services," liable as a joint employer. However, this case actually undermines Fresh Direct's position, as the court found the staffing agency to be a joint employer where the facts connecting it to the alleged discriminatory conduct were sparser than those alleged here. Indeed, the court denied the staffing agency's motion to dismiss despite the absence of facts specifically connecting the agency to the plaintiff's claims of gender discrimination, sexual harassment, and retaliation.The court reasoned that "whether the staffing agency is liable under the joint employer doctrine requires a more fact-intensive inquiry," which could not be resolved in a motion to dismiss. So too here.

The other cases cited by Fresh Direct to defeat its liability under the joint employment doctrine are distinguishable. For instance, in *Sosa v. Medstaff, Inc.,* the court found a staffing agency not to be liable as a joint employer where the plaintiff failed to assert factual allegations that plausibly connected the purported joint employer to the conduct at issue. More specifically, the plaintiff in *Sosa* was a nurse placed by a staffing agency at a healthcare facility who brought claims of discrimination and hostile work environment related to conduct by plaintiff's supervisor at the medical facility. As the claims centered on the supervisor's conduct, the court determined that the staffing agency could not be held liable for plaintiff's claims because the supervisor, who was employed by the medical facility, was "not alleged to have had contact, much less a relationship" with the staffing agency. Here, however, Plaintiff's claims center on the alleged discrimination that Vertex perpetuated while on Fresh Direct's premises, in the process of hiring employees who were to provide services to Fresh Direct. Fresh Direct engaged Vertex's services for the specific purpose of hiring employees to staff its business operations. In outsourcing this function to Vertex, Fresh Direct plausibly possessed some degree of knowledge and control over what Vertex was doing on its premises for its benefit. Unlike the cases cited by Fresh Direct, Plaintiff's claims of discriminatory hiring go to the crux of the relationship between Fresh Direct and Vertex and necessarily implicate them both.

Fresh Direct also cites two cases in which sister courts in this District denied joint employer status to defendants that exercised only "the minimal level of oversight" that any contractor would naturally exercise over laborers operating on its premises. In *Conde,* the court determined that a department store was not a plaintiff's joint employer when the plaintiff was formally employed by a company that operated a cosmetics counter within the department store. While the department store subjected the plaintiff to its dress code and workplace rules, the plaintiff's direct supervisor was an employee of the cosmetics company. The plaintiff alleged that her direct supervisor retaliated against her, fabricated allegations of misconduct against her, and compelled the cosmetic company's human resources director to offer her a transfer to a different department store. The court found that the cosmetics company, rather than the department store, was her employer, and the fact that the department store was involved in seeking plaintiff's transfer did not compel a contrary finding, because "an entity that has the power to request that an employee be moved but not to cause her to be terminated is not a joint employer."

In *Duff,* the court concluded that a subcontracting company was not a plaintiff's joint employer when he was formally employed by a general contractor to work on a construction project. The plaintiff, who brought claims for race discrimination, hostile work environment and retaliation, was supervised at his worksite by an employee of the subcontracting company, and alleged that the subcontractor maintained records of his hours, had the power to discipline him, and provided anti-discrimination training. Citing *Conde,* the court in *Duff* reasoned that these allegations constituted only "'the minimal level of oversight that any' contractor would naturally exercise over laborers working on the contractor's worksite." Furthermore, the court reasoned that the subcontractor's anti-discrimination training merely reflected its interest in managing its workplace and that plaintiff remained employed by the general contractor following his removal from the worksite.

The Court finds there to be a critical distinction between the putative joint employer relationships in *Conde* and *Duff* and that between Fresh Direct and Vertex: Individuals hired by Vertex operated with the expectation that satisfactory performance would lead to a full-time offer from Fresh Direct. This puts the employer relationship between Vertex and Fresh Direct on a fundamentally different plane than those in *Conde* and *Duff*. In *Conde,* there was no allegation that a protracted period of good work at the cosmetics counter could get someone hired at the department store. Likewise in *Duff,* good performance for the general contractor would not be expected to lead to a full-time employment opportunity with the subcontractor. Where the plaintiffs in those cases could have been moved to different department stores or worksites and still maintain their jobs with their formal employers, the job to which Plaintiff applied was restricted at all times to providing services to Fresh Direct. Furthermore, the first three months of an individual's employment with Vertex constituted a "probationary period" that could lead to a full-time offer with Fresh Direct. While it is true that Plaintiff would have been aided by additional allegations of precisely how Fresh Direct exercised control over Vertex hires and the extent to which Fresh Direct possessed the power to terminate Vertex employees, these matters are appropriate subjects of inquiry in discovery. Plaintiff has plausibly alleged that Fresh Direct exercised more control over Vertex's employees than that "minimal level of oversight" incident to any individual working on an employer's premises. Accordingly, the Court concludes that Fresh Direct and Vertex were Plaintiff's prospective joint employers and, therefore, that Fresh Direct may be held liable for Vertex's alleged NYCHRL violations.

Karraker v. Rent-A-Center, Inc., 411 F.3d 831 (7th Cir. 2005)

TERENCE T. EVANS, Circuit Judge.

To prove their worth prior to the annual college draft, NFL teams test aspiring professional football players' ability to run, catch, and throw. But that's not all. In addition to the physical tests, a draft prospect also takes up to 15 personality and knowledge tests, answering questions such as:

> Assume the first two statements are true.
>
> The boy plays football. All football players wear helmets. The boy wears a helmet.
>
> Is the final statement:
>
> "True?

"False?

"Not certain

They are also asked questions like "What is the ninth month of the year?" *See* Richard Hoffer, "Get Smart!", *Sports Illustrated* (Sept. 5, 1994).

This case involves a battery of nonphysical tests similar to some of those given by NFL teams, though the employees here applied for less glamorous, and far less well-paying, positions. Steven, Michael, and Christopher Karraker are brothers who worked for Rent-A-Center (RAC), a chain of stores that offer appliances, furniture, and other household goods on a rent-to-own basis. During the relevant time, each RAC store had a store manager, several middle managers, and entry-level account managers. Most new employees start as account managers and can progress to upper-level positions. In order to secure a promotion, however, an employee was required to take the APT Management Trainee-Executive Profile, which was made up of nine tests designed to measure math and language skills as well as interests and personality traits.

As part of the APT Test, the Karrakers and others were asked 502 questions from the Minnesota Multiphasic Personality Inventory (MMPI), a test RAC said it used to measure personality traits. But the MMPI does not simply measure such potentially relevant traits as whether someone works well in groups or is comfortable in a fast-paced office. Instead, the MMPI considers where an applicant falls on scales measuring traits such as depression, hypochondriasis, hysteria, paranoia, and mania. In fact, elevated scores on certain scales of the MMPI can be used in diagnoses of certain psychiatric disorders.

All parts of the APT Test were scored together, and any applicant who had more than 12 "weighted deviations" was not considered for promotion. Thus, an applicant could be denied any chance for advancement simply because of his or her score on the MMPI. The Karrakers, who all had more than 12 deviations on the APT, sued on behalf of the employees at 106 Illinois RAC stores, claiming RAC's use of the MMPI as part of its testing program violated the Americans With Disabilities Act of 1990 (ADA). They also claimed that RAC failed to protect the confidentiality of the test results in violation of Illinois tort law.

The district court first granted RAC's motion for partial summary judgment on Steven Karraker's failure to promote claim, finding that he did not file his charge of discrimination with the EEOC within 300 days of any alleged discrimination. The court also granted the Karrakers' motion for class certification on the ADA and public disclosure of private facts claims.

The district court later granted RAC's motion for summary judgment and denied the Karrakers' motion for summary judgment on the outstanding claims with the exception of Steven Karraker's wrongful termination claim. The Karrakers stipulated to the dismissal of that claim to allow this appeal to go forward. Here, they challenge the district court's decision that the use of the MMPI did not violate the ADA, the dismissal of Steven Karraker's failure to promote claim, and the dismissal of the Karrakers' claim of public disclosure of private facts.

Americans with disabilities often faced barriers to joining and succeeding in the workforce. These barriers were not limited to inaccessible physical structures. They also included attitudinal barriers resulting from unfounded stereotypes and prejudice. People with psychiatric disabilities have suffered as a result of such attitudinal barriers, with an employment rate dramatically lower than people without disabilities and far lower than people with other types of disabilities.

Congress enacted the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Congress recognized that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." The ADA's definition of disability is not limited to physical impairments, but also includes mental impairments. Title I of the ADA is devoted to eliminating employment discrimination based on actual or perceived disabilities.

Congress enacted three provisions in Title I which explicitly limit the ability of employers to use "medical examinations and inquiries" as a condition of employment: a prohibition against using pre-employment medical tests; a prohibition against the use of medical tests that lack job-relatedness and business necessity; and a prohibition against the use of tests which screen out (or tend to screen out) people with disabilities.

At its heart, the issue in this case is whether the MMPI fits the ADA's definition of a "medical examination." In that regard, we note the parties' agreement that, although the Karrakers were already employed by RAC, the tests here were administered "pre-employment" for ADA purposes because they were required for those seeking new positions within RAC. This agreement means we need not determine whether the Karrakers should be considered to be in the preemployment offer category. Plaintiffs have argued only that the MMPI is a medical examination. RAC could have argued not only that the MMPI is not a medical examination, but also that even if it is, it is "job-related and consistent with business necessity." By prevailing on the latter, defendants could claim that the test is permissible during employment, even if impermissible pre-offer. By not arguing that the test is "job-related and consistent with business necessity," RAC seeks a clear finding that the MMPI is not a medical examination and thus not regulated at all by the ADA.

The EEOC defines "medical examination" as "a procedure or test that seeks information about an individual's physical or mental impairments or health." *See* "ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations" (1995). According to the EEOC, factors to consider in determining whether a particular test is a "medical examination" include:

> (1) whether the test is administered by a health care professional;
>
> (2) whether the test is interpreted by a health care professional;
>
> (3) whether the test is designed to reveal an impairment of physical or mental health;
>
> (4) whether the test is invasive;
>
> (5) whether the test measures an employee's performance of a task or measures his/her physiological responses to performing the task;
>
> (6) whether the test normally is given in a medical setting; and
>
> (7) whether medical equipment is used.

"One factor may be enough to determine that a procedure or test is medical." Psychological tests that are "designed to identify a mental disorder or impairment" qualify as medical examinations, but psychological tests "that measure personality traits such as honesty, preferences, and habits" do not.

Therefore, this case largely turns on whether the MMPI test is designed to reveal a mental impairment. RAC argues that, as it used the MMPI, the test only measured personality traits. For example, RAC argues in its brief that the MMPI does not test whether an applicant is clinically depressed, only "the extent to which the test subject is experiencing the kinds of feelings of 'depression' that everyone feels from time to time (*e.g.,* when their favorite team loses the World Series)." Although that particular example seems odd to us (can an Illinois chain really fill its management positions if it won't promote disgruntled Cubs fans?), the logic behind it doesn't seem to add up, either. Repeating the claim at oral argument, RAC argued that the MMPI merely tested a "state of mood" and suggested that an applicant might, for example, score high on the depression scale because he lost his keys that morning. But why would RAC care if an applicant lost his keys the morning of the MMPI or took the test the day after another Cubs loss? Would RAC really want to exclude an employee from consideration for a promotion because he happened to feel sad on the wrong day? We see two possibilities: either the MMPI was a very poor predictor of an applicant's potential as a manager (which might be one reason it is no longer used by RAC), or it actually was designed to measure more than just an applicant's mood on a given day.

To help us sort out which of these possibilities is more likely, the EEOC guidelines offer three examples of tests given pre-employment:

> Example: A psychological test is designed to reveal mental illness, but a particular employer says it does not give the test to disclose mental illness (for example, the employer says it uses the test to disclose just tastes and habits). But, the test also is interpreted by a psychologist, and is routinely used in a clinical setting to provide evidence that would lead to a diagnosis of a mental disorder or impairment (for example, whether an applicant has paranoid tendencies, or is depressed). Under these facts, this test is a medical examination.

> Example: An employer gives applicants the RUOK Test (hypothetical), an examination which reflects whether applicants have characteristics that lead to identifying whether the individual has excessive anxiety, depression, and certain compulsive disorders (DSM-listed conditions). This test is medical.

> Example: An employer gives the IFIB Personality Test (hypothetical), an examination designed and used to reflect only whether an applicant is likely to lie. This test, as used by the employer, is not a medical examination.

RAC's use of the MMPI almost fits the first example in that it is a psychological test that is designed, at least in part, to reveal mental illness. And RAC claims it uses the test only to measure personality traits, not to disclose mental illness. The parallel falls apart, however, because the test was not interpreted by a psychologist, a difference that led the district court to conclude that it is not a medical examination. In doing so, the district court relied on the deposition testimony of Colin Koransky, a clinical psychologist. Koransky described various scoring methods for the MMPI, explaining that a clinical protocol could be used for medical purposes while a vocational scoring protocol would focus more on personality traits of potential employees. The district court found that, because RAC used the vocational protocol to score the test, RAC used the MMPI "solely for the purposes of discerning personality traits."

The mere fact that a psychologist did not interpret the MMPI is not, however, dispositive. The problem with the district court's analysis is that the practical effect of the use of the MMPI is similar no matter how the test is used or scored — that is, whether or not RAC used the test to weed out applicants with certain disorders, its use of the MMPI likely had the effect of excluding employees with disorders from promotions.

Dr. Koransky claims, for example, that the Pa scale "does not diagnose or detect any psychological disorders," but that "an elevated score on the Pa scale is one of several symptoms which may contribute" to a diagnosis of paranoid personality disorder. We accept Dr. Koransky's contention that a high score on the Pa scale does not necessarily mean that the person has paranoid personality disorder. But it also seems likely that a person who does, in fact, have paranoid personality disorder, and is therefore protected under the ADA, would register a high score on the Pa scale. And that high score could end up costing the applicant any chance of a promotion. Because it is designed, at least in part, to reveal mental illness and has the effect of hurting the employment prospects of one with a mental disability, we think the MMPI is best categorized as a medical examination. And even though the MMPI was only a part (albeit a significant part) of a battery of tests administered to employees looking to advance, its use, we conclude, violated the ADA.

3.2 Negligent Hiring

Keith v. Health-Pro Home Care Services, Inc., 873 S.E.2d 567 (N.C. 2022)

BARRINGER, Justice.

Employers are in no way general insurers of acts committed by their employees, but as recognized by our precedent, an employer may owe a duty of care to a victim of an employee's intentional tort when there is a nexus between the employment relationship and the injury. Here, when the evidence is viewed in the light most favorable to the plaintiffs, plaintiffs, who are an elderly infirm couple that contracted with a company to provide them a personal care aide in their home, have shown a nexus between their injury and the employment relationship. The employee was inadequately screened and supervised, being placed in a position of opportunity to commit crimes against vulnerable plaintiffs after her employer suspected her of stealing from plaintiffs. Therefore, we conclude that the Court of Appeals erred by reversing the judgment in favor of plaintiffs and by remanding for entry of a judgment notwithstanding the verdict in favor of defendant. Further, the Court of Appeals misinterpreted North Carolina precedent, and thus erred by holding the trial court erred by denying defendant's requested instructions.

I. Background

On 29 September 2016, plaintiffs Thomas and Teresa Keith (Mr. and Mrs. Keith), an elderly married couple with health and mobility issues, were the victims of a home invasion and armed robbery orchestrated by a personal care aide working for defendant Health-Pro Home Care Services, Inc. (Health-Pro). The aide, Deitra Clark, was assigned to assist the Keiths in their home. Clark subsequently pleaded guilty to first-degree burglary and second-degree kidnapping for her conduct.

In December 2016, the Keiths sued Health-Pro for negligence and punitive damages. The Keiths alleged that they hired Health-Pro as their in-home health care provider and "despite Deitra Clark's criminal record, lack of a driver's license, and history of prior incidents of suspected prior thefts from the Keiths' home, Health-Pro negligently allowed Deitra Clark to provide in-home care to the Keiths, and Health-Pro's conduct in assigning Deitra Clark to these responsibilities, as opposed to some other position in the company, was a proximate cause of the robbery of the Keiths and the consequent injuries sustained by them."

The case proceeded to trial and was tried before a jury at the 19 March 2018 session of superior court in Pitt County. At the conclusion of the Keiths' presentation of evidence, Health-Pro moved for directed verdict on the negligence claim pursuant to North Carolina Rule of Civil Procedure 50. Health-Pro argued that:

> As far as negligence, your Honor, we would contend there has been no evidence to meet the Plaintiffs' burden of proof. My understanding from the proposed jury instructions that the Plaintiffs have passed up is they treat this as an ordinary negligence case. The Defense contends this is negligence sic hiring retention and supervision case, which is part of our proposed instructions. That's very similar to what the Plaintiffs have pled. That type of case is what has essentially been argued to this jury and that's what the evidence has revealed. In order to succeed on that case and even in an ordinary negligence case the Plaintiffs have to show that the events of September 29th, 2016, and Deitra Clarks' unfitness and participation in those events were foreseeable to my clients. Those are the events that have caused the Plaintiffs the only injury they complain of. And there is nothing in the record that suggests that it was foreseeable.

The trial court denied the motion for a directed verdict.

The jury returned a verdict in favor of the Keiths. The jury answered in the affirmative that both Mr. and Mrs. Keith were injured by the negligence of Health-Pro. The jury found Mr. Keith entitled to recover $500,000 in damages from Health-Pro for his personal injuries and found Mrs. Keith entitled to recover $250,000 in damages from Health-Pro for her personal injuries. The trial court then entered judgment to this effect on 11 April 2018.

Health-Pro subsequently moved for judgment notwithstanding the verdict and, in the alternative, for a new trial . The trial court denied these post-trial motions . Health-Pro appealed .

On appeal, a divided panel of the Court of Appeals reversed the judgment and remanded for entry of a judgment notwithstanding the verdict in Health-Pro's favor.

To address Health-Pro's appeal of the trial court's denial of its motions for directed verdict and motion for judgment notwithstanding the verdict, the Court of Appeals determined that it "must first decide whether the Keiths' case was appropriately presented to the jury as an 'ordinary' negligence claim instead of an action for negligent hiring." The Court of Appeals considered the allegations in the Keiths' complaint and the evidence presented at trial "within the context of precedent governing both ordinary negligence and negligent hiring." The Court of Appeals ultimately indicated that it agreed with Health-Pro that the Keiths' "allegations and the facts of this case constituted a claim for negligent hiring," obligating the Keiths to prosecute their claim as one for negligent hiring. The Court of Appeals explained as follows:

> *All* of Plaintiffs' relevant allegations and evidence directly challenge whether Defendant should have hired Ms. Clark as an in-home aide; whether Defendant acted appropriately in response to hearing from Plaintiffs that money had been taken from their home on two occasions—which would have involved either greater supervision of—such as moving Ms. Clark to a no-client-contact position, as suggested by Plaintiffs—or a decision regarding whether to retain her in Defendant's employ at all. Plaintiffs have cited no binding authority for the proposition that an action brought on allegations, and tried on facts, that clearly fall within the scope of a negligent hiring claim may avoid the heightened burden of proving all the elements of negligent hiring by simply designating the action as one in ordinary negligence, and we find none.

As such, the Court of Appeals held that the trial court erred by denying Health-Pro's motions for directed verdict and judgment notwithstanding the verdict "with respect to ordinary negligence, as that claim was not properly before the trial court, and no evidence could support it."

The Court of Appeals then considered whether the Keiths' evidence was sufficient to survive a motion for judgment notwithstanding the verdict "based upon the theory of negligent hiring." It began by discussing the Court of Appeals' case *Little v. Omega Meats I, Inc.,* 171 N.C. App. 583 (2005), which this Court affirmed per curiam without written opinion.

The Court of Appeals concluded that according to *Little,* "three specific elements must be proven by a plaintiff in order to show that an employer had a duty to protect a third party from its employee's negligent or intentional acts committed out-side of the scope of the employment." Specifically,

> (1) the employee and the plaintiff must have been in places where each had a right to be when the wrongful act occurred; (2) the plaintiff must have met the employee, when the wrongful act occurred, as a direct result of the employment; and (3) the employer must have received some benefit, even if only potential or indirect, from the meeting of the employee and the plaintiff that resulted in the plaintiff's injury.

The Court of Appeals held that there was no evidence to support any of the three elements in this case.

Next, the Court of Appeals concluded that even if the requirements of *Little* are not applicable to this case, the trial court still erred by denying Health-Pro's motion for judgment notwithstanding the verdict based on a theory of negligent hiring. Specifically, the Court of Appeals held that Health-Pro had no duty to protect the Keiths' from Clark's criminal acts on 29 September 2016, and the Keiths' "evidence was insufficient to demonstrate proximate cause.

The dissent disagreed with the majority's holding that the judgment in favor of the Keiths must be reversed and that Health-Pro was entitled to judgment as a matter of law. The dissent contended that although the Keiths alleged that Health-Pro was negligent in hiring Clark, the evidence of negligent hiring "is merely a means by which a plaintiff proves ordinary negligence." "Negligent hiring (like any other ordinary negligence claim) requires a plaintiff to show that the defendant owed a duty, that the defendant breached that duty, and that the plaintiff suffered an injury proximately caused by the breach."

Further, the dissent argued that when viewed in the light most favorable to the Keiths, the evidence was sufficient to make out an ordinary negligence claim based on their evidence of Health-Pro's negligent hiring of a dishonest employee. Unlike the majority, the dissent concluded that the Keiths did not have to prove that the robbery occurred while Clark was on duty. The evidence was sufficient for a negligence claim because when viewed in the light most favorable to the Keiths, Health-Pro's "dishonest employee used 'intel' learned while on duty to facilitate a theft."

The dissent asserted its view that the majority misread *Little*, and analyzed how the evidence when viewed in the light most favorable to the Keiths, as the non-moving party, is sufficient for each element, rendering denial of the motions for directed verdict and judgment notwithstanding the verdict proper.

The dissent acknowledged that reasonable minds may reach different conclusions concerning Health-Pro's liability for the criminal conduct of Clark in this case, but that decision was for the jury, and the jury has spoken in this case in favor of liability.

The Keiths appealed based on the dissent .

III. Analysis

A. Health-Pro's Rule 50 Motions

To address the issues before us, we must summarize the relevant aspects of the law of this State concerning negligence and negligent hiring. The common law claim of negligence has three elements: (1) a legal duty owed by the defendant to the plaintiff, (2) a breach of that legal duty, and (3) injury proximately caused by the breach. Precedent decided by this Court further defines the contours of these three elements. For instance, this Court has recognized that "no legal duty exists unless the injury to the plaintiff was foreseeable and avoidable through due care."

Given this limitation, a defendant rarely has a legal duty to prevent the criminal acts of others. However, "a defendant may be liable for the criminal acts of another when the defendant's relationship with the plaintiff or the third person justifies making the defendant answerable civilly for the harm to the plaintiff." For example, this Court has recognized that a common carrier owes to its passengers a duty to provide for their safe conveyance and that, in the performance of its duty, it must protect a passenger from assault by the carrier's employees and intruders when by the exercise of due care, the acts of violence could have been foreseen and avoided. Similarly, a store owner owes to a customer on its premises during business hours for the purpose of transacting business thereon a duty to protect or warn the customer of endangerment from the criminal acts of third persons when reasonably foreseeable by the store owner and when such acts could have been prevented by the exercise of ordinary care by the store owner.

In the context of employment, this Court held that a defendant employer owes its employees the duty to exercise reasonable care in its employment and retention of employees, and if there be negligence in this respect, which is shown to be proximate cause of the injury to the employee, the defendant employer may be liable for the injury caused by the negligence of the fellow employee, or by the intentional torts of the employer's supervisors. Later precedent recognized that an employer's duty to exercise reasonable care in its employment and retention of employees could extend to third persons.

In *Braswell* and *Medlin,* this Court expressly recognized that North Carolina courts have recognized a cause of action for negligent hiring. In *Medlin,* this Court delineated what a plaintiff must prove for this claim:

> (1) the specific negligent act on which the action is founded (2) incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; and (3) either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in 'oversight and supervision,' and (4) that the injury complained of resulted from the incompetency proved.

In *Little,* the Court of Appeals addressed whether there was sufficient evidence for a claim by third-person plaintiffs for negligent hiring against a defendant employer when the injury causing acts were intentional torts and criminal. The Court of Appeals held that on the record before it, the defendant employer did not owe plaintiffs a duty of care and affirmed the trial court's granting of directed verdict in the defendant employer's favor. The Court of Appeals explained:

> In the instant case Smith, an independent contractor for defendant employer Omega, was not in a place where he had a legal right to be since he broke in to plaintiffs' home; Smith and plaintiffs did not meet as a direct result of Smiths' relationship with defendants, since he did not enter plaintiffs' home as a salesman; finally, defendants received no benefit, direct, indirect or potential, from the tragic "meeting" between Smith and plaintiffs. We have found no authority in North Carolina suggesting that defendants owed plaintiffs a duty of care on these facts, and we hold that in fact none existed.
>
> We refuse to make employers insurers to the public at large by imposing a legal duty on employers for victims of their independent contractors' intentional torts that bear no relationship to the employment. We note that because this is a direct action against the employer, for the purposes of this appeal the result would be the same if Smith had been an employee of defendants instead of an independent contractor. Smith could have perpetrated the exact same crimes against these plaintiffs, in the exact same manner, and with identical chances of success, on a day that he was not selling Omega's meats and driving Omega's vehicle.

Prior to this analysis and holding, the Court of Appeals quoted three sentences from an article published in the Minnesota Law Review:

> Most jurisdictions accepting the theory of negligent hiring have stated that an employer's duty to select competent employees extends to any member of the general public who comes into contact with the employment situation. Thus, courts have found liability in cases where employers invite the general public onto the business premises, or require employees to visit residences or employment establishments. One commentator, in analyzing the requisite connection between plaintiffs and employment situations in negligent hiring cases, noted three common factors underlying most case law upholding a duty to third parties: (1) the employee and the plaintiff must have been in places where each had a right to be when the wrongful act occurred; (2) the plaintiff must have met the employee as a direct result of the employment; and (3)

> the employer must have received some benefit, even if only potential or indirect, from the meeting of the employee and the plaintiff.

Citing this Article, the Court of Appeals in *Little* further stated, "courts in other jurisdictions have generally, though not exclusively, declined to hold employers liable for the acts of their independent contractors or employees under the doctrine of negligent hiring or retention when *any one* of these three factors was not proven."

The dissent in *Little* contended that "our courts have already established a duty on the part of employers of independent contractors and that the majority opinion's conclusion that there is no duty in this case—as a matter of law—cannot be reconciled with this authority." This Court affirmed per curiam the Court of Appeals' decision.

In the case before us, the Court of Appeals interpreted the aforementioned statements in *Little* as having "identified three specific elements that must be proven in order to show that an employer had a duty to protect a third party from its employee's negligent or intentional acts committed out-side of the scope of the employment." We hold that the Court of Appeals erred by reading *Little* as adopting such rigid requirements for reasons similar to those that the Court of Appeals' dissent in this case raised.

In *Little,* the Court of Appeals quoted a statement from a Minnesota Law Review article that "*one commentator* noted three common *factors* underlying *most* case law upholding a duty to third parties" and cited this article for support that there is a *general,* but *not exclusive,* trend in other jurisdictions related to these factors. The Court of Appeals' analysis in *Little* implicitly reflected consideration of these factors, but the Court of Appeals indicated that its decision turned on the lack of "authority in North Carolina suggesting that defendants owed plaintiffs a duty of care *on these facts.*"

The Court of Appeals did not state that it adopted these factors. It further did not even describe other jurisdictions as holding these factors to be elements. Nowhere in the *Little* decision did it state that these factors must be alleged, proven, or shown in courts of this State to establish an employer's duty to a third-party injured by an employee to exercise reasonable care in its hiring of employees. Nor is it said that these factors are required. Rather, the Court of Appeals "refused to make employers insurers to the public at large by imposing a legal duty on employers for victims of their independent contractors' intentional torts that bear no relationship to the employment," and thus "required for a duty to third parties for negligent hiring a nexus between the employment relationship and the injury." The *Little* court considered these factors, in the absence of existing North Carolina law, in determining whether there is a sufficient nexus between the employment relationship and the injury, but it did not adopt a requirement that all three factors be proven.

Thus, the Court of Appeals in this case erred by reading *Little* to have "identified three specific elements that must be proven," and by declining "to hold employers liable for the acts of their employees under the doctrine of negligent hiring or retention when any one of these three factors was not proven."

The Court of Appeals further erred by holding that the trial court erred by denying Health-Pro's motions for directed verdict and judgment notwithstanding the verdict. The Court of Appeals agreed with defendant that the Keiths' were obligated to prosecute their claim as one for negligent hiring because the Keiths' allegations and facts of this case constituted a claim for negligent hiring. However, this conclusion and the analysis supporting it failed to properly apply the standard of review for Rule 50 motions, the matter before the Court of Appeals.

Even when addressing an argument by Health-Pro that the negligence claim in this case is in fact a negligent hiring claim, a Rule 50 motion turns on the sufficiency of the evidence at the trial. Thus, we analyze the evidence at trial to assess whether there is support for each element of the nonmoving party's cause of action.

The evidence at trial tended to show the following when viewed in the light most favorable to the nonmoving party, the Keiths. The Keiths were an elderly couple with serious health issues and limited mobility. Mr. Keith had just undergone heart surgery when they sought an at-home-care provider. The Keiths and their son, Fred Keith (Fred), met with Health-Pro's sole owner, Chief Executive Officer, and President, Sylvester Bailey III (Mr. Bailey). Health-Pro provided at-home personal and health care. During that meeting, Health-Pro, through Mr. Bailey, informed them that all employees undergo criminal background checks. After the meeting, the Keiths hired Health-Pro for their services in December 2012.

In 2015, Health-Pro received an employment application from Clark and permission to conduct a criminal background check. Pursuant to State law, “an offer of employment by a home care agency licensed under Chapter 131E on Health Care Facilities and Services to an applicant to fill a position that requires entering the patient’s home is conditioned on consent to a criminal history record check of the applicant.”

Health-Pro’s criminal background investigation policy was that “all employees of Health-Pro must undergo a criminal background check by the State Bureau of Investigation or other approved entity” and “if the criminal history involves a felony not listed above, a misdemeanor, a series of arrests, or a criminal conviction greater than seven years, the agency will review the offense, its relevance to the particular job performance, and to the length of time between conviction and the employment date.” Further, “a decision regarding employment will be reached only after the nature, severity and date of the offense have been carefully evaluated.”

Similarly, under State law,

> within five business days of making a conditional offer of employment, a home care agency shall submit a request to the Department of Public Safety under § 143B-939 to conduct a State or national criminal history record check required by § 131E-265, or shall submit a request to a private entity to conduct a State criminal history record check required by § 131E-265.

“If an applicant’s criminal history record check reveals one or more convictions of a relevant offense, the home care agency shall consider the enumerated factors in this section in determining whether to hire the applicant.” Relevant offense is defined as “a county, state, or federal criminal history of conviction or pending indictment of a crime, whether a misdemeanor or felony, that bears upon an individual’s fitness to have responsibility for the safety and well-being of aged or disabled persons.” “An entity and officers and employees of an entity shall be immune from civil liability for failure to check an employee’s history of criminal offenses if the employee’s criminal history record check is requested and received in compliance with N.C.G.S. § 131E-266.”

Health-Pro admitted that it did not run a criminal background check with the State Bureau of Investigation or other approved entity and admitted that the review and evaluation required by the policy was not completed. However, Health-Pro contended it ran a criminal background check and was aware of Clark's misdemeanor convictions and other charges. To the contrary, the only document in Health-Pro's employment file relating to a criminal background check was one page and only showed personal information not material to this decision:

Additionally, the company, from which Health-Pro contended it ran a criminal background check, stated on its website that its services cannot be used to conduct background checks for employees or applicants.

Mr. Bailey offered conflicting testimony at trial concerning why Health-Pro's employment file for Clark only contained this one page, first stating that Health-Pro culled down the file every year because some reports were fifteen pages and then later saying Health-Pro just prints one page of a criminal background report for the file. Notably, Mr. Bailey also testified at his deposition that he conducted the criminal background check but did not have a specific memory of running the check or seeing the charges and convictions. Yet, he subsequently changed his testimony when deposed as the representative of Health-Pro and when he testified at trial.

Health-Pro's criminal background investigation policy also dictated that the criminal history record information received from the criminal background check be stored in a separate locked file in the Human Resource Department, but this was not done. Additionally, the Interviewing and Hiring Process form used by Health-Pro for hiring Clark did not have checks next to the boxes for a criminal background check as reflected below:

Thus, viewed in the light most favorable to the Keiths, Health-Pro did not run a criminal background check of Clark upon hiring her as a personal care aide in September 2015. It did not check to confirm that she had a driver's license as indicated on her application. Health-Pro simply interviewed Clark after receiving her application and then hired her. Nevertheless, Health-Pro represented on its website that it carefully screened caregivers by calling previous employers and performing criminal background checks.

As of the date of her hiring, a criminal background check of Clark would have revealed the following: 2007 charge for no operator's license; 2008 found guilty of driving while license revoked; 2009 charge for possession of marijuana; 2009 found guilty of possession of drug paraphernalia; 2010 charge for possession of drug paraphernalia; 2010 charge for communicating threats (dismissed because of noncooperating witness); 2010 found guilty of criminal contempt; and 2011 charge for communicating threats (dismissed because of noncooperating witness). Further, at that time, Clark did not have a valid driver's license.

Clark, however, indicated on her employment application that she had never been convicted of or entered a plea of guilty in a court of law. Thus, as conceded by Health-Pro, Clark lied on her job application about her criminal background. Health-Pro acknowledged that this dishonesty would be concerning to Health-Pro if caught. Clark also identified that she had a driver's license on her application, but she did not have a driver's license at the time of her application, just an identification card.

A few months later in November or December, Health-Pro assigned Clark to work for the Keiths as a personal care aide at their home. The Keiths understood that Health-Pro ran background checks on all their aides, including Clark, and would provide aides that would do a good job and not pose a danger.

Clark was one of the primary aides working for the Keiths. She helped in the home by cleaning the house, doing laundry, and driving Mrs. Keith for errands. Clark had access to the whole house and could move around the house freely. Through her employment, Clark learned about the Keiths, their valuables, their schedules, their collection of rolled coins, and their spare key.

On or about 25 May 2016, Health-Pro received a letter from Pitt County Child Support Enforcement indicating that a claim against Clark for nonpayment of child support was being pursued.

In 2016, after Clark had been assigned to the Keiths' home, the Keiths' granddaughter and daughter discovered that about $900 of rolled coins were missing. Additionally, $1,260 in cash went missing from Mrs. Keith's dresser. Before the cash went missing, an aide had seen Mrs. Keith remove money from her dresser drawer. Mrs. Keith thought the aide was Clark but was not positive, so she did not accuse her when the cash went missing. Cash also went missing from Mr. Keith's wallet on two occasions.

The Keiths informed Health-Pro about the missing money, and Mr. Bailey on behalf of Health-Pro came to the Keiths' home to discuss in July 2016. The missing money was not located at the meeting (nor was it ever found), but Health-Pro said it would investigate everything and removed Clark and the other aide assigned at the time from servicing the Keiths' home. Health-Pro also agreed to pay back the missing money to the Keiths.

Health-Pro determined that Clark and one other aide were the only aides in the home on the days that money went missing and spoke to them. Yet, Health-Pro did nothing further; it did not run a criminal background check or report the incident to the police.

Fred, the Keiths' son, also met with Mr. Bailey after he learned about the missing money. Mr. Bailey informed Fred that it was either Clark or the other aide but that he had a strong belief that Clark was the one involved. Mr. Bailey assured Fred that neither one of them would be back in his parents' home, and Fred made clear that he did not want Clark back in his parents' home.

Nevertheless, a few weeks later, Health-Pro assigned Clark back to the Keiths' home. Although Health-Pro contended that Fred asked for Clark to return to the home because Clark gave Mrs. Keith better baths than other aides, Fred testified that he disputed Health-Pro's contention, and the Keiths testified that they did not ask for Clark to be reassigned to their home. The Keiths assumed that Health-Pro, after completing its investigation, thought Clark did not pose a threat to the Keiths. Health-Pro also admitted that it did not inform Fred that they were sending Clark back to the home. Thus, viewing the evidence in the light most favorable to the Keiths, Health-Pro made the unilateral decision to reassign Clark as a personal care aide to the Keiths' home after the thefts.

On 9 September 2016, Health-Pro received another letter from Pitt County Child Support Enforcement.

A few weeks later on 28 September 2016, Clark used the information that she gleaned about the Keiths' home, the comings and goings of Health-Pro aides and the Keiths' family, and their valuables to accomplish a home invasion and robbery. Clark informed her accomplices about everything, including the location of the spare hidden key. Clark also knew and shared with her accomplices that the Health-Pro aide assigned to work that evening, Erica, would leave when her shift ended at 11:00 p.m. and no other family was visiting and staying with the Keiths that evening.

The assigned aide, Erica, did in fact leave in accordance with her shift schedule at 11:00 p.m. on the evening of 28 September 2016. Shortly thereafter, Clark drove her two accomplices in her car to the Keiths' house and dropped them off to complete the home invasion and robbery. Her accomplices dressed in dark clothing and wore masks. Between 11:30 p.m. and 12:00 a.m., the accomplices used the spare hidden key to enter the house and walked into the den where Mr. Keith was watching a movie. Mrs. Keith was in bed. The accomplices disconnected the telephone.

As testified by Mr. Keith, the accomplices knew exactly where to go in the house; they knew where everything was.

One accomplice had a gun and pointed the gun at Mr. Keith and ordered Mr. Keith to lay on the floor face down. The other accomplice walked into the bedroom where Mrs. Keith was lying in bed and took from the bed stand the .32 caliber Harrison and Richardson pistol belonging to Mr. Keith. The originally armed accomplice found Mr. Keith's ATM card in one of his desk drawers and started waiving it around like it was something for which he was searching. Additionally, while in the home, the other accomplice stole the Keiths' two boxes of rolled coins, totaling $500. The Keiths had stored the boxes in a black bag under Mr. Keith's work desk in the den of their home. One of the accomplices also told Mrs. Keith that she should be sure to mention the name of Erica.

The originally armed accomplice forced Mr. Keith at gunpoint to drive him to an ATM. During the drive to the ATM, the accomplice asked Mr. Keith if he had a worker that comes over to the home named Erica. After Mr. Keith answered affirmatively, the accomplice told Mr. Keith that he needed to fire Erica because she left the door open. Arriving at the ATM around 12:30 a.m., the accomplice forced Mr. Keith to withdraw a thousand dollars. The accomplice then ordered Mr. Keith to drive him to an elementary school, where the accomplice got out of the car and ran away.

Clark picked up both accomplices along with the stolen cash, coins, and gun. Thereafter, she and the accomplices took her car to Walmart to convert the stolen coins into cash by using a Coinstar machine at around 1:00 a.m.

Health-Pro terminated Clark after it identified her in the video footage from the police showing the conversion of the coins to cash at the Coinstar machine.Only after the home invasion and robbery and after firing Clark did Health-Pro run a criminal background check on Clark.

After undertaking an analysis of the evidence and considering it in the light most favorable to the Keiths, we find that there is evidence to support each element of the Keiths' cause of action and that the motion for directed verdict and subsequent motion for judgment notwithstanding the verdict should be denied.

Here, the Keiths pursued a negligence claim against the employer of the intentional tortfeasor, Health-Pro, premised on Health-Pro's own negligence in hiring, retaining, and/or assigning Clark, the intentional tortfeasor, to work as a personal care aide at their home. Given that the Keiths' claim relied on negligence by the employer in hiring, retaining, and/or assigning an employee, our precedent recognizes this claim under the theory of liability known as negligent hiring, or more commonly framed as a claim for negligent hiring. While the elements of negligence are a legal duty, breach, and injury proximately caused by the breach, appellate precedent further defines the contours of these elements in specific contexts as previously discussed. Thus, when a plaintiff alleges an employer negligently hired, retained, or supervised an employee, and seeks recovery from the employer for injury caused by the employee, the elements for negligent hiring and the nexus requirement for duty must be satisfied to show a negligence claim in this context.

Therefore, to survive a motion for directed verdict or judgment notwithstanding the verdict for their negligence claim, the Keiths had to present evidence to support each element set forth in *Medlin* and to support a nexus between the employment and the injury as required by *Little*. The evidence when viewed in the light most favorable to the Keiths, as summarized previously, satisfied the elements in *Medlin* and the nexus requirement in *Little*. In addition to evidence supporting each of the elements, there is enough distinguishing this case from *Little* and enough similarity with *Lamb* to preclude our precedent from foreclosing the claim as a matter of law.

Unlike *Little,* the evidence viewed in the light most favorable to plaintiffs suggests a sufficient nexus between the injurious act and employment relationship to create a duty. The plaintiffs in this case were daily customers of the defendant employer and had been for years. The defendant employer assigned the intentional tortfeasor employee to work for the plaintiffs inside plaintiffs' home. Thus, defendant employer participated in the meeting between the intentional tortfeasor employee and the plaintiffs and gained financially from their continued meeting. When viewed in the light most favorable to the Keiths, the intentional tortfeasor employee also injured the plaintiff customer, the Keiths, by disclosing and using the intel she gained through her employment to orchestrate a robbery at the intentional tortfeasor employee's place of employment, the Keiths' home.

When the evidence is viewed in the light most favorable to the Keiths, the intentional tortfeasor employee was skilled at her work but incompetent to work for vulnerable customers in the customers' home without supervision by another, rendering this case similar to *Lamb*. In *Lamb,* the defendant's supervisor had command over the department in which plaintiff, a ten-year-old boy, worked as floor sweeper. The supervisor shoved plaintiff causing him injury, and plaintiff sued the supervisor's employer. While there was no evidence of the unskillfulness of the supervisor, he had treated the plaintiff poorly the day before the injury and had a general reputation for his cruelty and temper. This Court concluded that "the evidence shows that he was unfit and incompetent to perform the duties of supervising children and the help under him by reason of his cruel nature and high temper." Given the foregoing, this Court found that the trial court erred by not submitting the case to the jury and reversed the motion dismissing the case for nonsuit.

In this case, evidence concerning the falsities in Clark's employment application, Health-Pro's belief that she committed the prior thefts, and the particulars of her criminal background support the inference that Health-Pro knew or should have known of Clark's incompetence for her assignment to the Keiths' home. Health-Pro's personal care aides served elderly and vulnerable adults and by the nature of their work gained information about their clients' daily routine, personality, finances, and home and were not supervised while in the home. The Keiths, in fact, retained Health-Pro because Mr. Keith needed an at-home-care provider after his heart surgery and throughout their engagement of Health-Pro's services were elderly and with serious health issues and limited mobility.

In addition to the foregoing, evidence also supports the foreseeability of the injury to the Keiths from such incompetence. "Proximate cause is a cause which in natural and continuous sequence produces a plaintiff's injuries and one from which a person of ordinary prudence could have reasonably foreseen that such a result or some similar injurious result was probable." "It is not necessary that a defendant anticipate the particular consequences which ultimately result from his negligence. It is required only that a person of ordinary prudence could have reasonably foreseen that such a result, *or some similar injurious result,* was probable under the facts as they existed."

In this matter, Health-Pro acknowledged that it must discipline employees when Health-Pro knows the employee did something out of compliance because absent discipline, there is a risk that the conduct would get worse. Health-Pro also knew or should have known that Clark was under financial strain on account of the child support enforcement letters and that Clark may retaliate against the Keiths for disclosing the prior thefts given particulars in her criminal background, including charges of communicating threats and a conviction for criminal contempt. Health-Pro further knew or should have known that Clark committed prior thefts in the Keiths' home. Additionally, because of their age, medical conditions, and limited mobility, the Keiths were vulnerable to adverse conduct against them in their home by an incompetent Health-Pro employee. Thus, when viewed in the light most favorable to the Keiths, a person of ordinary prudence could have reasonably foreseen that as a result of Health-Pro's negligent hiring, the home invasion and robbery of the Keiths' home or some similar injurious result was probable and that the trauma from such event would injure the Keiths.

Thus, in this case, the jury, not the court, must decide the outcome of the Keiths' claim. The Court of Appeals in this matter erred by not considering the evidence in the light most favorable to the Keiths, just as Health-Pro's arguments urge us to do. Health-Pro contends that Clark's actions bore no relationship to her employment and no action or inaction by Health-Pro proximately caused the Keiths' injuries because "any information Clark learned about the Keiths' home on the job could have been ascertained just as easily by others watching the home from the street." The jury could have agreed with Health-Pro and weighed the evidence in its favor but given the testimony and evidence before the trial court supporting a contrary interpretation of the facts, this argument cannot justify judgment in Health-Pro's favor as a matter of law. We must view all of the evidence which supports the Keith's claim as true and consider the evidence in the light most favorable to the Keiths, giving them the benefit of every reasonable inference that may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in their favor. Therefore, we conclude that the Court of Appeals erred by reversing the trial court and remanding for entry of judgment in favor of Health-Pro.

IV. Conclusion

We agree with the Court of Appeals that plaintiffs' negligence claim was dependent on a theory of negligent hiring, which is commonly plead as a negligent hiring claim. However, the evidence, taken in the light most favorable to plaintiffs, was sufficient as a matter of law to be presented to the jury. There was evidence to support each element of the claim, the *Medlin* elements, and the *Little* nexus requirement. Therefore, the Court of Appeals erred by reversing the judgment in favor of plaintiffs and by remanding to the trial court for entry of an order granting defendant's motion for judgment notwithstanding the verdict. Further, the Court of Appeals misinterpreted precedent from *Little,* and under a proper reading of that case and other precedent, the jury instruction requested by defendant was not an accurate statement of the law. Therefore, the Court of Appeals also erred by holding that the trial court erred by denying defendant's requested instruction. Accordingly, we reverse the Court of Appeals' decision.

3.3 Employment References

Desai v. Charter Communications, LLC, 381 F.Supp.3d 774 (W.D. Ky. 2019)

David J. Hale, Judge.

Plaintiffs alleged that their former employer, Charter Communications, LLC, falsely accused them of theft after their employment was terminated. Following a weeklong trial, a jury agreed, finding Charter liable for defamation per se. Charter has moved for judgment as a matter of law or a new trial. In the alternative, it seeks reduction of the damage award. For the reasons explained below, the Court will reduce the punitive damages and deny Charter's motion in all other respects.

I. BACKGROUND

The Court previously summarized the facts of this case as follows:

> Plaintiffs worked at Charter's call center in Louisville, Kentucky, in various capacities. Each was given a Hewlett-Packard (HP) computer printer by Linda Showalter, an administrative assistant at Charter. Plaintiffs maintain that they believed Showalter's distribution of printers was authorized by management. Charter, however, considered Plaintiffs' acceptance of the printers to be a violation of its policy against removing company property without authorization, and it terminated most of the employees involved.
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> Approximately one month after Plaintiffs were fired, Charter Human Resources Manager Rodger Simms gave a PowerPoint presentation during a Charter leadership conference. On a slide with the heading "Leadership and Judgment," Simms referred to "'Operation' Green-light, Buzz-kill, Printer-gate." He encouraged employees to "act with Integrity and Character." The notes for Simms's oral presentation accompanying the slide state: "Let's get the elephant in the room out in the open, how many of you have heard of Operation codes for things that weren't right! All examples of poor judgment. Not bad people, people we know and love but they made the wrong choices." Simms emphasized the importance

> of "integrity," "character," and having "the courage to do the right thing." He also warned that "knowing something isn't right and allowing it to continue is the same as you doing it!" "Green-light" referred to an incident in which a Charter employee used a company credit card for personal benefit and was terminated as a result. "Buzz-kill" involved the sale of illegal drugs on Charter property by Charter employees; those employees were also terminated.
>
> Plaintiffs sued Charter for defamation on the ground that "Charter made false statements alleging misconduct on the part of the Plaintiffs relating to the distribution of Hewlett-Packard ink jet printers, including but not limited to the PowerPoint presentation." They contend that the use of the term "Printer-gate," particularly in conjunction with references to employee theft and drug-dealing, implied that their actions were criminal.

The case was tried solely on a theory of defamation per se. At the close of Plaintiffs' case, Charter moved for judgment as a matter of law, arguing that "Printer-gate" could not constitute defamation per se because it had no "objectively understood definition" and was not defamatory on its face; that Plaintiffs had no proof of damages to support a claim of defamation per quod; and that any inference arising from "Printer-gate" was true because the term referred to "an incident involving the unauthorized removal of company printers from Charter's premises." The Court denied that motion and later granted Plaintiffs' motion for judgment as a matter of law on Charter's truth defense, concluding that there was insufficient evidence from which a reasonable jury could find that Plaintiffs' actions constituted criminal theft. The jury ultimately found Charter liable, awarding each plaintiff $350,000 in compensatory damages and $1 million in punitive damages. The Court entered judgment for Plaintiffs in accordance with the jury's verdict, and Charter timely sought relief under Rules 50 and 59 of the Federal Rules of Civil Procedure.

II. ANALYSIS

Charter renews its motion for judgment as a matter of law on the issue of whether the term "Printer-gate" can constitute defamation per se. It further argues that it is entitled to a new trial on the grounds that it should have been allowed to present the defenses of truth and qualified privilege; that James Eversole's testimony was admitted in error; and that the jury was required to find malice by clear and convincing evidence in order to award punitive damages.

A. Defamation Per Se

As it has on numerous prior occasions, Charter argues that the term "Printer-gate" cannot constitute defamation per se. Charter first asserts that there was no evidence to support a finding that Simms's presentation imputed criminal conduct to Plaintiffs. It further contends that the Court, not the jury, should have determined whether defamation per se occurred. Neither argument is persuasive.

1. Sufficiency of the Evidence

According to Charter, "on the evidence presented at trial, no reasonable jury could have concluded that the use of the term 'Printer-gate' suggested that the Plaintiffs had engaged in theft." But that was not the issue before the jury; the Court had already found, as a matter of law, that the term was "capable of bearing a defamatory meaning." The jury was tasked with deciding whether the "Printer-gate" reference "was reasonably understood by persons who heard it as accusing the plaintiffs of criminal theft."

Charter observes that "multiple witnesses who attended the presentation testified that they did not understand the term to suggest anything criminal at all." It cites the testimony of current Charter employees Mike Barnard, Sandi Streicher, and Theo Carney defining "Printer-gate" as they understood it. Charter acknowledges, however, that two witnesses who attended the meeting—Samantha Little and James Eversole—testified that they understood the term to imply that Plaintiffs had stolen from the company. Contrary to Charter's representation, Little did not merely "testify vaguely that the term 'insinuates that some type of illegal activity had been performed'"; she also testified that she interpreted it as referring to theft. And Eversole, in addition to his statement that the presentation "kind of compared Plaintiffs to gambling and murder", stated that

> the message that was given during the summit didn't really filter into the conversations that were afterward. Those particular conversations were like, oh, well, *that was the time that we fired a bunch of people because they stole equipment.* Like don't do it, like don't take anything from the company.

Thus, both Little and Eversole provided testimony supporting the jury's verdict.

Charter next asserts that Little's testimony cannot support the verdict because "the vague inference of illegal activity that Little drew from the presentation depended entirely on coupling"Printer-gate" with the two other incidents mentioned in the same presentation (Green-light and Buzz-kill) *and* upon knowledge of what those incidents involved." According to Charter, "Kentucky courts long ago decided that merely mentioning an incident involving the plaintiff in the same context as incidents involving illegal conduct cannot be treated as implying that the plaintiff engaged in some illegality." The single case it cites in support of this contention, *Boyd v. Hutton,* 196 Ky. 512 (1922), made no such proclamation and involved starkly different facts.

In *Boyd,* the plaintiff alleged that he was defamed by a 1920 newspaper report, clearly offensive by today's standards, that read: "Last Thursday night there were lots of fireworks in Harrodsburg. Jim Boyd, colored, claimed that someone shot him through an open window while he was reading, or lacing his shoes. The shots covered nearly all of his entire body." The report appeared under the same headline—"Shootings in Town"—as reports that another person had "shot at a chicken thief the same night" and a third person "shot at a prowler on his premises." Boyd argued that "the reporting of the three news items in one article was intended to connect him with one of the other two shootings, and did in fact impute to him conduct of a disgraceful or degrading nature." In a four-paragraph opinion affirming the directed verdict in favor of the defendant, the court found Boyd's "construction of the article to be wholly fanciful, for it certainly is not warranted by any fair interpretation of the publication itself."

The Court finds Charter's reliance on *Boyd* curious in light of the case's historical context; given this context, and the opinion's limited analysis, it has little precedential value. In any event, the facts are clearly distinguishable from those at issue here. Simms's presentation explicitly linked "Printer-gate" to the drug and embezzlement incidents, describing them as "all examples of poor judgment" in which the individuals involved "made the wrong choices." Moreover, as discussed above, there was testimony that some Charter employees who attended the presentation construed the "Printer-gate" reference as imputing criminal conduct to Plaintiffs; in *Boyd,* there was apparently no testimony beyond the plaintiff's own. In short, *Boyd* does not preclude consideration of the context in which the "Printergate" reference was made—indeed, even

Charter has acknowledged that allegedly defamatory words "*must* be evaluated in context."

Viewing the evidence in the light most favorable to Plaintiffs and drawing all reasonable inferences in their favor, the Court concludes that there was sufficient evidence to support the jury's verdict.

2. Definition of Defamation Per Se

Charter's overarching argument is that the "Printer-gate" reference in Simms's presentation cannot constitute defamation per se because it requires consideration of extrinsic circumstances. The definition of defamation per se has been a point of contention throughout this case, despite the Kentucky Supreme Court and Court of Appeals' numerous declarations that a statement falsely imputing crime—particularly theft—constitutes defamation per se.

Notwithstanding this extensive precedent, Charter insists that "Printer-gate" cannot be defamation per se because it is not defamatory on its face. Quoting *Stringer v. Wal-Mart Stores, Inc*., 151 S.W.3d 781 (Ky. 2004), Charter repeatedly asserts that "'if a comprehension of the defamatory nature of the written or spoken words requires extrinsic evidence of context or circumstances,' then the statement can solely be 'libelous or slanderous per quod' and 'special damages, *i.e.,* actual injury to reputation, must be affirmatively proved.'" By taking this passage out of context, however, Charter misses its point:

> In comparison to slanderous per se oral statements, which must contain defamatory language of a specific nature, the common law treats a broader class of written defamatory statements as actionable per se: "while spoken words are slanderous per se only if they impute crime, infectious disease, or unfitness to perform duties of office, or tend to disinherit him, written or printed publications, which are false and tend to injure one in his reputation or to expose him to public hatred, contempt, scorn, obloquy, or shame, are libelous per se." All other defamatory statements are merely libelous or slanderous per quod, and special damages, i.e., actual injury to reputation, must be affirmatively proved if a comprehension of the defamatory nature of the written or spoken words requires extrinsic evidence of context or circumstances. We need not belabor this discussion further, however, because a "false accusation of theft is actionable per se—that is, libelous or slanderous per se." Accordingly, Appellants were not required to provide affirmative proof of

> injury to their reputations in order to recover for the defamatory statements at issue in this case.

In other words, certain types of statements—including false accusations of theft—are presumed to have damaged the plaintiffs' reputations, and thus no proof of injury resulting from such statements is required: they are "actionable per se." "All *other* defamatory statements are merely libelous or slanderous per quod"; these require "affirmative proof of injury to the plaintiffs' reputations." Charter's contention that the per se/per quod determination turns on whether extrinsic proof is needed to interpret the statement as defamatory is thus misguided; it is instead "the proof necessary to demonstrate an injury to reputation" that "varies depending upon the characterization of the defamatory language" as defamation per se or per quod.

Like the instant case, *Stringer* involved terminated employees who alleged that they were later falsely painted as thieves by their former employer. One of the statements at issue was that "there was more to the plaintiffs' firing than" eating candy from open bags (known as "claims candy"). The *Stringer* court concluded that this statement alone was enough to support the jury's finding of defamation per se.

Clearly, the words "there was more to it than that" are not, on their face, defamatory. Nor was the statement an obvious reference to theft even if placed in context: an assistant manager, "when asked whether the plaintiffs had been terminated for eating candy from the claims area, responded that"'there was more to it than that" and that he couldn't talk about it.'" Indeed, as in this case, the context (with its reference to "claims candy" or "candy from the claims area") likely would not have been understood by a non-employee. Yet because another employee testified that she interpreted the statement "as an assertion that the plaintiffs had stolen items in addition to claims candy," it was sufficient to support a verdict in favor of the plaintiffs. Charter's contention that the jury could not properly consider the context in which "Printer-gate" was discussed is therefore unavailing.

At bottom, the dispute over the characterization of "Printer-gate" is whether it is *actionable* per se or per quod—i.e., whether Plaintiffs should have been required to prove damages. As explained in *Stringer,* no proof of damages is required where the statement amounts to an accusation of theft, whether direct or indirect. Charter is thus not entitled to judgment as a matter of law on this ground.

B. Truth Defense

Charter seeks a new trial on the ground that the Court "erred by granting judgment foreclosing the defense of truth." It contends that this "defense should have gone to the jury as long as there was evidence in the record—from any source—sufficient to permit a reasonable jury to conclude that Plaintiffs' actions met the definition of theft." The two cases it cites in support of this contention state no such rule. Charter next cites the Kentucky model jury instruction for theft by unlawful taking, asserting that "proving the defense of truth simply required evidence from which a jury could conclude" that the three statutory elements of theft were met. Those elements, as set out in the criminal pattern instruction, are (1) that Plaintiffs took property that belonged to Charter; (2) that in so doing, they knew the property was not their own and were not acting under a claim of right to it; and (3) that in taking the property, Plaintiffs intended to deprive Charter of it.

The Court notes that Charter objected at trial to application of the statutory definition of theft (which formed part of the model instruction on defamation per se), and its counsel admitted that no witness had referred to Plaintiffs' conduct as criminal. In fact, Charter's company representative, Mike Barnard, testified unequivocally that Plaintiffs "did not have the intent to steal" and did not steal from Charter. Each of the plaintiffs testified that there was nothing surreptitious about their taking of the printers; some testified that they didn't even need or want the printers but accepted them at Showalter's repeated urging. All testified that they believed Showalter's distribution of the printers was authorized by management.

Charter nevertheless argues that "there was ample evidence from which the jury could have concluded that the Plaintiffs knew that they did not have legitimate permission to take company property, and that they did so anyway." In support, it first points to various Charter policies and Plaintiffs' acknowledgment that they failed to independently seek authorization from a manager before accepting the printers. According to Charter, "Plaintiffs' decisions *not* to follow known procedures provides evidence that Plaintiffs knew they did not have authorization to take company property and it could give rise to a reasonable inference that Plaintiffs did not ask for authorization because they knew they would not like the answer they would get." Such an inference is not reasonable, however, in light of the overwhelming evidence—including from Charter's own representative—that Plaintiffs lacked criminal intent.

Charter next asserts that Showalter lacked either actual or apparent authority to distribute the printers because "none of the Plaintiffs testified that a manager at Charter suggested to them that Ms. Showalter had authority to give away the printers." Whether the evidence establishes apparent authority as a matter of Kentucky agency law is of little relevance, however. It is now undisputed that Showalter was not authorized to distribute the printers. The fact that she may have lacked legal authority says nothing about Plaintiffs' state of mind, i.e., whether Plaintiffs "knew the printers were not their own" and thus intended to steal them. Meanwhile, Plaintiffs' testimony that they believed Showalter was authorized to give them the printers fits neatly into Kentucky's "claim of right" defense to theft, which applies if the defendant "had the permission, or believed he had the permission, of the victim or some other person authorized to give permission to take the property.

Charter's final assertion, that "there was evidence that Plaintiffs knew their conduct was improper, because they *lied* about how they got the printers to make their actions appear legitimate," likewise barely warrants discussion. As evidence of Plaintiffs' purported dishonesty, Charter cites an exhibit attached to each plaintiff's interrogatory answers that characterized the printers as having been "apparently passed out as part of an incentive program with the knowledge of management." Plaintiffs did not, as Charter implies, admit to "fabricating" that statement; rather, they merely acknowledged that they did not receive the printers through an incentive program. A generic exhibit attached to discovery responses, drafted by counsel as part of litigation and with the qualifier "apparently," hardly constitutes the sort of "evidence that one has attempted to cover up a crime" that would serve as "circumstantial proof of one's consciousness of guilt." Charter further misrepresents the record when it claims, citing the testimony of Kruti Desai and Gale Parkerson, that "Plaintiffs admitted that management had not actually been informed of the printer-distribution scheme": Desai acknowledged that she *now* knows that managers were not aware that she had taken printers, while Gale

Parkerson agreed that Charter ultimately determined that Showalter lacked authority to distribute the printers.

In sum, there was insufficient evidence for the jury to reasonably find that Plaintiffs intended to steal the printers, and the Court thus did not err in granting judgment as a matter of law on the issue of truth. Charter is not entitled to a new trial on this ground.

C. Qualified Privilege

Charter next argues that it should have been permitted to assert the defense of qualified privilege. Charter sought leave to amend its answer to assert qualified privilege after the deadline for amendment of pleadings had passed. Magistrate Judge Dave Whalin denied the motion, and the Court overruled Charter's objection to that ruling. In its post-trial motion, Charter argues for the first time that amendment was not required, and it again challenges the denial of its request to amend.

The court held that "Charter waived the defense of qualified privilege by failing to assert it in a responsive pleading" and that the magistrate judge properly denied Charter's motion for leave to amend its answer to assert that defense.

The Court recognizes that availability of the qualified-privilege defense could have drastically altered the outcome of this case. An inexplicable oversight or strategic error on Charter's part, however, does not justify altering the litigation schedule or depriving Plaintiffs of necessary discovery in disregard of Sixth Circuit law and the Federal Rules of Civil Procedure. Given Charter's failure to assert qualified privilege in its answer, a timely amended answer, or a motion to dismiss, it is reasonable to conclude that omission of the defense earlier in the case was intentional. Yet Charter now essentially asks the Court to allow it the benefit of hindsight—to benefit both from asserting the defense, and from not asserting it. Charter is not entitled to a new trial on this ground.

Arku v. Wells Fargo Bank, No. 3:22-cv-00225-RJC-DCK (W.D.N.C. Aug. 15, 2022)

Robert J. Conrad, Jr., United States District Judge

I. BACKGROUND

A. Factual Background

Plaintiff Josephine Arku filed this action against Defendant Wells Fargo Bank, National Association ("Wells Fargo") seeking compensatory damages for allegedly informing Plaintiff's prospective employers that she owed Wells Fargo an overpayment which caused her to lose several job opportunities.

Accepting the well-pleaded factual allegations of the Complaint as true, Plaintiff worked for Wells Fargo for more than twenty years when she needed to take paid leave from work. Thereafter, in February 2016, she was subject to a corporate layoff and received a severance package which included continuation of her salary for eleven months. Wells Fargo calculated the number of benefits that Plaintiff received. In August 2016, Plaintiff accepted short-term employment for five months through Wells Fargo and then started to apply for other job opportunities. Potential employers notified Plaintiff that Wells Fargo reported her as owing an overpayment to Wells Fargo. Once Plaintiff became aware of the overpayment, she contacted Wells Fargo and paid back the overpayment with the understanding that Wells Fargo would remove the overpayment information from her record. After receiving payment, Wells Fargo failed to remove the overpayment information from Plaintiff's record, despite numerous requests to do so. Between 2018 and 2020, Plaintiff applied to employers and believes, due to the overpayment listing on her record, that she lost various job opportunities. Plaintiff alleges that Wells Fargo's failure to correct the adverse employment information caused her to lose

$135,000 in income and resulted in a $100,000 increase in interest payments regarding her home and vehicle loans.

III. DISCUSSION

In the Motion to Dismiss, Wells Fargo argues (1) it is immune from civil liability; and (4) Plaintiff did not meet the heightened pleading standard for a negligent misrepresentation claim.

A. Civil Immunity

Under N.C. Gen. Stat. § 1-539.12, Wells Fargo asserts that it is immune from liability for both the breach of contract and negligent misrepresentation claims. Wells Fargo cites to subsection (a) of the statute, which states:

> An employer who discloses information about a current or former employee's job history or job performance to a prospective employer of the current or former employee upon request of the prospective employer or upon request of the current or former employee is immune from civil liability and is not liable in civil damages for the disclosure or any consequences of the disclosure.

The statute further defines "job performance" as "(1) the suitability of the employee for re-employment; (2) the employee's skills, abilities, and traits as they may relate to suitability for future employment; and (3) in the case of a former employee, the reason for the employee's separation."

Relying on this statute, Wells Fargo argues that it has civil immunity because reporting the overpayment information is akin to disclosing Plaintiff's job history and performance to a prospective employer. In particular, Wells Fargo argues that the information relates to Plaintiff's suitability for re-hire. Plaintiff disagrees, arguing that overpayment information is not correlated to an employee's job performance.

The statute appears incongruent with the facts of this case. The statute only provides immunity when a former employer provides information to a prospective employer regarding an employee's job performance or job history. Here, the information that Wells Fargo disclosed about Plaintiff was her failure to pay an overpayment that she received from Wells Fargo. It is unclear how this information pertains to her job performance or job history. For example, the best and worst employee could receive an overpayment from the same employer and disclosing this information would provide no insight into the abilities or job performance of either employee.

Moreover, the facts do not show that Wells Fargo disclosed the overpayment information "upon request of the prospective employer." It appears that Wells Fargo reported this information to a Credit Bureau. There are no facts that Wells Fargo provided any information about Plaintiff directly to a prospective employer upon that prospective employer's request as required under the statute.

Regardless, even if the statute does apply to information about an employee's failure to pay back an overpayment, it does not provide immunity when the information is false. Here, Plaintiff alleges that Wells Fargo failed to remove the overpayment information even after she repaid it, and that she lost potential employment because of this. Plaintiff thus alleges that she lost employment opportunities because of false information that Wells Fargo provided. This precludes civil immunity.

D. Negligent Misrepresentation

Wells Fargo asserts that Plaintiff failed to meet the heightened pleading standard for a negligent misrepresentation claim. North Carolina has adopted the definition of negligent misrepresentation set forth in the Restatement (Second) of Torts under which:

> one who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Thus, the tort of negligent misrepresentation occurs when (1) a party justifiably relies, (2) to his detriment, (3) on information prepared without reasonable care, (4) by one who owed the relying party a duty of care. "Such a duty commonly arises within professional relationships." Moreover, Federal Rule of Civil Procedure 9(b) mandates a heightened standard for pleading a claim for fraud or mistake. Rule 9(b) requires, "in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." To meet this standard, the plaintiff must, at a minimum, describe “the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby,” otherwise known as the “who, what, when, where, and how” of the alleged fraud. This Court has previously held the heightened pleading standard applies to negligent misrepresentation claims.

Accepting all the well-pleaded facts as true, the Complaint states facts sufficient to meet all the elements of a negligent misrepresentation claim. First, it is plausible that Plaintiff’s former employer, Wells Fargo, owed her a reasonable duty of care when reporting information relating to her credit. Second, the Complaint states that Wells Fargo continued to report false information after Plaintiff repaid the overpayment. This shows that Wells Fargo may have breached its duty to Plaintiff by reporting the information without reasonable care. Third, Plaintiff relied on Wells Fargo’s assertion that it would remove the overpayment notice. And fourth, her reliance on Wells Fargo’s reporting led to her detriment as she lost multiple job opportunities when Wells Fargo failed to remove the notice.

Moreover, the Complaint meets the heightened pleading standard under Rule 9(b) because it states the “who, what, when, where, and how” of the alleged mistake. For example, in the Complaint, the “who” is identified as Wells Fargo, who allegedly committed negligent misrepresentation; the “what” is identified as Wells Fargo’s failure to remove the overpayment notice; the “when” is 2018 to 2020, the time period when the alleged breach occurred; the “where” is on Plaintiff’s credit report; and the “how” is that Wells Fargo failed to remove the notice after Plaintiff repaid the overpayment, in contravention of the agreement between the parties. Plaintiff’s failure to specifically identify the employee(s) she communicated with at Wells Fargo is not fatal to her claim at this time as the Complaint meets the heightened pleading standard.

Moreover, “there is no requirement that any precise formula be followed or that any certain language be used,” and “it is sufficient if, upon a liberal construction of the whole pleading, the charge of fraud might be supported by proof of the alleged constitutive facts.” “Significantly, a court should not dismiss a complaint pursuant to Rule 9(b) if the court is satisfied that the defendant has been made aware of the particular circumstances for which he will have to prepare a defense at trial.” In this respect, Wells Fargo has been made aware of the negligent misrepresentation claim against it that stems from its failure to remove the notice after Plaintiff repaid the overpayment, resulting in lost employment opportunities for Plaintiff. Accordingly, Defendant's motion to dismiss the negligent misrepresentation claim is denied.

NCGS § 1-539.12

Immunity from civil liability for employers disclosing information.

(a) An employer who discloses information about a current or former employee's job history or job performance to a prospective employer of the current or former employee upon request of the prospective employer or upon request of the current or former employee is immune from civil liability and is not liable in civil damages for the disclosure or any consequences of the disclosure. This immunity shall not apply when a claimant shows by a preponderance of the evidence both of the following:

(1) The information disclosed by the current or former employer was false.

(2) The employer providing the information knew or reasonably should have known that the information was false.

(b) For purposes of this section, "job performance" includes:

(1) The suitability of the employee for re-employment;

(2) The employee's skills, abilities, and traits as they may relate to suitability for future employment; and

(3) In the case of a former employee, the reason for the employee's separation.

(c) The provisions of this section apply to any employee, agent, or other representative of the current or former employer who is authorized to provide and who provides information in accordance with the provisions of this section. For the purposes of this section, "employer" also includes a job placement service but does not include a private personnel service as defined in G.S. 95-47.1 except as provided hereinafter. The provisions of this section apply to a private personnel service as defined in G.S. 95-47.1 only to the extent that the service conveys information derived from credit reports, court records, educational records, and information furnished to it by the employee or prior employers and the service identifies the source of the information.

(d) This section does not affect any privileges or immunities from civil liability established by another section of the General Statutes or available at common law.

Friel v. Angell Care, Inc., 440 S.E.2d 111 (N.C. App. 1994)

WYNN, Judge.

Plaintiff Patricia W. Friel was employed as a secretary by defendant company Angell Care Incorporated ("Angell Care") from July 1982 until 17 April 1987. She held several positions within the company before being assigned to be the personal secretary to Bruce Smith, a new vice-president of the company. On or about 18 March 1987, plaintiff alleged that Smith had sexually harassed her. On 17 April 1987, plaintiff entered into a settlement agreement signed by Angell Care's president, Dennis Young, on behalf of Angell Care. Under the terms of the agreement, plaintiff would leave the company and would not discuss the terms and contents of the agreement. Angell Care would pay plaintiff $9566.63; would not discuss the terms or contents of the agreement with plaintiff's prospective employers; and would provide her prospective employers with neutral employment references.

After leaving Angell Care, plaintiff stayed home with her children, intermittently caring for other children in her home.

During the week of 23 May 1988, plaintiff testified against Angell Group Inc., a company related to Angell Care, pursuant to a subpoena in the case of *Angell Group, Inc., et al. v. Bowling Green Health Care Center, Inc., et al.,* in Forsyth County Superior Court.

In approximately June or July 1990, plaintiff applied for several secretarial positions. She contacted a local attorney, Meyressa Schoonmaker, for employment, either with Schoonmaker's law practice or with the North Carolina Center for Laws Affecting Women ("NCLAW"), an organization of which Schoonmaker was the president and legal director. Plaintiff submitted an application to Schoonmaker, listing her last employer as Angell Care and giving the names of Don Angell and Stewart Swain. Schoonmaker asked a NCLAW employee, Linda Parker, to contact Angell and Swain. Parker contacted Angell. She asked him if he would rehire plaintiff. When he said he would not, Parker asked why. Parker's and Angell's accounts of his response differ. Angell testified that he said, "there was an unproven sexual harassment charge when she left," and that he "was not aware of the details." Parker's written notes of the conversation state, "Angell said that plaintiff left under adverse (?) circumstances, and he really could not discuss the circumstances." Plaintiff was not offered either position with Schoonmaker.

In August 1990, plaintiff asked Sherrill Horton, a friend who worked for a law firm, if she knew anyone who needed a secretary. Horton said that she did not know if the firm had any openings, but one of the attorneys was unhappy with his current secretary. Plaintiff asked Horton to call Don Angell for a reference, because she wanted to know why Angell Care would not rehire her. Horton called Don Angell, indicating that she was calling him on behalf of her firm because plaintiff had listed him as a reference in applying for a job there, even though plaintiff had not actually submitted an application. Horton testified, and Angell confirmed, that she asked if the company would rehire plaintiff; he said it would not; and he said plaintiff had accused a male employee of sexual harassment, but the charge was never proven. Horton further testified that Angell said that plaintiff left the company under adverse circumstances and that she was difficult to work with.

On 19 October 1990, plaintiff sued Angell Care and Don Angell for compensatory and punitive damages. Plaintiff alleged that Angell and Angell Care had breached the settlement contract; committed slander *per se;* maliciously interfered with her contractual rights; and blacklisted her in violation of N.C.Gen.Stat. § 14-355.

Defendants moved for summary judgment on all the claims. The motion was heard on 16 July 1992. By written order and judgment entered 23 July 1992, the court granted summary judgment for defendants on the slander, malicious interference with contractual rights, and blacklisting claims. On 21 July 1992, plaintiff filed a voluntary dismissal without prejudice of her breach of contract claim.

Plaintiff appealed the claims of slander *per se,* malicious interference with contractual rights, and blacklisting, as to both defendants.

I.

Plaintiff contends that Angell's statements to Parker and Horton were slander *per se* because they impeached her in her profession.

Initially, we uphold summary judgment on the portion of the slander action that is based on Angell's statements to Horton. All the evidence indicates that the conversation between Angell and Horton took place at the request and direction of the plaintiff. A communication to the plaintiff, or to a person acting at the plaintiff's request, cannot form the basis for a libel or slander claim. In this case, Horton contacted Angell because plaintiff had asked her to "check out (her) references," not because Horton's employer had independently wished to contact Angell. Under these circumstances, plaintiff has no claim for defamation based on any statement made to Horton.

This leaves us with the statements made to Linda Parker. A claim of slander *per se* has three essential elements:

> To establish a claim for slander *per se,* a plaintiff must prove: (1) defendant spoke base or defamatory words which tended to prejudice him in his reputation, office, trade, business or means of livelihood or hold him up to disgrace, ridicule or contempt; (2) the statement was false; and (3) the statement was published or communicated to and understood by a third person.

We find that plaintiff has not met the second element of this cause of action. Plaintiff never established that Angell's statements to Parker were false. Angell said that he would not rehire plaintiff; there was an unproven sexual harassment charge when she left the company; and, viewing the evidence in the best light for plaintiff, that plaintiff left the company under adverse circumstances. All the evidence suggests that the statements were in fact true. Plaintiff left the employment of defendant pursuant to a negotiated settlement after making a claim of sexual harassment which was not proven. A description of this situation as "adverse circumstances" does not seem inaccurate.

We note that defendant's statements to Parker and Horton may well have been in breach of the settlement agreement between plaintiff and defendant Angell Care, Inc. However, because plaintiff voluntarily dismissed her claim for breach of contract, issues relating to performance of that contract are not before us today.

II.

Plaintiff next contends that defendant maliciously interfered with her right to enter into an employment contract with Meyressa Schoonmaker and the North Carolina Center for Laws Affecting Women. In order to state a claim for malicious interference with contract, plaintiff must establish that the defendant's actions were malicious in the legal sense. To establish legal malice, a plaintiff must show that defendant interfered "with design of injury to plaintiff or gaining some advantage at his expense." Plaintiff never established that defendant intended to injure her or gain some advantage at her expense. The only evidence of malice plaintiff put forth is her belief that Angell felt ill will toward her because after she testified adversely to defendants in the *Bowling Green Health Care* case, Angell raised his voice and exhibited anger toward the other party (not toward her). Plaintiff's speculation, without any facts to support it, is clearly insufficient to meet her burden of proof. A party cannot prevail against a motion for summary judgment by relying on "conclusory allegations, unsupported by facts." We affirm summary judgment for defendant on the malicious interference with contract claim.

III.

Plaintiff's third claim is that defendant Angell's conversations with Parker and Horton violated N.C.Gen.Stat. § 14-355, which prohibits blacklisting employees. Under this statute, an employer may be liable if, after discharging someone from employment, it prevents or attempts to prevent that person from obtaining employment:

> If any person, agent, company or corporation, after having discharged any employee from his or its service, shall prevent or attempt to prevent, by word or writing of any kind, such discharged employee from obtaining employment with any other person, company or corporation, such person, agent or corporation shall be guilty of a misdemeanor and shall be liable in penal damages to such discharged person, to be recovered by civil action. This section shall not be construed as prohibiting any person from furnishing in writing, upon request, any other person, company or corporation to whom such discharged person has applied for employment, a truthful statement of the reason for such discharge.

However, statements made about a former employee in response to a request from a prospective employer are privileged under § 14-355. For the statute to be violated, the statements to the prospective employer would have had to have been unsolicited. Plaintiff admits here that Don Angell's statements came only upon inquiry from people he believed to be prospective employers of his former employee. We therefore hold that N.C.Gen.Stat. § 14-355 does not apply as a matter of law and uphold summary judgment for defendants.

Kadlec Medical Center v. Lakeview Anesthesia Assocs., 527 F.3d 412 (5th Cir. 2008)

REAVLEY, Circuit Judge:

Kadlec Medical Center and its insurer, Western Professional Insurance Company, filed this diversity action in Louisiana district court against Louisiana Anesthesia Associates (LAA), its shareholders, and Lakeview Regional Medical Center (Lakeview Medical). The LAA shareholders worked with Dr. Robert Berry — an anesthesiologist and former LAA shareholder — at Lakeview Medical, where the defendants discovered his on-duty use of narcotics. In referral letters written by the defendants and relied on by Kadlec, his future employer, the defendants did not disclose Dr. Berry's drug use.

While under the influence of Demerol at Kadlec, Dr. Berry's negligent performance led to the near-death of a patient, resulting in a lawsuit against Kadlec. Plaintiffs claim here that the defendants' misleading referral letters were a legal cause of plaintiffs' financial injury, i.e., having to pay over $8 million to defend and settle the lawsuit. The jury found in favor of the plaintiffs and judgment followed. We reverse the judgment against Lakeview Medical, vacate the remainder of the judgment, and remand.

I. Factual Background

Dr. Berry was a licensed anesthesiologist in Louisiana and practiced with Drs. William Preau, Mark Dennis, David Baldone, and Allan Parr at LAA. From November 2000 until his termination on March 13, 2001, Dr. Berry was a shareholder of LAA, the exclusive provider of anesthesia services to Lakeview Medical (a Louisiana hospital).

In November 2000, a small management team at Lakeview Medical investigated Dr. Berry after nurses expressed concern about his undocumented and suspicious withdrawals of Demerol. The investigative team found excessive Demerol withdrawals by Dr. Berry and a lack of documentation for the withdrawals.

Lakeview Medical CEO Max Lauderdale discussed the team's findings with Dr. Berry and Dr. Dennis. Dr. Dennis then discussed Dr. Berry's situation with his partners. They all agreed that Dr. Berry's use of Demerol had to be controlled and monitored. But Dr. Berry did not follow the agreement or account for his continued Demerol withdrawals. Three months later, Dr. Berry failed to answer a page while on-duty at Lakeview Medical. He was discovered in the call-room, asleep, groggy, and unfit to work. Personnel immediately called Dr. Dennis, who found Dr. Berry not communicating well and unable to work. Dr. Dennis had Dr. Berry taken away after Dr. Berry said that he had taken prescription medications.

Lauderdale, Lakeview Medical's CEO, decided that it was in the best interest of patient safety that Dr. Berry not practice at the hospital. Dr. Dennis and his three partners at LAA fired Dr. Berry and signed his termination letter on March 27, 2001, which explained that he was fired "for cause":

> You have been fired for cause because you have reported to work in an impaired physical, mental, and emotional state. Your impaired condition has prevented you from properly performing your duties and puts our patients at significant risk. Please consider your termination effective March 13, 2001.

At Lakeview Medical, Lauderdale ordered the Chief Nursing Officer to notify the administration if Dr. Berry returned.

Despite recognizing Dr. Berry's drug problem and the danger he posed to patients, neither Dr. Dennis nor Lauderdale reported Dr. Berry's impairment to the hospital's Medical Executive Committee, eventually noting only that Dr. Berry was "no longer employed by LAA." Neither one reported Dr. Berry's impairment to Lakeview Medical's Board of Trustees, and no one on behalf of Lakeview Medical reported Dr. Berry's impairment or discipline to the Louisiana Board of Medical Examiners or to the National Practitioner's Data Bank. In fact, at some point Lauderdale took the unusual step of locking away in his office all files, audits, plans, and notes concerning Dr. Berry and the investigation.

After leaving LAA and Lakeview Medical, Dr. Berry briefly obtained work as a *locum tenens* (traveling physician) at a hospital in Shreveport, Louisiana. In October 2001, he applied through Staff Care, a leading *locum tenens* staffing firm, for *locum tenens* privileges at Kadlec Medical Center in Washington State. After receiving his application, Kadlec began its credentialing process. Kadlec examined a variety of materials, including referral letters from LAA and Lakeview Medical.

LAA's Dr. Preau and Dr. Dennis, two months after firing Dr. Berry for his on-the-job drug use, submitted referral letters for Dr. Berry to Staff Care, with the intention that they be provided to future employers. The letter from Dr. Dennis stated that he had worked with Dr. Berry for four years, that he was an excellent clinician, and that he would be an asset to any anesthesia service. Dr. Preau's letter said that he worked with Berry at Lakeview Medical and that he recommended him highly as an anesthesiologist. Dr. Preau's and Dr. Dennis's letters were submitted on June 3, 2001, only sixty-eight days after they fired him for using narcotics while on-duty and stating in his termination letter that Dr. Berry's behavior put "patients at significant risk."

On October 17, 2001, Kadlec sent Lakeview Medical a request for credentialing information about Berry. The request included a detailed confidential questionnaire, a delineation of privileges, and a signed consent for release of information. The interrogatories on the questionnaire asked whether "Dr. Berry has been subject to any disciplinary action," if "Dr. Berry has the ability (health status) to perform the privileges requested," whether "Dr. Berry has shown any signs of behavior/personality problems or impairments," and whether Dr. Berry has satisfactory "judgement."

Nine days later, Lakeview Medical responded to the requests for credentialing information about fourteen different physicians. In thirteen cases, it responded fully and completely to the request, filling out forms with all the information asked for by the requesting health care provider. The fourteenth request, from Kadlec concerning Berry, was handled differently. Instead of completing the multi-part forms, Lakeview Medical staff drafted a short letter. In its entirety, it read:

> This letter is written in response to your inquiry regarding Dr. Berry. Due to the large volume of inquiries received in this office, the following information is provided.
>
> Our records indicate that Dr. Robert L. Berry was on the Active Medical Staff of Lakeview Regional Medical Center in the field of Anesthesiology from March 04, 1997 through September 04, 2001.
>
> If I can be of further assistance, you may contact me at (504) 867-4076.

The letter did not disclose LAA's termination of Dr. Berry; his on-duty drug use; the investigation into Dr. Berry's undocumented and suspicious withdrawals of Demerol that "violated the standard of care"; or any other negative information. The employee who drafted the letter said at trial that she just followed a form letter, which is one of many that Lakeview Medical used.

Kadlec then credentialed Dr. Berry, and he began working there. After working at Kadlec without incident for a number of months, he moved temporarily to Montana where he worked at Benefis Hospital. During his stay in Montana, he was in a car accident and suffered a back injury. Kadlec's head of anesthesiology and the credentialing department all knew of Dr. Berry's accident and back injury, but they did not investigate whether it would impair his work.

After Dr. Berry returned to Kadlec, some nurses thought that he appeared sick and exhibited mood swings. One nurse thought that Dr. Berry's entire demeanor had changed and that he should be watched closely. In mid-September 2002, Dr. Berry gave a patient too much morphine during surgery, and she had to be revived using Narcan. The neurosurgeon was irate about the incident.

On November 12, 2002, Dr. Berry was assigned to the operating room beginning at 6:30 a.m. He worked with three different surgeons and multiple nurses well into the afternoon. According to one nurse, Dr. Berry was "screwing up all day" and several of his patients suffered adverse affects from not being properly anesthetized. He had a hacking cough and multiple nurses thought he looked sick. During one procedure, he apparently almost passed out.

Kimberley Jones was Dr. Berry's fifth patient that morning. She was in for what should have been a routine, fifteen minute tubal ligation. When they moved her into the recovery room, one nurse noticed that her fingernails were blue, and she was not breathing. Dr. Berry failed to resuscitate her, and she is now in a permanent vegetative state.

Dr. Berry's nurse went directly to her supervisor the next morning and expressed concern that Dr. Berry had a narcotics problem. Dr. Berry later admitted to Kadlec staff that he had been diverting and using Demerol since his June car accident in Montana and that he had become addicted to Demerol. Dr. Berry wrote a confession, and he immediately admitted himself into a drug rehabilitation program.

Jones's family sued Dr. Berry and Kadlec in Washington. Dr. Berry's insurer settled the claim against him. After the Washington court ruled that Kadlec would be responsible for Dr. Berry's conduct under *respondeat superior,* Western, Kadlec's insurer, settled the claim against Kadlec.

II. Procedural History

Kadlec and Western filed this suit in Louisiana district court against LAA, Dr. Dennis, Dr. Preau, Dr. Baldone, Dr. Parr, and Lakeview Medical, asserting Louisiana state law claims for intentional misrepresentation, negligent misrepresentation, strict responsibility misrepresentation, and general negligence. Plaintiffs alleged that defendants' tortious activity led to Kadlec's hiring of Dr. Berry and the resulting millions of dollars it had to expend settling the Jones lawsuit. Plaintiffs' claim against LAA for negligence, based on a negligent monitoring and investigation theory, was dismissed before trial.

Plaintiffs' surviving claims for intentional and negligent misrepresentation arise out of the alleged misrepresentations in, and omissions from, the defendants' referral letters for Dr. Berry. These claims were tried to a jury, which returned a verdict in favor of the plaintiffs on both claims. The jury awarded plaintiffs $8.24 million, which is approximately equivalent to the amount Western spent settling the Jones lawsuit ($7.5 million) plus the amount it spent on attorneys fees, costs, and expenses (approximately $744,000) associated with the Jones lawsuit. The jury also found Kadlec and Dr. Berry negligent. The jury apportioned fault as follows: Dr. Dennis 20%; Dr. Preau 5%; Lakeview Medical 25%; Kadlec 17%; and Dr. Berry 33%. The judgments against Dr. Dennis and Dr. Preau were *in solido* with LAA. Because defendants were found liable for intentional misrepresentation, plaintiffs' recovery was not reduced by the percentage of fault ascribed to Kadlec. But the amount was reduced to $5.52 million to account for Dr. Berry's 33% of the fault. The district court entered judgment against Lakeview Medical and LAA.

III. Discussion

A. The Intentional and Negligent Misrepresentation Claims

The plaintiffs allege that the defendants committed two torts: intentional misrepresentation and negligent misrepresentation. The elements of a claim for *intentional* misrepresentation in Louisiana are: (1) a misrepresentation of a material fact; (2) made with intent to deceive; and (3) causing justifiable reliance with resultant injury. To establish a claim for intentional misrepresentation when it is by silence or inaction, plaintiffs also must show that the defendant owed a duty to the plaintiff to disclose the information. To make out a *negligent* misrepresentation claim in Louisiana: (1) there must be a legal duty on the part of the defendant to supply correct information; (2) there must be a breach of that duty, which can occur by omission as well as by affirmative misrepresentation; and (3) the breach must have caused damages to the plaintiff based on the plaintiff's reasonable reliance on the misrepresentation.

The defendants argue that any representations in, or omissions from, the referral letters cannot establish liability. We begin our analysis below by holding that after choosing to write referral letters, the defendants assumed a duty not to make affirmative misrepresentations in the letters. We next analyze whether the letters were misleading, and we conclude that the LAA defendants' letters were misleading, but the letter from Lakeview Medical was not. We also examine whether the defendants had an affirmative duty to disclose negative information about Dr. Berry in their referral letters, and we conclude that there was not an affirmative duty to disclose. Based on these holdings, Lakeview Medical did not breach any duty owed to Kadlec, and therefore the judgment against it is reversed. Finally, we examine other challenges to the LAA defendants' liability, and we conclude that they are without merit.

1. The Affirmative Misrepresentations

The defendants owed a duty to Kadlec to avoid affirmative misrepresentations in the referral letters. In Louisiana, "although a party may keep absolute silence and violate no rule of law or equity, if he volunteers to speak and to convey information which may influence the conduct of the other party, he is bound to disclose the whole truth." In negligent misrepresentation cases, Louisiana courts have held that even when there is no initial duty to disclose information, "once a party volunteers information, it assumes a duty to insure that the information volunteered is correct."

Consistent with these cases, the defendants had a legal duty not to make affirmative misrepresentations in their referral letters. A party does not incur liability every time it casually makes an incorrect statement. But if an employer makes a misleading statement in a referral letter about the performance of its former employee, the former employer may be liable for its statements if the facts and circumstances warrant. Here, defendants were recommending an anesthesiologist, who held the lives of patients in his hands every day. Policy considerations dictate that the defendants had a duty to avoid misrepresentations in their referral letters if they misled plaintiffs into thinking that Dr. Berry was an "excellent" anesthesiologist, when they had information that he was a drug addict. Indeed, if defendants' statements created a misapprehension about Dr. Berry's suitability to work as an anesthesiologist, then by "volunteering to speak and to convey information which influenced the conduct of Kadlec, they were bound to disclose the whole truth." In other words, if they created a misapprehension about Dr. Berry due to their own statements, they incurred a duty to disclose information about his drug use and for-cause firing to complete the whole picture.

We now review whether there is evidence that the defendants' letters were misleading. We start with the LAA defendants. The letter from Dr. Preau stated that Dr. Berry was an "excellent anesthesiologist" and that he "recommended him highly." Dr. Dennis's letter said that Dr. Berry was "an excellent physician" who "he is sure will be an asset to his future employer's anesthesia service." These letters are false on their face and materially misleading. Notably, these letters came only sixty-eight days after Drs. Dennis and Preau, on behalf of LAA, signed a letter terminating Dr. Berry for using narcotics while on-duty and stating that Dr. Berry's behavior put "patients at significant risk." Furthermore, because of the misleading statements in the letters, Dr. Dennis and Dr. Preau incurred a duty to cure these misleading statements by disclosing to Kadlec that Dr. Berry had been fired for on-the-job drug use.

The question as to whether Lakeview Medical's letter was misleading is more difficult. The letter does not comment on Dr. Berry's proficiency as an anesthesiologist, and it does not recommend him to Kadlec. Kadlec says that the letter is misleading because Lakeview Medical stated that it could not reply to Kadlec's detailed inquiry in full "due to the large volume of inquiries received." But whatever the real reason that Lakeview Medical did not respond in full to Kadlec's inquiry, Kadlec did not present evidence that this could have affirmatively misled it into thinking that Dr. Berry had an uncheckered history at Lakeview Medical.

Kadlec also says that the letter was misleading because it erroneously reported that Dr. Berry was on Lakeview Medical's active medical staff until September 4, 2001. Kadlec presented testimony that had it known that Dr. Berry never returned to Lakeview Medical after March 13, 2001, it would have been suspicious about the apparently large gap in his employment. While it is true that Dr. Berry did not return to Lakeview Medical after March 13, this did not terminate his privileges at the hospital, or mean that he was not on "active medical staff." In fact, it appears that Dr. Berry submitted a formal resignation letter on October 1, 2001, weeks *after* September 4. Therefore, while the September 4 date does not accurately reflect when Dr. Berry was no longer on Lakeview Medical's active medical staff, it did not mislead Kadlec into thinking that he had less of a gap in employment than he actually had.

In sum, we hold that the letters from the LAA defendants were affirmatively misleading, but the letter from Lakeview Medical was not. Therefore, Lakeview Medical cannot be held liable based on its alleged affirmative misrepresentations. It can only be liable if it had an affirmative duty to disclose information about Dr. Berry. We now examine the theory that, even assuming that there were no misleading statements in the referral letters, the defendants had an affirmative duty to disclose. We discuss this theory with regard to both defendants for reasons that will be clear by the end of the opinion.

2. The Duty to Disclose

In Louisiana, a duty to disclose does not exist absent special circumstances, such as a fiduciary or confidential relationship between the parties, which, under the circumstances, justifies the imposition of the duty. Louisiana cases suggest that before a duty to disclose is imposed the defendant must have had a pecuniary interest in the transaction. In Louisiana, the existence of a duty is a question of law, and we review the duty issue here *de novo*.

Plaintiffs assert that Lakeview Medical and the LAA doctors had a pecuniary interest in the referral letters supplied to Kadlec. The plaintiffs rely on the pecuniary interest definition in the Second Restatement of Torts. Section 552, comment d of the Restatement, provides (with emphasis added):

> The defendant's pecuniary interest in supplying the information will normally lie in a consideration paid to him for it or paid in a transaction in the course of and as a part of which it is supplied. It may, however, be of a more indirect character.
>
> The fact that the information is given in the course of the defendant's business, profession or employment is a sufficient indication that he has a pecuniary interest in it, even though he receives no consideration for it at the time. It is not, however, conclusive.

The "course of business" definition of pecuniary interest has been endorsed by Louisiana appellate courts. In *Anderson v. Heck,* the court defined the "pecuniary interest" of the defendant by directly quoting and applying the portion of the Restatement comment highlighted above. The court in *Dousson v. South Central Bell* held that the fact that information is given in the course of a party's business or profession is a sufficient indication of pecuniary interest even though the party receives no consideration for it at the time.

The defendants argue that, even assuming the Restatement governs, they did not have a pecuniary interest in providing reference information. They contend that any information provided to future employers about Dr. Berry was gratuitous, and they point out that the Restatement's comments say that a party will not be considered to have a pecuniary interest in a transaction where the information is given "purely gratuitously."

The defendants have the better argument on the lack of pecuniary interest and, in addition, the requisite "special relationship" between the defendants and Kadlec, necessary to impose a duty to disclose, is lacking.

Plaintiffs argue that policy considerations weigh in favor of recognizing a duty to disclose. They contend that imposing a duty on health care employers to disclose that a physician's drug dependence could pose a serious threat to patient safety promotes important policy goals recognized by Louisiana courts. Plaintiffs point to the decision in *Dornak v. Lafayette General Hospital,* where the Louisiana Supreme Court imposed on a hospital the duty to disclose to its employee the results of a pre-employment physical which showed tuberculosis, "especially considering the fact that her duties placed her in contact with co-employees and hospital patients." The Louisiana legislature recently adopted legislation that requires health care entities to "report to the appropriate professional licensing board each instance in which the health care entity takes an adverse action against a health care professional due to impairment or possible impairment." This shows that the legislature has recognized the importance of reporting possible impairments that could affect patient safety.

Despite these compelling policy arguments, we do not predict that courts in Louisiana — absent misleading statements such as those made by the LAA defendants — would impose an affirmative duty to disclose. The defendants did not have a fiduciary or contractual duty to disclose what it knew to Kadlec. And although the defendants might have had an ethical obligation to disclose their knowledge of Dr. Berry's drug problems, they were also rightly concerned about a possible defamation claim if they communicated negative information about Dr. Berry. As a general policy matter, even if an employer believes that its disclosure is protected because of the truth of the matter communicated, it would be burdensome to impose a duty on employers, upon receipt of a employment referral request, to investigate whether the negative information it has about an employee fits within the courts' description of *which* negative information must be disclosed to the future employer. Finally, concerns about protecting employee privacy weigh in favor of not mandating a potentially broad duty to disclose.

The Louisiana court in *Louviere* recognized that no court in Louisiana has imposed on an employer a duty to disclose information about a former employee to a future employer. Furthermore, we have not found a single case outside of Louisiana where a court imposed an affirmative duty on an employer to disclose negative information about a former employee. Some courts have held that employers have a legal duty to disclose negative information about former employees who later cause foreseeable physical harm in their new jobs, at least when there are misleading statements made by the former employer. But each of these cases based its conclusion on the fact that the former employer had made affirmative misrepresentations in its referral, and none imposed a duty based on the employer's mere nondisclosure. These cases reinforce our conclusion that the defendants had a duty to avoid misleading statements in their referral letters, but they do not support plaintiffs' duty to disclose theory. In fact, one court explicitly held that a hospital did not have an affirmative duty to disclose a nurse's past sexual misconduct toward patients when asked for an evaluation by a prospective employer, but that "the defendant did not challenge the proposition that, in undertaking to provide a reference, and in volunteering information about the employee's qualities as a nurse, it incurred a duty to use reasonable care to avoid disclosing factually misleading information."

3. Legal Cause

LAA contends that even if it breached a legal duty to Kadlec, the plaintiffs' claims fail for lack of legal causation. LAA argues that legal cause is not met here because Kadlec's and Dr. Berry's intervening negligence precludes concluding that it is a legal cause of plaintiffs' injuries. Because legal cause is a legal question under Louisiana law, we review the district court's conclusion as to legal cause *de novo*.

The leading case on legal cause in Louisiana is *Roberts v. Benoit*. There, the Louisiana Supreme Court held that "the critical test in Louisiana is phrased in terms of 'the ease of association' which melds policy and foreseeability into one inquiry: Is the harm which befell the plaintiff easily associated with the type of conduct engaged in by the defendant?" Under Louisiana law, and with the jury's factual findings in mind, the LAA defendants' actions and omissions were a legal cause of Kadlec's liability. Following the Louisiana Supreme Court, we ask ourselves whether the harm to plaintiffs is easily associated with the type of conduct engaged in by the defendant. Here, Dr. Dennis and Dr. Preau gave Dr. Berry favorable recommendations, when they knew that Dr. Berry had used narcotic drugs while on duty at a hospital. LAA even fired Dr. Berry for cause for "reporting to work in an impaired physical, mental, and emotional state, which prevented him from properly performing his duties and put his patients at significant risk." The harm to Jones and the harm to plaintiffs that resulted from the LAA defendants' breaches are "easily associated" with Kadlec's liability. In fact, harm stemming from Dr. Berry's use of narcotic drugs while on-duty is the type of harm we would expect.

The LAA defendants' argument that the intervening negligence of Dr. Berry and Kadlec absolves them of liability is not accepted. *Roberts* held that "it is well settled in Louisiana law that an intervening act does not automatically absolve a prior negligent party from liability." Whether an intervening act absolves a prior negligent actor from liability depends on the foreseeability of the act from the perspective of the original tortfeasor and whether the intervening act is "easily associated" with the risk of harm brought about by the breach of the original duty. Dr. Berry's hiring and his subsequent negligent use of narcotics while on-duty was foreseeable and “easily associated” with the LAA defendants’ actions. He had used narcotics while on-duty in the past, and the LAA defendants could foresee that he would do so again if they misled a future employer about his drug problem.

The LAA defendants focus on Kadlec’s negligence and claim that it was a superseding cause of plaintiffs’ injuries. They argue that Kadlec had multiple warning signs that Dr. Berry was using drugs, and had it responded with an investigation, plaintiffs’ injuries would have been avoided. The LAA defendants focus on Dr. Berry’s erratic behavior after his return from Montana, his over-anesthetization of a patient in September 2002, and the signs that he was ill on the day of Jones’s surgery. The jury found that Kadlec’s own negligence was a cause of plaintiffs’ financial injury. But this does not relieve the defendants of liability. The jury also reasonably concluded that the LAA defendants negligently *and intentionally* misled Kadlec about Dr. Berry’s drug addiction. By intentionally covering up Dr. Berry’s drug addiction in communications with a future employer, they should have foreseen that the future employer might miss the warning signs of Dr. Berry’s addiction. This was within the scope of the risk they took.

Indeed, both plaintiffs’ and defendants’ witnesses agreed at trial that narcotics addiction is a disease, that addicts try to hide their disease from their co-workers, and that particularly in the case of narcotics-addicted anesthesiologists, for whom livelihood and drug supply are in the same place, colleagues may be the last to know about their addiction and impairment. This is not a case where a future tortious act is so unforeseeable that it should relieve the earlier tortfeasor of liability. In fact, this case illustrates why the comparative fault system was developed — so, as here, multiple actors can share fault for an injury based on their respective degrees of responsibility.

Chapter 4: Scope & Limits of Employer Control

1. Control at Work

1.1 Privacy, Autonomy, & Dignity

K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W.2d 632 (Tex. App. 1984)

BULLOCK, Justice.

K-Mart Corporation appeals from a judgment awarding the appellee, Trotti, $8,000.00 in actual damages and $100,000.00 in exemplary damages for invasion of privacy.

The appellee was an employee in the hosiery department at the appellants' store number 7441. Her supervisors had never indicated any dissatisfaction with her work nor any suspicion of her honesty.

The appellants provided their employees with lockers for the storage of personal effects during working hours. There was no assignment of any given locker to any individual employee. The employees could, on request, receive locks for the lockers from the appellants, and if the appellants provided the lock to an employee they would keep either a copy of the lock's combination or a master key for padlocks. Testimony indicated that there was some problem in providing a sufficient number of locks to employees, and, as a result, the store's administrative personnel permitted employees to purchase and use their own locks on the lockers, but in these instances, the appellants did not require the employee to provide the manager with either a combination or duplicate key. The appellee, with appellants' knowledge, used one of these lockers and provided her own combination lock.

On October 31, 1981, the appellee placed her purse in her locker when she arrived for work. She testified that she snapped the lock closed and then pulled on it to make sure it was locked. When she returned to her locker during her afternoon break, she discovered the lock hanging open. Searching through her locker, the appellee further discovered her personal items in her purse in considerable disorder. Nothing was missing from either the locker or the purse. The store manager testified that, in the company of three junior administrators at the store, he had that afternoon searched the lockers because of a suspicion raised by the appellants' security personnel that an unidentified employee, not the appellee, had stolen a watch. The manager and his assistants were also searching for missing price-marking guns. The appellee further testified that, as she left the employee's locker area after discovering her locker open, she heard the manager suggest to his assistants, "Let's get busy again." The manager testified that none of the parties searched through employees' personal effects.

The appellee approached the manager later that day and asked if he had searched employees' lockers and/or her purse. The manager initially denied either kind of search and maintained this denial for approximately one month. At that time, the manager then admitted having searched the employees' lockers and further mentioned that they had, in fact, searched the appellee's purse, later saying that he meant that they had searched only her locker and not her purse.

The manager testified that during the initial hiring interviews, all prospective employees received verbal notification from personnel supervisors that it was the appellants' policy to conduct ingress-egress searches of employees and also to conduct unannounced searches of lockers. A personnel supervisor and an assistant manager, however, testified that, although locker searches did regularly occur, the personnel supervisors did not apprise prospective employees of this policy.

The fundamental and basic right to be left alone constitutes the essence of the right to privacy.

> The right of privacy has been defined as the right of an individual to be left alone, to live a life of seclusion, to be free from unwarranted publicity.

This right to privacy is so important that the United States Supreme Court has repeatedly deemed it to stem implicitly from the Bill of Rights. Our State courts have long recognized a civil cause of action for the invasion of the right to privacy and have defined such an invasion in many ways: As an intentional intrusion upon the solitude or seclusion of another that is highly offensive to a reasonable person, and as the right to be free from the wrongful intrusion into one's private activities in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.

The appellants requested the trial court to define an "invasion of privacy" as "the intentional intrusion upon the solitude or seclusion of another that is highly offensive to a reasonable person." The court refused to include the part of the requested instruction, "that is highly offensive to a reasonable person." The appellants argue that this refusal constituted an abuse of discretion because the Rules of Civil Procedure require such an instruction. The appellee alleges that the record establishes that the intrusion was highly offensive as a matter of law, and that, therefore, the instruction was unnecessary.

The definition of "invasion of privacy" that the appellant requested is one widely and repeatedly accepted. Although the Texas Supreme Court has not adopted a verbatim rendition of this definition, it is clear that, in Texas, an actionable invasion of privacy by intrusion must consist of an unjustified intrusion of the plaintiff's solitude or seclusion of such magnitude as to cause an ordinary individual to feel severely offended, humiliated, or outraged.

The appellants correctly point out that no Texas case yet reported has ever declined to include a requirement that the intrusion complained of be highly offensive to a reasonable person, and the appellee agrees with this statement. Nevertheless, the appellee urges that since the facts of this case established the highly objectionable nature of the intrusion as a matter of law, the requested instruction was unnecessary, and thus the trial court properly refused to include it.

We disagree with the appellee's contention. The record does indicate the appellee's outrage upon discovering the appellants' activities but fails to demonstrate that there could be no dispute as to the severity of the offensiveness of the intrusion, thereby making it impossible for us to conclude that the facts established the disputed portion of the instruction as a matter of law.

Moreover, we note that the result of accepting this contention would be to raise the legal theory of invasion of privacy from the realm of intentional torts into the sphere of strict liability. It would make any wrongful intrusion actionable, requiring a plaintiff to establish merely that the intrusion occurred and that the plaintiff did not consent to it. Because of the stern form of liability which already stems from an invasion of privacy, accepting a definition of invasion of privacy which lacked a standard of high offensiveness would result in fundamentally unfair assessments against defendants who offended unreasonably sensitive plaintiffs, but whose transgressions would not realistically fill either an ordinary person or the general society with any sense of outrage. A business executive, for example, could find himself liable for entering an associate's office without express permission; so could a beautician who opened a co-worker's drawer in order to find some supplies needed for a customer.

The lockers undisputably were the appellants' property, and in their unlocked state, a jury could reasonably infer that those lockers were subject to legitimate, reasonable searches by the appellants. This would also be true where the employee used a lock provided by the appellants, because in retaining the lock's combination or master key, it could be inferred that the appellants manifested an interest both in maintaining control over the locker and in conducting legitimate, reasonable searches. Where, as in the instant case, however, the employee purchases and uses his own lock on the lockers, with the employer's knowledge, the fact finder is justified in concluding that the employee manifested, and the employer recognized, an expectation that the locker and its contents would be free from intrusion and interference.

In the present case, there is evidence that the appellee locked the locker with her own lock; that when the appellee returned from a break, the lock was lying open; that upon searching her locker, the appellee discovered that someone had rifled her purse; that the appellants' managerial personnel initially denied making the search but subsequently admitted searching her locker and her purse. We find this is far more evidence than a "mere scintilla," and we hold that there is some evidence to support the jury's finding.

As to the "insufficiency" point, after examining the record as a whole, we find it indicates all of the above. The appellee remembers having locked the locker and having seen the lock closed before starting work that day. The record indicates that the searching personnel denied having gone through any employee's purses, yet nothing in the record directly challenges the appellee's testimony as to the disruption of her personal effects inside her purse, and, therefore, the jury could make a reasonable inference that the managerial personnel had, in fact, gone through her personal effects. The record also establishes that other employees knew these searches were going on. The store manager testified that all employees received notification of these sporadic searches during their hiring interviews; however, two administrators, including a former personnel supervisor, denied that employees ever received this notification. We hold that the weight of the evidence indicates that the appellants' employees came upon a locker with a lock provided by an employee, disregarded the appellee's demonstration of her expectation of privacy, opened and searched the locker, and probably opened and searched her purse as well; and, in so holding, we consider it is immaterial whether the appellee actually securely locked her locker or not. It is sufficient that an employee in this situation, by having placed a lock on the locker at the employee's own expense and with the appellants' consent, has demonstrated a legitimate expectation to a right of privacy in both the locker itself and those personal effects within it.

The appellants urged the trial court to adopt concepts of negligence in submitting an intentional tort to the jury and now ask this court to require such concepts in all disputes involving an invasion of privacy. The appellants cite considerable authority applying negligence concepts to cases involving intentional civil assaults and batteries.

These concepts are inapplicable, and the appellants' authorities are distinguishable on two grounds. First, the circumstances of those assault and battery cases raised questions of causation not usually encountered in intentional torts. Here, however, there is no question that the appellants invaded the appellee's privacy by opening the locked locker and by opening and investigating her purse. This unwarranted invasion of privacy alone demonstrates that the single act of opening and inspecting the locker, and certainly the purse, was sufficient to justify the jury's findings. We overrule the appellant's eighteenth through twenty-first points of error.

The appellants further argue that any physical effects of the intrusion were merely effects stemming from an earlier health problem the appellee had suffered. The record does support these facts, and it would be reasonable to conclude that the unwarranted intrusion of the locker and purse at best exacerbated an earlier physical ailment. This contention, however, is immaterial in this kind of case.

The basis of a cause of action for invasion of privacy is that the defendant has violated the plaintiff's rights to be left alone. This intrusion itself is actionable, and the plaintiff can receive at least nominal damages for that actionable intrusion without demonstrating physical detriment. The appellants' improper intrusion of an area where the appellee had manifested an expectation of privacy alone raised her right to recover. We overrule the appellants' fifteenth point of error.

The jury awarded $8,000.00 as actual damages and $100,000.00 as exemplary damages to the appellee. The appellants contend that this award of exemplary damages was improper because: (1) no evidence, or insufficient evidence, exists of malice.

An award of exemplary damages will be improper where the defendant acted in good faith. A mere wrongful act is insufficient to justify the award of exemplary damages. An award of exemplary damages requires a preliminary finding that the defendant behaved maliciously or with wanton disregard for the plaintiff. Malice is an unlawful act done intentionally and without justification or excuse.

The appellants argue that no malice exists in this case because: (1) the appellants acted correctly and lawfully in opening and searching the lockers; and (2) even if the appellants wrongfully searched the lockers, they did so in a good faith belief that they had the right to do so. Neither of the appellants' allegations has merit.

First, the record establishes, and we have held herein, that the appellants' search of the appellee's locker and purse was wrongful. The mere suspicion either that another employee had stolen watches, or that unidentified employees may have stolen price-marking guns was insufficient to justify the appellants' search of appellee's locker and personal possessions without her consent. The record also demonstrates that the appellants lied to appellee and concealed the truth of their wrongful search for approximately one month.

The record indicates, particularly through the appellants' subsequent denial of their activities, that there was sufficient evidence from which the jury could reasonably conclude that the appellants acted with malicious disregard for both the appellee's rights of privacy and the rights of privacy of her co-workers. We find that there was sufficient evidence to support the jury's finding of malice.

Stengart v. Loving Care Agency, Inc., 990 A.2d 650 (N.J. 2010)

Chief Justice RABNER delivered of the opinion of the Court.

In the past twenty years, businesses and private citizens alike have embraced the use of computers, electronic communication devices, the Internet, and e-mail. As those and other forms of technology evolve, the line separating business from personal activities can easily blur.

In the modern workplace, for example, occasional, personal use of the Internet is commonplace. Yet that simple act can raise complex issues about an employer's monitoring of the workplace and an employee's reasonable expectation of privacy.

This case presents novel questions about the extent to which an employee can expect privacy and confidentiality in personal e-mails with her attorney, which she accessed on a computer belonging to her employer. Marina Stengart used her company-issued laptop to exchange e-mails with her lawyer through her personal, password-protected, web-based e-mail account. She later filed an employment discrimination lawsuit against her employer, Loving Care Agency, Inc. (Loving Care), and others.

In anticipation of discovery, Loving Care hired a computer forensic expert to recover all files stored on the laptop including the e-mails, which had been automatically saved on the hard drive. Loving Care's attorneys reviewed the e-mails and used information culled from them in the course of discovery. In response, Stengart's lawyer demanded that communications between him and Stengart, which he considered privileged, be identified and returned. Opposing counsel disclosed the documents but maintained that the company had the right to review them. Stengart then sought relief in court.

The trial court ruled that, in light of the company's written policy on electronic communications, Stengart waived the attorney-client privilege by sending e-mails on a company computer. The Appellate Division reversed and found that Loving Care's counsel had violated *RPC* 4.4(b) by reading and using the privileged documents.

We hold that, under the circumstances, Stengart could reasonably expect that e-mail communications with her lawyer through her personal account would remain private, and that sending and receiving them via a company laptop did not eliminate the attorney-client privilege that protected them. By reading e-mails that were at least arguably privileged and failing to notify Stengart promptly about them, Loving Care's counsel breached *RPC* 4.4(b). We therefore modify and affirm the judgment of the Appellate Division and remand to the trial court to determine what, if any, sanctions should be imposed on counsel for Loving Care.

I.

This appeal arises out of a lawsuit that plaintiff-respondent Marina Stengart filed against her former employer, defendant-appellant Loving Care, its owner, and certain board members and officers of the company. She alleges, among other things, constructive discharge because of a hostile work environment, retaliation, and harassment based on gender, religion, and national origin, in violation of the New Jersey Law Against Discrimination. Loving Care denies the allegations and suggests they are an attempt to escape certain restrictive covenants that are the subject of a separate lawsuit.

Loving Care provides home-care nursing and health services. Stengart began working for Loving Care in 1994 and, over time, was promoted to Executive Director of Nursing. The company provided her with a laptop computer to conduct company business. From that laptop, Stengart could send e-mails using her company e-mail address; she could also access the Internet and visit websites through Loving Care's server. Unbeknownst to Stengart, certain browser software in place automatically made a copy of each web page she viewed, which was then saved on the computer's hard drive in a "cache" folder of temporary Internet files. Unless deleted and overwritten with new data, those temporary Internet files remained on the hard drive.

On several days in December 2007, Stengart used her laptop to access a personal, password-protected e-mail account on Yahoo's website, through which she communicated with her attorney about her situation at work. She never saved her Yahoo ID or password on the company laptop.

Not long after, Stengart left her employment with Loving Care and returned the laptop. On February 7, 2008, she filed the pending complaint.

In an effort to preserve electronic evidence for discovery, in or around April 2008, Loving Care hired experts to create a forensic image of the laptop's hard drive. Among the items retrieved were temporary Internet files containing the contents of seven or eight e-mails Stengart had exchanged with her lawyer via her Yahoo account. Stengart's lawyers represented at oral argument that one e-mail was simply a communication he sent to her, to which she did not respond.

A legend appears at the bottom of the e-mails that Stengart's lawyer sent. It warns readers that

> THE INFORMATION CONTAINED IN THIS EMAIL COMMUNICATION IS INTENDED ONLY FOR THE PERSONAL AND CONFIDENTIAL USE OF THE DESIGNATED RECIPIENT NAMED ABOVE. This message may be an Attorney-Client communication, and as such is privileged and confidential. If the reader of this message is not the intended recipient, you are hereby notified that you have received this communication in error, and that your review, dissemination, distribution, or copying of the message is strictly prohibited. If you have received this transmission in error, please destroy this transmission and notify us immediately by telephone and/or reply email.

At least two attorneys from the law firm representing Loving Care, Sills Cummis (the “Firm”), reviewed the e-mail communications between Stengart and her attorney. The Firm did not advise opposing counsel about the e-mails until months later. In its October 21, 2008 reply to Stengart’s first set of interrogatories, the Firm stated that it had obtained certain information from “e-mail correspondence”—between Stengart and her lawyer—from Stengart’s “office computer on December 12, 2007 at 2:25 p.m.” In response, Stengart’s attorney sent a letter demanding that the Firm identify and return all “attorney-client privileged communications” in its possession. The Firm identified and disclosed the e-mails but asserted that Stengart had no reasonable expectation of privacy in files on a company-owned computer in light of the company’s policy on electronic communications.

Loving Care and its counsel relied on an Administrative and Office Staff Employee Handbook that they maintain contains the company’s Electronic Communication policy (Policy). The record contains various versions of an electronic communications policy, and Stengart contends that none applied to her as a senior company official. Loving Care disagrees. We need not resolve that dispute and assume the Policy applies in addressing the issues on appeal.

The proffered Policy states, in relevant part:

> The company reserves and will exercise the right to review, audit, intercept, access, and disclose all matters on the company’s media systems and services at any time, with or without notice.
>
> E-mail and voice mail messages, internet use and communication and computer files are considered part of the company’s business and client records. Such communications are not to be considered private or personal to any individual employee.
>
> The principal purpose of electronic mail (*e-mail*) is for company business communications. Occasional personal use is permitted; however, the system should not be used to solicit for outside business ventures, charitable organizations, or for any political or religious purpose, unless authorized by the Director of Human Resources.

The Policy also specifically prohibits "certain uses of the e-mail system" including sending inappropriate sexual, discriminatory, or harassing messages, chain letters, "messages in violation of government laws," or messages relating to job searches, business activities unrelated to Loving Care, or political activities. The Policy concludes with the following warning: "Abuse of the electronic communications system may result in disciplinary action up to and including separation of employment."

Stengart's attorney applied for an order to show cause seeking return of the e-mails and other relief. The trial court converted the application to a motion, which it later denied in a written opinion. The trial court concluded that the Firm did not breach the attorney-client privilege because the company's Policy placed Stengart on sufficient notice that her e-mails would be considered company property. Stengart's request to disqualify the Firm was therefore denied.

The Appellate Division granted Stengart's motion for leave to appeal. The panel reversed the trial court order and directed the Firm to turn over all copies of the e-mails and delete any record of them. Assuming that the Policy applied to Stengart, the panel found that "an objective reader could reasonably conclude that not all personal emails are necessarily company property." In other words, an employee could "retain an expectation of privacy" in personal e-mails sent on a company computer given the language of the Policy.

The panel balanced Loving Care's right to enforce reasonable rules for the workplace against the public policies underlying the attorney-client privilege. The court rejected the notion that "ownership of the computer is the sole determinative fact" at issue and instead explained that there must be a nexus between company policies and the employer's legitimate business interests. The panel concluded that society's important interest in shielding communications with an attorney from disclosure outweighed the company's interest in upholding the Policy. As a result, the panel found that the e-mails were protected by the attorney-client privilege and should be returned.

The Appellate Division also concluded that the Firm breached its obligations under *RPC* 4.4(b) by failing to alert Stengart's attorneys that it possessed the e-mails before reading them. The panel remanded for a hearing to determine whether disqualification of the Firm or some other sanction was appropriate.

We granted Loving Care's motion for leave to appeal and ordered a stay pending the outcome of this appeal.

II.

Loving Care argues that its employees have no expectation of privacy in their use of company computers based on the company's Policy. In its briefs before this Court, the company also asserts that by accessing e-mails on a personal account through Loving Care's computer and server, Stengart either prevented any attorney-client privilege from attaching or waived the privilege by voluntarily subjecting her e-mails to company scrutiny. Finally, Loving Care maintains that its counsel did not violate *RPC* 4.4(b) because the e-mails were left behind on Stengart's company computer—not "inadvertently sent," as per the *Rule*—and the Firm acted in the good faith belief that any privilege had been waived.

Stengart argues that she intended the e-mails with her lawyer to be confidential and that the Policy, even if it applied to her, failed to provide adequate warning that Loving Care would save on a hard drive, or monitor the contents of, e-mails sent from a personal account. Stengart also maintains that the communications with her lawyer were privileged. When the Firm encountered the arguably protected e-mails, Stengart contends it should have immediately returned them or sought judicial review as to whether the attorney-client privilege applied.

III.

Our analysis draws on two principal areas: the adequacy of the notice provided by the Policy and the important public policy concerns raised by the attorney-client privilege. Both inform the reasonableness of an employee's expectation of privacy in this matter. We address each area in turn.

A.

We start by examining the meaning and scope of the Policy itself. The Policy specifically reserves to Loving Care the right to review and access "all matters on the company's media systems and services at any time." In addition, e-mail messages are plainly "considered part of the company's business records."

It is not clear from that language whether the use of personal, password-protected, web-based e-mail accounts via company equipment is covered. The Policy uses general language to refer to its "media systems and services" but does not define those terms. Elsewhere, the Policy prohibits certain uses of "the e-mail system," which appears to be a reference to company e-mail accounts. The Policy does not address personal accounts at all. In other words, employees do not have express notice that messages sent or received on a personal, web-based e-mail account are subject to monitoring if company equipment is used to access the account.

The Policy also does not warn employees that the contents of such e-mails are stored on a hard drive and can be forensically retrieved and read by Loving Care.

The Policy goes on to declare that e-mails "are not to be considered private or personal to any individual employee." In the very next point, the Policy acknowledges that "occasional personal use of e-mail is permitted." As written, the Policy creates ambiguity about whether personal e-mail use is company or private property.

The scope of the written Policy, therefore, is not entirely clear.

B.

The policies underlying the attorney-client privilege further animate this discussion. The venerable privilege is enshrined in history and practice. Its primary rationale is to encourage "free and full disclosure of information from the client to the attorney." That, in turn, benefits the public, which "is well served by sound legal counsel" based on full, candid, and confidential exchanges.

Under the New Jersey Rules of Evidence "for a communication to be privileged it must initially be expressed by an individual in his capacity as a client in conjunction with seeking or receiving legal advice from the attorney in his capacity as such, with the expectation that its content remain confidential."

E-mail exchanges are covered by the privilege like any other form of communication.

The e-mail communications between Stengart and her lawyers contain a standard warning that their contents are personal and confidential and may constitute attorney-client communications. The subject matter of those messages appears to relate to Stengart's working conditions and anticipated lawsuit against Loving Care.

IV.

Under the particular circumstances presented, how should a court evaluate whether Stengart had a reasonable expectation of privacy in the e-mails she exchanged with her attorney?

A.

Preliminarily, we note that the reasonable-expectation-of-privacy standard used by the parties derives from the common law and the Search and Seizure Clauses of both the Fourth Amendment and Article I, paragraph 7 of the New Jersey Constitution. The latter sources do not apply in this case, which involves conduct by private parties only.

The common law source is the tort of "intrusion on seclusion," which can be found in the *Restatement (Second) of Torts* § 652B (1977). That section provides that "one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." A high threshold must be cleared to assert a cause of action based on that tort. A plaintiff must establish that the intrusion "would be highly offensive to the ordinary reasonable man, as the result of conduct to which the reasonable man would strongly object."

As is true in Fourth Amendment cases, the reasonableness of a claim for intrusion on seclusion has both a subjective and objective component. Moreover, whether an employee has a reasonable expectation of privacy in her particular work setting "must be addressed on a case-by-case basis."

B.

A number of courts have tested an employee's claim of privacy in files stored on company computers by evaluating the reasonableness of the employee's expectation. No reported decisions in New Jersey offer direct guidance for the facts of this case. In one matter, the Appellate Division found that the defendant had no reasonable expectation of privacy in personal information he stored on a workplace computer under a separate password. The defendant had been advised that all computers were company property. His former employer consented to a search by the State Police, who, in turn, retrieved information tied to the theft of company funds. The court reviewed the search in the context of the Fourth Amendment and found no basis for the defendant's privacy claim in the contents of a company computer that he used to commit a crime.

In another case, the Appellate Division found no legitimate expectation of privacy in an employee's use of a company computer to access websites containing adult and child pornography. In its analysis, the court referenced a policy authorizing the company to monitor employee website activity and e-mails, which were deemed company property.

Certain decisions from outside New Jersey, which the parties also rely on, are more instructive. Among them, *National Economic Research Associates v. Evans*, (Mass. Super. Ct. Sept. 25, 2006), is most analogous to the facts here. In *Evans,* an employee used a company laptop to send and receive attorney-client communications by e-mail. In doing so, he used his personal, password-protected Yahoo account and not the company's e-mail address. The e-mails were automatically stored in a temporary Internet file on the computer's hard drive and were later retrieved by a computer forensic expert. The expert recovered various attorney-client e-mails; at the instruction of the company's lawyer, those e-mails were not reviewed pending guidance from the court.

A company manual governed the laptop's use. The manual permitted personal use of e-mail, to "be kept to a minimum," but warned that computer resources were the "property of the Company" and that e-mails were "not confidential" and could be read "during routine checks."

The court denied the company's application to allow disclosure of the e-mails that its expert possessed. The court reasoned,

> Based on the warnings furnished in the Manual, Evans (the employee) could not reasonably expect to communicate in confidence with his private attorney if Evans e-mailed his attorney using his NERA (company) e-mail address through the NERA Intranet, because the Manual plainly warned Evans that e-mails on the network could be read by NERA network administrators. The Manual, however, did not expressly declare that it would monitor the *content* of Internet communications. Most importantly, the Manual did not expressly declare, or even implicitly suggest, that NERA would monitor the content of e-mail communications made from an employee's personal e-mail account via the Internet whenever those communications were viewed on a NERA-issued computer. Nor did NERA warn its employees that the content of such Internet e-mail communications is stored on the hard disk of a NERA-issued computer and therefore capable of being read by NERA.

As a result, the court found the employee's expectation of privacy in e-mails with his attorney to be reasonable.

In *In re Asia Global Crossing, Ltd.*,, the Bankruptcy Court for the Southern District of New York considered whether a bankruptcy trustee could force the production of e-mails sent by company employees to their personal attorneys on the *company's* e-mail system. The court developed a four-part test to "measure the employee's expectation of privacy in his computer files and e-mail":

> (1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or e-mail, (3) do third parties have a right of access to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?

Because the evidence was "equivocal" about the existence of a corporate policy banning personal use of e-mail and allowing monitoring, the court could not conclude that the employees' use of the company e-mail system eliminated any applicable attorney-client privilege.

Other courts have measured the factors outlined in *Asia Global* among other considerations. In reviewing those cases, we are mindful of the fact-specific nature of the inquiry involved and the multitude of different facts that can affect the outcome in a given case. No one factor alone is necessarily dispositive.

According to some courts, employees appear to have a lesser expectation of privacy when they communicate with an attorney using a company e-mail system as compared to a personal, web-based account like the one used here. As a result, courts might treat e-mails transmitted via an employer's e-mail account differently than they would web-based e-mails sent on the same company computer.

Courts have also found that the existence of a clear company policy banning personal e-mails can also diminish the reasonableness of an employee's claim to privacy in e-mail messages with his or her attorney. We recognize that a zero-tolerance policy can be unworkable and unwelcome in today's dynamic and mobile workforce and do not seek to encourage that approach in any way.

The location of the company's computer may also be a relevant consideration. In *Curto v. Medical World Communications, Inc.*, (E.D.N.Y. May 15, 2006), for example, an employee working from a home office sent e-mails to her attorney on a company laptop via her personal AOL account. Those messages did not go through the company's servers but were nonetheless retrievable. Notwithstanding a company policy banning personal use, the trial court found that the e-mails were privileged.

We realize that different concerns are implicated in cases that address the reasonableness of a privacy claim under the Fourth Amendment. This case, however, involves no governmental action. Stengart's relationship with her private employer does not raise the specter of any government official unreasonably invading her rights.

V.

A.

Applying the above considerations to the facts before us, we find that Stengart had a reasonable expectation of privacy in the e-mails she exchanged with her attorney on Loving Care's laptop.

Stengart plainly took steps to protect the privacy of those e-mails and shield them from her employer. She used a personal, password-protected e-mail account instead of her company e-mail address and did not save the account's password on her computer. In other words, she had a subjective expectation of privacy in messages to and from her lawyer discussing the subject of a future lawsuit.

In light of the language of the Policy and the attorney-client nature of the communications, her expectation of privacy was also objectively reasonable. As noted earlier, the Policy does not address the use of personal, web-based e-mail accounts accessed through company equipment. It does not address personal accounts at all. Nor does it warn employees that the contents of e-mails sent via personal accounts can be forensically retrieved and read by the company. Indeed, in acknowledging that occasional personal use of e-mail is permitted, the Policy created doubt about whether those e-mails are company or private property.

Moreover, the e-mails are not illegal or inappropriate material stored on Loving Care's equipment, which might harm the company in some way. They are conversations between a lawyer and client about confidential legal matters, which are historically cloaked in privacy. Our system strives to keep private the very type of conversations that took place here in order to foster probing and honest exchanges.

In addition, the e-mails bear a standard hallmark of attorney-client messages. They warn the reader directly that the e-mails are personal, confidential, and may be attorney-client communications. While a pro forma warning at the end of an e-mail might not, on its own, protect a communication, other facts present here raise additional privacy concerns.

Under all of the circumstances, we find that Stengart could reasonably expect that e-mails she exchanged with her attorney on her personal, password-protected, web-based e-mail account, accessed on a company laptop, would remain private.

It follows that the attorney-client privilege protects those e-mails. In reaching that conclusion, we necessarily reject Loving Care's claim that the attorney-client privilege either did not attach or was waived. In its reply brief and at oral argument, Loving Care argued that the manner in which the e-mails were sent prevented the privilege from attaching. Specifically, Loving Care contends that Stengart effectively brought a third person into the conversation from the start—watching over her shoulder—and thereby forfeited any claim to confidentiality in her communications. We disagree.

Stengart has the right to prevent disclosures by third persons who learn of her communications "in a manner not reasonably to be anticipated." That is what occurred here. The Policy did not give Stengart, or a reasonable person in her position, cause to anticipate that Loving Care would be peering over her shoulder as she opened e-mails from her lawyer on her personal, password-protected Yahoo account. The language of the Policy, the method of transmittal that Stengart selected, and the warning on the e-mails themselves all support that conclusion.

Loving Care also argued in earlier submissions that Stengart waived the attorney-client privilege. For similar reasons, we again disagree.

A person waives the privilege if she, "without coercion and with knowledge of her right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone." Because consent is not applicable here, we look to whether Stengart either knowingly disclosed the information contained in the e-mails or failed to "take reasonable steps to insure and maintain their confidentiality."

As discussed previously, Stengart took reasonable steps to keep discussions with her attorney confidential: she elected not to use the company e-mail system and relied on a personal, password-protected, web-based account instead. She also did not save the password on her laptop or share it in some other way with Loving Care.

As to whether Stengart knowingly disclosed the e-mails, she certified that she is unsophisticated in the use of computers and did not know that Loving Care could read communications sent on her Yahoo account. Use of a company laptop alone does not establish that knowledge. Nor does the Policy fill in that gap. Under the circumstances, we do not find either a knowing or reckless waiver.

B.

Our conclusion that Stengart had an expectation of privacy in e-mails with her lawyer does not mean that employers cannot monitor or regulate the use of workplace computers. Companies can adopt lawful policies relating to computer use to protect the assets, reputation, and productivity of a business and to ensure compliance with legitimate corporate policies. And employers can enforce such policies. They may discipline employees and, when appropriate, terminate them, for violating proper workplace rules that are not inconsistent with a clear mandate of public policy. For example, an employee who spends long stretches of the workday getting personal, confidential legal advice from a private lawyer may be disciplined for violating a policy permitting only occasional personal use of the Internet. But employers have no need or basis to read the specific *contents* of personal, privileged, attorney-client communications in order to enforce corporate policy. Because of the important public policy concerns underlying the attorney-client privilege, even a more clearly written company manual—that is, a policy that banned all personal computer use and provided unambiguous notice that an employer could retrieve and read an employee's attorney-client communications, if accessed on a personal, password-protected e-mail account using the company's computer system—would not be enforceable.

VI.

We next examine whether the Firm's review and use of the privileged e-mails violated *RPC* 4.4(b). The *Rule* provides that "a lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender." According to the ABA Model Rules on which *RPC* 4.4(b) is patterned, the term "'document' includes e-mail or other electronic modes of transmission subject to being read or put into readable form." *Model Rules of Prof'l Conduct R.* 4.4 cmt. 2 (2004).

Loving Care contends that the *Rule* does not apply because Stengart left the e-mails behind on her laptop and did not send them inadvertently. In actuality, the Firm retained a computer forensic expert to retrieve e-mails that were automatically saved on the laptop's hard drive in a "cache" folder of temporary Internet files. Without Stengart's knowledge, browser software made copies of each webpage she viewed. Under those circumstances, it is difficult to think of the e-mails as items that were simply left behind. We find that the Firm's review of privileged e-mails between Stengart and her lawyer, and use of the contents of at least one e-mail in responding to interrogatories, fell within the ambit of *RPC* 4.4(b) and violated that rule.

To be clear, the Firm did not hack into plaintiff's personal account or maliciously seek out attorney-client documents in a clandestine way. Nor did it rummage through an employee's personal files out of idle curiosity. Instead, it legitimately attempted to preserve evidence to defend a civil lawsuit. Its error was in not setting aside the arguably privileged messages once it realized they were attorney-client communications, and failing either to notify its adversary or seek court permission before reading further. There is nothing in the record before us to suggest any bad faith on the Firm's part in reading the Policy as it did. Nonetheless, the Firm should have promptly notified opposing counsel when it discovered the nature of the e-mails.

Jesperson v. Harrah's Operating Company, Inc., 444 F.3d 1104 (9th Cir. 2006)

SCHROEDER, Chief Judge.

We took this sex discrimination case en banc in order to reaffirm our circuit law concerning appearance and grooming standards, and to clarify our evolving law of sex stereotyping claims.

The plaintiff, Darlene Jespersen, was terminated from her position as a bartender at the sports bar in Harrah's Reno casino not long after Harrah's began to enforce its comprehensive uniform, appearance and grooming standards for all bartenders. The standards required all bartenders, men and women, to wear the same uniform of black pants and white shirts, a bow tie, and comfortable black shoes. The standards also included grooming requirements that differed to some extent for men and women, requiring women to wear some facial makeup and not permitting men to wear any. Jespersen refused to comply with the makeup requirement and was effectively terminated for that reason.

The district court granted summary judgment to Harrah's on the ground that the appearance and grooming policies imposed equal burdens on both men and women bartenders because, while women were required to use makeup and men were forbidden to wear makeup, women were allowed to have long hair and men were required to have their hair cut to a length above the collar. The district court also held that the policy could not run afoul of Title VII because it did not discriminate against Jespersen on the basis of the "immutable characteristics" of her sex. The district court further observed that the Supreme Court's decision in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), prohibiting discrimination on the basis of sex stereotyping, did not apply to this case because in the district court's view, the Ninth Circuit had excluded grooming standards from the reach of *Price Waterhouse.* In reaching that conclusion, the district court relied on *Nichols v. Azteca Restaurant Enters., Inc.,* 256 F.3d 864 (9th Cir.2001) ("We do not imply that all gender-based distinctions are actionable under Title VII. For example, our decision does not imply that there is any violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards."). The district court granted summary judgment to Harrah's on all claims.

The three-judge panel affirmed, but on somewhat different grounds. The panel majority held that Jespersen, on this record, failed to show that the appearance policy imposed a greater burden on women than on men. It pointed to the lack of any affidavit in this record to support a claim that the burdens of the policy fell unequally on men and women. Accordingly, the panel did not agree with the district court that grooming policies could never discriminate as a matter of law. The panel also held that *Price Waterhouse* could apply to grooming or appearance standards only if the policy amounted to sexual harassment, which would require a showing that the employee suffered harassment for failure to conform to commonly-accepted gender stereotypes. The dissent would have denied summary judgment on both theories.

We agree with the district court and the panel majority that on this record, Jespersen has failed to present evidence sufficient to survive summary judgment on her claim that the policy imposes an unequal burden on women. With respect to sex stereotyping, we hold that appearance standards, including makeup requirements, may well be the subject of a Title VII claim for sexual stereotyping, but that on this record Jespersen has failed to create any triable issue of fact that the challenged policy was part of a policy motivated by sex stereotyping. We therefore affirm.

I. BACKGROUND

Plaintiff Darlene Jespersen worked successfully as a bartender at Harrah's for twenty years and compiled what by all accounts was an exemplary record. During Jespersen's entire tenure with Harrah's, the company maintained a policy encouraging female beverage servers to wear makeup. The parties agree, however, that the policy was not enforced until 2000. In February 2000, Harrah's implemented a "Beverage Department Image Transformation" program at twenty Harrah's locations, including its casino in Reno. Part of the program consisted of new grooming and appearance standards, called the "Personal Best" program. The program contained certain appearance standards that applied equally to both sexes, including a standard uniform of black pants, white shirt, black vest, and black bow tie. Jespersen has never objected to any of these policies. The program also contained some sex-differentiated appearance requirements as to hair, nails, and makeup.

In April 2000, Harrah's amended that policy to require that women wear makeup. Jespersen's only objection here is to the makeup requirement. The amended policy provided in relevant part:

> All Beverage Service Personnel, in addition to being friendly, polite, courteous and responsive to our customer's needs, must possess the ability to physically perform the essential factors of the job as set forth in the standard job descriptions. They must be well groomed, appealing to the eye, be firm and body toned, and be comfortable with maintaining

this look while wearing the specified uniform. Additional factors to be considered include, but are not limited to, hair styles, overall body contour, and degree of comfort the employee projects while wearing the uniform.

* * *

Beverage Bartenders and Barbacks will adhere to these additional guidelines:

• Overall Guidelines (applied equally to male/ female):

• Appearance: Must maintain Personal Best image portrayed at time of hire.

• Jewelry, if issued, must be worn. Otherwise, tasteful and simple jewelry is permitted; no large chokers, chains or bracelets.

• No faddish hairstyles or unnatural colors are permitted.

• Males:

• Hair must not extend below top of shirt collar. Ponytails are prohibited.

• Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted.

• Eye and facial makeup is not permitted.

• Shoes will be solid black leather or leather type with rubber (non skid) soles.

• Females:

• Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times, no exceptions.

• Stockings are to be of nude or natural color consistent with employee's skin tone. No runs.

• Nail polish can be clear, white, pink or red color only. No exotic nail art or length.

• Shoes will be solid black leather or leather type with rubber (non skid) soles.

• *Make up (face powder, blush and mascara) must be worn and applied neatly in complimentary colors. Lip color must be worn at all times. (emphasis added).*

Jespersen did not wear makeup on or off the job, and in her deposition stated that wearing it would conflict with her self-image. It is not disputed that she found the makeup requirement offensive, and felt so uncomfortable wearing makeup that she found it interfered with her ability to perform as a bartender. Unwilling to wear the makeup, and not qualifying for any open positions at the casino with a similar compensation scale, Jespersen left her employment with Harrah's.

After exhausting her administrative remedies with the Equal Employment Opportunity Commission and obtaining a right to sue notification, Jespersen filed this action in July 2001. In her complaint, Jespersen sought damages as well as declaratory and injunctive relief for discrimination and retaliation for opposition to discrimination, alleging that the "Personal Best" policy discriminated against women by "(1) subjecting them to terms and conditions of employment to which men are not similarly subjected, and (2) requiring that women conform to sex-based stereotypes as a term and condition of employment."

Harrah's moved for summary judgment, supporting its motion with documents giving the history and purpose of the appearance and grooming policies. Harrah's argued that the policy created similar standards for both men and women, and that where the standards differentiated on the basis of sex, as with the face and hair standards, any burdens imposed fell equally on both male and female bartenders.

In her deposition testimony, attached as a response to the motion for summary judgment, Jespersen described the personal indignity she felt as a result of attempting to comply with the makeup policy. Jespersen testified that when she wore the makeup she "felt very degraded and very demeaned." In addition, Jespersen testified that "it prohibited her from doing her job" because "it affected her self-dignity and took away her credibility as an individual and as a person." Jespersen made no cross-motion for summary judgment, taking the position that the case should go to the jury. Her response to Harrah's motion for summary judgment relied solely on her own deposition testimony regarding her subjective reaction to the makeup policy, and on favorable customer feedback and employer evaluation forms regarding her work.

The record therefore does not contain any affidavit or other evidence to establish that complying with the “Personal Best” standards caused burdens to fall unequally on men or women, and there is no evidence to suggest Harrah’s motivation was to stereotype the women bartenders. Jespersen relied solely on evidence that she had been a good bartender, and that she had personal objections to complying with the policy, in order to support her argument that Harrah’s “‘sells’ and exploits its women employees.” Jespersen contended that as a matter of law she had made a prima facie showing of gender discrimination, sufficient to survive summary judgment on both of her claims.

The district court granted Harrah’s motion for summary judgment on all of Jespersen’s claims. In this appeal, Jespersen maintains that the record before the district court was sufficient to create triable issues of material fact as to her unlawful discrimination claims of unequal burdens and sex stereotyping. We deal with each in turn.

II. UNEQUAL BURDENS

In order to assert a valid Title VII claim for sex discrimination, a plaintiff must make out a prima facie case establishing that the challenged employment action was either intentionally discriminatory or that it had a discriminatory effect on the basis of gender. Once a plaintiff establishes such a prima facie case, “the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”

In this case, Jespersen argues that the makeup requirement itself establishes a prima facie case of discriminatory intent and must be justified by Harrah’s as a bona fide occupational qualification. *See* 42 U.S.C. § 2000e-2(e)(1). [27] Our settled law in this circuit, however, does not support Jespersen’s position that a sex-based difference in appearance standards alone, without any further showing of disparate effects, creates a prima facie case.

In *Gerdom v. Cont’l Airlines, Inc.,* 692 F.2d 602 (9th Cir.1982), we considered the Continental Airlines policy that imposed strict weight restrictions on female flight attendants, and held it constituted a violation of Title VII. We did so because the airline imposed no weight restriction whatsoever on a class of male employees who performed the same or similar functions

27. (n.1 in opinion) “It shall not be an unlawful employment practice for an employer to hire and employ employees on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”

as the flight attendants. Indeed, the policy was touted by the airline as intended to "create the public image of an airline which offered passengers service by thin, attractive women, whom executives referred to as Continental's 'girls.'" In fact, Continental specifically argued that its policy was justified by its "desire to compete with other airlines by featuring attractive female cabin attendants," a justification which this court recognized as "discriminatory on its face." The weight restriction was part of an overall program to create a sexual image for the airline.

In contrast, this case involves an appearance policy that applied to both male and female bartenders, and was aimed at creating a professional and very similar look for all of them. All bartenders wore the same uniform. The policy only differentiated as to grooming standards.

In *Frank v. United Airlines, Inc.,* 216 F.3d 845 (9th Cir.2000), we dealt with a weight policy that applied different standards to men and women in a facially unequal way. The women were forced to meet the requirements of a medium body frame standard while men were required to meet only the more generous requirements of a large body frame standard. In that case, we recognized that "an appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment." The United weight policy, however, did not impose equal burdens. On its face, the policy embodied a requirement that categorically "'applied less favorably to one gender,'" and the burdens imposed upon that gender were obvious from the policy itself.

This case stands in marked contrast, for here we deal with requirements that, on their face, are not more onerous for one gender than the other. Rather, Harrah's "Personal Best" policy contains sex-differentiated requirements regarding each employee's hair, hands, and face. While those individual requirements differ according to gender, none on its face places a greater burden on one gender than the other. Grooming standards that appropriately differentiate between the genders are not facially discriminatory.

We have long recognized that companies may differentiate between men and women in appearance and grooming policies, and so have other circuits. The material issue under our settled law is not whether the policies are different, but whether the policy imposed on the plaintiff creates an "unequal burden" for the plaintiff's gender.

Not every differentiation between the sexes in a grooming and appearance policy creates a “significantly greater burden of compliance.” For example, in *Fountain,* this court upheld Safeway’s enforcement of its sex-differentiated appearance standard, including its requirement that male employees wear ties, because the company’s actions in enforcing the regulations were not “overly burdensome to its employees.” Similarly, as the Eighth Circuit has recognized, “where, as here, such grooming and appearance policies are reasonable and are imposed in an evenhanded manner on all employees, slight differences in the appearance requirements for males and females have only a negligible effect on employment opportunities.” Under established equal burdens analysis, when an employer’s grooming and appearance policy does not unreasonably burden one gender more than the other, that policy will not violate Title VII.

Jespersen asks us to take judicial notice of the fact that it costs more money and takes more time for a woman to comply with the makeup requirement than it takes for a man to comply with the requirement that he keep his hair short, but these are not matters appropriate for judicial notice. Judicial notice is reserved for matters “generally known within the territorial jurisdiction of the trial court” or “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” The time and cost of makeup and haircuts is in neither category. The facts that Jespersen would have this court judicially notice are not subject to the requisite “high degree of indisputability” generally required for such judicial notice.

Having failed to create a record establishing that the “Personal Best” policies are more burdensome for women than for men, Jespersen did not present any triable issue of fact. The district court correctly granted summary judgment on the record before it with respect to Jespersen’s claim that the makeup policy created an unequal burden for women.

III. SEX STEREOTYPING

In *Price Waterhouse,* the Supreme Court considered a mixed-motive discrimination case. There, the plaintiff, Ann Hopkins, was denied partnership in the national accounting firm of Price Waterhouse because some of the partners found her to be too aggressive. While some partners praised Hopkins's "'strong character, independence and integrity,'" others commented that she needed to take "'a course at charm school.'" The Supreme Court determined that once a plaintiff has established that gender played "a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account."

Consequently, in establishing that "gender played a motivating part in an employment decision," a plaintiff in a Title VII case may introduce evidence that the employment decision was made in part because of a sex stereotype. According to the Court, this is because "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for 'in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" It was therefore impermissible for Hopkins's employer to place her in an untenable Catch-22: she needed to be aggressive and masculine to excel at her job, but was denied partnership for doing so because of her employer's gender stereotype. Instead, Hopkins was advised to "'walk more femininely, talk more femininely, dress more femininely, wear make up, have her hair styled, and wear jewelry.'"

The stereotyping in *Price Waterhouse* interfered with Hopkins' ability to perform her work; the advice that she should take "a course at charm school" was intended to discourage her use of the forceful and aggressive techniques that made her successful in the first place. Impermissible sex stereotyping was clear because the very traits that she was asked to hide were the same traits considered praiseworthy in men.

Harrah's "Personal Best" policy is very different. The policy does not single out Jespersen. It applies to all of the bartenders, male and female. It requires all of the bartenders to wear exactly the same uniforms while interacting with the public in the context of the entertainment industry. It is for the most part unisex, from the black tie to the non-skid shoes. There is no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear. The record contains nothing to suggest the grooming standards would objectively inhibit a woman's ability to do the job. The only evidence in the record to support the stereotyping claim is Jespersen's own subjective reaction to the makeup requirement.

Judge Pregerson's dissent improperly divides the grooming policy into separate categories of hair, hands, and face, and then focuses exclusively on the makeup requirement to conclude that the policy constitutes sex stereotyping. This parsing, however, conflicts with established grooming standards analysis. The requirements must be viewed in the context of the overall policy. The dissent's conclusion that the unequal burdens analysis allows impermissible sex stereotyping to persist if imposed equally on both sexes, is wrong because it ignores the protections of *Price Waterhouse* our decision preserves. If a grooming standard imposed on either sex amounts to impermissible stereotyping, something this record does not establish, a plaintiff of either sex may challenge that requirement under *Price Waterhouse.*

We respect Jespersen's resolve to be true to herself and to the image that she wishes to project to the world. We cannot agree, however, that her objection to the makeup requirement, without more, can give rise to a claim of sex stereotyping under Title VII. If we were to do so, we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination.

This is not a case where the dress or appearance requirement is intended to be sexually provocative, and tending to stereotype women as sex objects. In *EEOC v. Sage Realty Corp.,* 507 F.Supp. 599 (S.D.N.Y.1981), the plaintiff was a lobby attendant in a hotel that employed only female lobby attendants and required a mandatory uniform. The uniform was an octagon designed with an opening for the attendant's head, to be worn as a poncho, with snaps at the wrists and a tack on each side of the poncho, which was otherwise open. The attendants wore blue dancer pants as part of the uniform but were prohibited from wearing a shirt, blouse, or skirt under the outfit. There, the plaintiff was required to wear a uniform that was "short and revealing on both sides such that her thighs and portions of her buttocks were exposed." Jespersen, in contrast, was asked only to wear a unisex uniform that covered her entire body and was designed for men and women. The "Personal Best" policy does not, on its face, indicate any discriminatory or sexually stereotypical intent on the part of Harrah's.

Nor is this a case of sexual harassment. Following *Price Waterhouse,* our court has held that sexual harassment of an employee because of that employee's failure to conform to commonly-accepted gender stereotypes is sex discrimination in violation of Title VII. In *Nichols,* a male waiter was systematically abused for failing to act "as a man should act," for walking and carrying his tray "like a woman," and was derided for not having sexual intercourse with a female waitress who was his friend. Applying *Price Waterhouse,* our court concluded that this harassment was actionable discrimination because of the plaintiff's sex. In *Rene,* the homosexual plaintiff stated a Title VII sex stereotyping claim because he endured assaults "of a sexual nature" when Rene's co-workers forced him to look at homosexual pornography, gave him sexually-oriented "joke" gifts and harassed him for behavior that did not conform to commonly-accepted male stereotypes. *Nichols* and *Rene* are not grooming standards cases, but provide the framework for this court's analysis of when sex stereotyping rises to the level of sex discrimination for Title VII purposes. Unlike the situation in both *Rene* and *Nichols,* Harrah's actions have not condoned or subjected Jespersen to any form of alleged harassment. It is not alleged that the "Personal Best" policy created a hostile work environment.

Nor is there evidence in this record that Harrah's treated Jespersen any differently than it treated any other bartender, male or female, who did not comply with the written grooming standards applicable to all bartenders. Jespersen's claim here materially differs from Hopkins' claim in *Price Waterhouse* because Harrah's grooming standards do not require Jespersen to conform to a stereotypical image that would objectively impede her ability to perform her job requirements as a bartender.

We emphasize that we do not preclude, as a matter of law, a claim of sex-stereotyping on the basis of dress or appearance codes. Others may well be filed, and any bases for such claims refined as law in this area evolves. This record, however, is devoid of any basis for permitting this particular claim to go forward, as it is limited to the subjective reaction of a single employee, and there is no evidence of a stereotypical motivation on the part of the employer. This case is essentially a challenge to one small part of what is an overall apparel, appearance, and grooming policy that applies largely the same requirements to both men and women. As we said in *Nichols,* in commenting on grooming standards, the touch-stone is reasonableness. A makeup requirement must be seen in the context of the overall standards imposed on employees in a given workplace.

PREGERSON, Circuit Judge, with whom Judges KOZINSKI, GRABER, and W. FLETCHER join, dissenting:

I agree with the majority that appearance standards and grooming policies may be subject to Title VII claims. I also agree with the majority that a Title VII plaintiff challenging appearance standards or grooming policies may "make out a prima facie case by establishing that the challenged employment action was *either* intentionally discriminatory *or* that it had a discriminatory effect on the basis of gender." Maj. Op. at 1108 (emphasis added). In other words, I agree with the majority that a Title VII plaintiff may make out a prima facie case by showing that the challenged policy either was motivated in part "because of a sex stereotype," Maj. Op. at 1111, or "creates an 'unequal burden' for the plaintiff's gender," Maj. Op. at 1110. Finally, I agree with the majority that Jespersen failed to introduce sufficient evidence to establish that Harrah's "Personal Best" program created an undue burden on Harrah's female bartenders. I part ways with the majority, however, inasmuch as I believe that the "Personal Best" program was part of a policy motivated by sex stereotyping and that Jespersen's termination for failing to comply with the program's requirements was "because of" her sex. Accordingly, I dissent from Part III of the majority opinion and from the judgment of the court.

The majority contends that it is bound to reject Jespersen's sex stereotyping claim because she presented too little evidence —only her "own subjective reaction to the makeup requirement." I disagree. Jespersen's evidence showed that Harrah's fired her because she did not comply with a grooming policy that imposed a facial uniform (full makeup) on only female bartenders. Harrah's stringent "Personal Best" policy required female beverage servers to wear foundation, blush, mascara, and lip color, and to ensure that lip color was on at all times. Jespersen and her female colleagues were required to meet with professional image consultants who in turn created a facial template for each woman. Jespersen was required not simply to wear makeup; in addition, the consultants dictated where and how the makeup had to be applied.

Quite simply, her termination for failing to comply with a grooming policy that imposed a facial uniform on only female bartenders is discrimination "because of" sex. Such discrimination is clearly and unambiguously impermissible under Title VII, which requires that "gender must be *irrelevant* to employment decisions."

Notwithstanding Jespersen's failure to present additional evidence, little is required to make out a sex-stereotyping—as distinct from an undue burden—claim in this situation. In *Price Waterhouse,* the Supreme Court held that an employer may not condition employment on an employee's conformance to a sex stereotype associated with their gender. As the majority recognizes, *Price Waterhouse* allows a Title VII plaintiff to "introduce evidence that the employment decision was made in part because of a sex stereotype." It is not entirely clear exactly what this evidence must be, but nothing in *Price Waterhouse* suggests that a certain type or quantity of evidence is required to prove a prima facie case of discrimination.

Moreover, *Price Waterhouse* recognizes that gender discrimination may manifest itself in stereotypical notions as to how women should dress and present themselves, not only as to how they should behave.

Hopkins, the *Price Waterhouse* plaintiff, offered individualized evidence, describing events in which she was subjected to discriminatory remarks. However, the Court did not state that such evidence was required. To the contrary, the Court noted that

> By focusing on Hopkins' specific proof we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision, and we refrain from deciding here which specific facts, 'standing alone,' would or would not establish a plaintiff's case, since such a decision is unnecessary in this case.

The fact that Harrah's required female bartenders to conform to a sex stereotype by wearing full makeup while working is not in dispute, and the policy is described at length in the majority opinion. This policy did not, as the majority suggests, impose a "grooming, apparel, or appearance requirement that an individual finds personally offensive," but rather one that treated Jespersen differently from male bartenders "because of" her sex. I believe that the fact that Harrah's designed and promoted a policy that required women to conform to a sex stereotype by wearing full makeup is sufficient "direct evidence" of discrimination.

The majority contends that Harrah's "Personal Best" appearance policy is very different from the policy at issue in *Price Waterhouse* in that it applies to both men and women. I disagree. As the majority concedes, "Harrah's 'Personal Best' policy contains sex-differentiated requirements regarding each employee's hair, hands, and face." The fact that a policy contains sex-differentiated requirements that affect people of both genders cannot excuse a particular requirement from scrutiny. By refusing to consider the makeup requirement separately, and instead stressing that the policy contained some gender-neutral requirements, such as color of clothing, as well as a variety of gender-differentiated requirements for "hair, hands, and face," the majority's approach would permit otherwise impermissible gender stereotypes to be neutralized by the presence of a stereotype or burden that affects people of the opposite gender, or by some separate non-discriminatory requirement that applies to both men and women. By this logic, it might well have been permissible in *Frank v. United Airlines, Inc.* to require women, but not men, to meet a medium body frame standard *if* that requirement were imposed as part of a "physical appearance" policy that also required men, but not women, to achieve a certain degree of upper body muscle definition. But the fact that employees of both genders are subjected to gender-specific requirements does not necessarily mean that particular requirements are not motivated by gender stereotyping.

Because I believe that we should be careful not to insulate appearance requirements by viewing them in broad categories, such as "hair, hands, and face," I would consider the makeup requirement on its own terms. Viewed in isolation—or, at the very least, as part of a narrower category of requirements affecting employees' faces—the makeup or facial uniform requirement becomes closely analogous to the uniform policy held to constitute impermissible sex stereotyping in *Carroll v. Talman Federal Savings & Loan Ass'n of Chicago,* 604 F.2d 1028 (7th Cir. 1979). In *Carroll,* the defendant bank required women to wear employer-issued uniforms, but permitted men to wear business attire of their own choosing. The Seventh Circuit found this rule discriminatory because it suggested to the public that the uniformed women held a “lesser professional status” and that women could not be trusted to choose appropriate business attire.

Just as the bank in *Carroll* deemed female employees incapable of achieving a professional appearance without assigned uniforms, Harrah’s regarded women as unable to achieve a neat, attractive, and professional appearance without the facial uniform designed by a consultant and required by Harrah’s. The inescapable message is that women’s undoctored faces compare unfavorably to men’s, not because of a physical difference between men’s and women’s faces, but because of a cultural assumption—and gender-based stereotype—that women’s faces are incomplete, unattractive, or unprofessional without full makeup. We need not denounce all makeup as inherently offensive, just as there was no need to denounce all uniforms as inherently offensive in *Carroll,* to conclude that *requiring* female bartenders to wear full makeup is an impermissible sex stereotype and is evidence of discrimination because of sex. Therefore, I strongly disagree with the majority’s conclusion that there “is no evidence in this record to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear.” Maj. Op. at 1112.

I believe that Jespersen articulated a classic case of *Price Waterhouse* discrimination and presented undisputed, material facts sufficient to avoid summary judgment. Accordingly, Jespersen should be allowed to present her case to a jury. Therefore, I respectfully dissent.

KOZINSKI, Circuit Judge, with whom Judges GRABER and W. FLETCHER join, dissenting:

I agree with Judge Pregerson and join his dissent—subject to one caveat: I believe that Jespersen also presented a triable issue of fact on the question of disparate burden.

The majority is right that “the makeup requirements must be viewed in the context of the overall policy.” But I find it perfectly clear that Harrah’s overall grooming policy is substantially more burdensome for women than for men. Every requirement that forces men to spend time or money on their appearance has a corresponding requirement that is as, or more, burdensome for women: short hair v. “teased, curled, or styled” hair; clean trimmed nails v. nail length and color requirements; black leather shoes v. black leather shoes. The requirement that women spend time and money applying full facial makeup has no corresponding requirement for men, making the "overall policy" more burdensome for the former than for the latter. The only question is how much.

It is true that Jespersen failed to present evidence about what it costs to buy makeup and how long it takes to apply it. But is there any doubt that putting on makeup costs money and takes time? Harrah's policy requires women to apply face powder, blush, mascara and lipstick. You don't need an expert witness to figure out that such items don't grow on trees.

Nor is there any rational doubt that application of makeup is an intricate and painstaking process that requires considerable time and care. Even those of us who don't wear makeup know how long it can take from the hundreds of hours we've spent over the years frantically tapping our toes and pointing to our wrists. It's hard to imagine that a woman could "put on her face," as they say, in the time it would take a man to shave—certainly not if she were to do the careful and thorough job Harrah's expects. Makeup, moreover, must be applied and removed every day; the policy burdens men with no such daily ritual. While a man could jog to the casino, slip into his uniform, and get right to work, a woman must travel to work so as to avoid smearing her makeup, or arrive early to put on her makeup there.

It might have been tidier if Jespersen had introduced evidence as to the time and cost associated with complying with the makeup requirement, but I can understand her failure to do so, as these hardly seem like questions reasonably subject to dispute. We could—and should—take judicial notice of these incontrovertible facts.

Alternatively, Jespersen did introduce evidence that she finds it burdensome to *wear* makeup because doing so is inconsistent with her self-image and interferes with her job performance. My colleagues dismiss this evidence, apparently on the ground that wearing makeup does not, as a matter of law, constitute a substantial burden. This presupposes that Jespersen is unreasonable or idiosyncratic in her discomfort. Why so? Whether to wear cosmetics—literally, the face one presents to the world—is an intensely personal choice. Makeup, moreover, touches delicate parts of the anatomy—the lips, the eyes, the cheeks—and can cause serious discomfort, sometimes even allergic reactions, for someone unaccustomed to wearing it. If you are used to wearing makeup—as most American women are—this may seem like no big deal. But those of us not used to wearing makeup would find a requirement that we do so highly intrusive. Imagine, for example, a rule that all judges wear face powder, blush, mascara and lipstick while on the bench. Like Jespersen, I would find such a regime burdensome and demeaning; it would interfere with my job performance. I suspect many of my colleagues would feel the same way.

Everyone accepts this as a reasonable reaction from a man, but why should it be different for a woman? It is not because of anatomical differences, such as a requirement that women wear bathing suits that cover their breasts. Women's faces, just like those of men, can be perfectly presentable without makeup; it is a cultural artifact that most women raised in the United States learn to put on—and presumably enjoy wearing—cosmetics. But cultural norms change; not so long ago a man wearing an earring was a gypsy, a pirate or an oddity. Today, a man wearing body piercing jewelry is hardly noticed. So, too, a large (and perhaps growing) number of women choose to present themselves to the world without makeup. I see no justification for forcing them to conform to Harrah's quaint notion of what a "real woman" looks like.

Nor do I think it appropriate for a court to dismiss a woman's testimony that she finds wearing makeup degrading and intrusive, as Jespersen clearly does. Not only do we have her sworn statement to that effect, but there can be no doubt about her sincerity or the intensity of her feelings: She quit her job—a job she performed well for two decades—rather than put on the makeup. That is a choice her male colleagues were not forced to make. To me, this states a case of disparate burden, and I would let a jury decide whether an employer can force a woman to make this choice.

Finally, I note with dismay the employer's decision to let go a valued, experienced employee who had gained accolades from her customers, over what, in the end, is a trivial matter. Quality employees are difficult to find in any industry and I would think an employer would long hesitate before forcing a loyal, long-time employee to quit over an honest and heartfelt difference of opinion about a matter of personal significance to her. Having won the legal battle, I hope that Harrah's will now do the generous and decent thing by offering Jespersen her job back, and letting her give it her personal best—without the makeup.

Cloutier v. Costco Wholesale Corp., 390 F.3d 126 (1st Cir. 2004)

LIPEZ, Circuit Judge.

Kimberly Cloutier alleges that her employer, Costco Wholesale Corp. (Costco), failed to offer her a reasonable accommodation after she alerted it to a conflict between the "no facial jewelry" provision of its dress code and her religious practice as a member of the Church of Body Modification. She argues that this failure amounts to religious discrimination in violation of Title VII, 42 U.S.C. § 2000e-2(a), and the corresponding Massachusetts statute. The district court granted summary judgment for Costco, concluding that Costco reasonably accommodated Cloutier by offering to reinstate her if she either covered her facial piercing with a band-aid or replaced it with a clear retainer. We affirm the grant of summary judgment, but on a different basis. We hold that Costco had no duty to accommodate Cloutier because it could not do so without undue hardship.

I.

Kimberly Cloutier began working at Costco's West Springfield, Massachusetts store in July 1997. Before her first day of work, Cloutier received a copy of the Costco employment agreement, which included the employee dress code. When she was hired, Cloutier had multiple earrings and four tattoos, but no facial piercings.

Cloutier moved from her position as a front-end assistant to the deli department in September 1997. In 1998, Costco revised its dress code to prohibit food handlers, including deli employees, from wearing any jewelry. Cloutier's supervisor instructed her to remove her earrings pursuant to the revised code, but Cloutier refused. Instead, she requested to transfer to a front-end position where she would be permitted to continue wearing her jewelry. Cloutier did not indicate at the time that her insistence on wearing her earrings was based on a religious or spiritual belief.

Costco approved Cloutier's transfer back to a front-end position in June 1998, and promoted her to cashier soon thereafter. Over the ensuing two years, she engaged in various forms of body modification including facial piercing and cutting. Although these practices were meaningful to Cloutier, they were not motivated by a religious belief.

In March 2001, Costco further revised its dress code to prohibit all facial jewelry, aside from earrings, and disseminated the modified code to its employees. Cloutier did not challenge the dress code or seek an accommodation, but rather continued uneventfully to wear her eyebrow piercing for several months.

Costco began enforcing its no-facial-jewelry policy in June 2001. On June 25, 2001, front-end supervisors Todd Cunningham and Michele Callaghan informed Cloutier and another employee, Jennifer Theriaque, that they would have to remove their facial piercings. Cloutier and Theriaque did not comply, returning to work the following day still wearing their piercings. When Callaghan reiterated the no-facial-jewelry policy, Cloutier indicated for the first time that she was a member of the Church of Body Modification (CBM), and that her eyebrow piercing was part of her religion.

The CBM was established in 1999 and counts approximately 1000 members who participate in such practices as piercing, tattooing, branding, cutting, and body manipulation. Among the goals espoused in the CBM's mission statement are for its members to "grow as individuals through body modification and its teachings," to "promote growth in mind, body and spirit," and to be "confident role models in learning, teaching, and displaying body modification." The church's website, apparently its primary mode for reaching its adherents, did not state that members' body modifications had to be visible at all times or that temporarily removing body modifications would violate a religious tenet. Still, Cloutier interprets the call to be a confident role model as requiring that her piercings be visible at all times and precluding her from removing or covering her facial jewelry. She does not extend this reasoning to the tattoos on her upper arms, which were covered at work by her shirt.

After reviewing information that Cloutier provided from the CBM website, Callaghan's supervisor, Andrew Mulik, instructed Cloutier and Theriaque to remove their facial jewelry. They refused. The following day, Cloutier filed a religious discrimination complaint with the Equal Employment

Opportunity Commission (EEOC), which is empowered to enforce Title VII.

When Cloutier returned to work for her next shift on June 29, 2001, she was still wearing her facial jewelry. She met with Mark Shevchuk, the store manager, about her membership in the CBM and the EEOC complaint. During the course of the meeting, Cloutier suggested that she be allowed to cover her eyebrow piercing with a flesh-colored band-aid. Shevchuk rejected the suggestion and told Cloutier that she had to remove the piercing or go home. She left.

Theriaque also returned to work wearing her facial jewelry on June 29, 2001 and was reminded of the dress code. She asked whether she could wear clear plastic retainers in place of her jewelry to prevent the piercings from closing. The parties disagree as to whether Costco accepted this arrangement immediately or after several weeks of consideration. For purposes of our summary judgment analysis, we accept Cloutier's contention that Theriaque wore the retainers to work for several weeks unnoticed before Costco gave her permission to do so.

Although Cloutier learned during the week of July 2, 2001 that Theriaque had returned to work with retainers, she chose to wait for her EEOC complaint to be resolved rather than following suit. During the week of July 7, 2001, Cloutier inquired of her superiors whether she could use vacation time to cover her absences and was told that she had been suspended. The following week, on July 14, Cloutier received notice in the mail that she had been terminated for her unexcused absences resulting from noncompliance with the dress code. She claims that this was her first notice that Costco had decided not to grant her request for an accommodation that would reconcile the dress code with her religious requirement of displaying her facial jewelry at all times.

The parties remained in contact after Cloutier's termination through the EEOC mediation process. During a meeting on August 10, 2001, Costco offered to let Cloutier return to work wearing either plastic retainers or a band-aid over her jewelry (the same accommodation that Cloutier had suggested prior to her termination). Shevchuk repeated the offer in a letter dated August 29, 2001, asking Cloutier to respond by September 6, 2001.

Although there is some dispute as to whether Cloutier attempted to respond to Costco's offer before the deadline, she now maintains that neither of the proffered accommodations would be adequate because the CBM's tenets, as she interprets them, require her to display all of her facial piercings at all times. Replacing her eyebrow piercing with a plastic retainer or covering it with a band-aid would thus contradict her religious convictions. Cloutier asserts that the only reasonable accommodation would be to excuse her from Costco's dress code, allowing her to wear her facial jewelry to work. Costco responds that this accommodation would interfere with its ability to maintain a professional appearance and would thereby create an undue hardship for its business.

The EEOC determined in May 2002 that Costco's actions violated Title VII of the Civil Rights Act of 1964. It found that Cloutier's refusal to remove her facial jewelry was "religiously based as defined by the EEOC," that Costco did not allow her to wear her facial jewelry at work, and that there was no evidence that allowing her to wear the jewelry would have constituted an undue hardship. Based on this determination, Cloutier filed a suit against Costco in federal district court in August 2002 alleging a Title VII violation. She amended the complaint four months later, adding state law claims for religious discrimination and violation of her civil rights.

The district court granted Costco's motion to dismiss Cloutier's state civil rights claim but allowed the federal and state discrimination claims to proceed. Costco then moved for summary judgment on the discrimination claims.

In ruling on that motion, the court applied the two-part framework set forth in *EEOC v. Unión Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico,* 279 F.3d 49 (1st Cir.2002). First, the court evaluated Cloutier's *prima facie* case, which required her to show that (1) a bona fide religious practice conflicted with an employment requirement, (2) she brought the practice to Costco's attention, and (3) the religious practice was the basis for the termination. The court expressed serious doubts as to whether Cloutier's claim was based on a "bona fide religious practice" for purposes of the first element, noting that even assuming arguendo that the CBM is a bona fide religion, it "in no way requires a *display* of facial piercings *at all times.* The requirement that she display her piercings, open and always, represents the plaintiff's personal interpretation of the stringency of her beliefs." The court also questioned the sincerity of Cloutier's personal interpretation, given that she initially offered to cover her piercing with a band-aid, an alternative that she now claims would violate her religion.

The court ultimately avoided ruling on whether the CBM is a religion or whether Cloutier's interpretation of the CBM tenets is protected by Title VII. Instead, the court concluded that even if Cloutier had met her *prima facie* case, Costco should prevail because it fulfilled its obligations under the second part of the Title VII framework. Specifically, the court found that Costco met its burden of showing that it had offered Cloutier a reasonable accommodation of her religious practice:

> Costco's offer of accommodation was manifestly reasonable as a matter of law. The temporary covering of plaintiff's facial piercings during working hours impinges on plaintiff's religious scruples no more than the wearing of a blouse, which covers plaintiff's tattoos. The alternative of a clear plastic retainer does not even require plaintiff to cover her piercings. Neither of these alternative accommodations will compel plaintiff to violate any of the established tenets of the CBM.

In granting summary judgment on the Title VII claim, the court stressed that "the search for a reasonable accommodation goes both ways. Although the employer is required under Title VII to accommodate an employee's religious beliefs, the employee has a duty to cooperate with the employer's good faith efforts to accommodate." The court also noted that Title VII does not require Costco to grant Cloutier's preferred accommodation, but merely a reasonable one. While Costco's suggested accommodation balanced Cloutier's beliefs with its interest in presenting a professional appearance, Cloutier "offered no accommodation whatsoever."

Having resolved the federal claim, the court turned to Cloutier's state law claim under Mass. Gen. Laws ch. 151B § 4(1A), which has been interpreted largely to mirror Title VII. The statute prevents employers from imposing a condition of employment which "would require an employee to violate, or forego the practice of, his creed or religion as required by that creed or religion." "Creed or religion" is defined as "any sincerely held religious beliefs, without regard to whether such beliefs are approved, espoused, prescribed or required by an established church or other religious institution or organization." The employee bears the burden of proof in establishing that something is a practice of his creed or religion. Under this examination, "inquiry as to whether an employee's belief is sincere is constitutionally appropriate." Where the employee demonstrates that a conflict exists, the burden shifts to the employer, who must prove that it offered the employee a "reasonable accommodation," defined as one that "shall not cause undue hardship in the conduct of the employer's business."

Under the foregoing framework, the district court concluded that summary judgment for Costco was appropriate. Although it noted the possibility that the state statute "casts a broader net than Title VII in covering purely personal beliefs that may be entitled to protection from discrimination," the court relied on its previous finding that Costco's offer to let Cloutier return to work wearing a band-aid or plastic retainer was "reasonable as a matter of law."

Cloutier now appeals, arguing that the court erred in finding no violation of Title VII or state law and that disputed material facts made summary judgment inappropriate.

II.

On appeal, Cloutier vigorously asserts that her insistence on displaying all her facial jewelry at all times is the result of a sincerely held religious belief. Determining whether a belief is religious is "more often than not a difficult and delicate task," one to which the courts are ill-suited. Fortunately, as the district court noted, there is no need for us to delve into this thorny question in the present case. Even assuming, *arguendo,* that Cloutier established her *prima facie* case, the facts here do not support a finding of impermissible religious discrimination.

We find dispositive that the only accommodation Cloutier considers reasonable, a blanket exemption from the no-facial-jewelry policy, would impose an undue hardship on Costco. In such a situation, an employer has no obligation to offer an accommodation before taking an adverse employment action.

A. Title VII

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of, among other things, religion. Under Title VII, an employer must offer a reasonable accommodation to resolve a conflict between an employee's sincerely held religious belief and a condition of employment, unless such an accommodation would create an undue hardship for the employer's business.

As noted, the First Circuit applies a two-part framework to religious discrimination claims under Title VII. First, the plaintiff must make her *prima facie* case that a bona fide religious practice conflicts with an employment requirement and was the reason for the adverse employment action. If the plaintiff establishes her *prima facie* case, the burden then shifts to the employer to show that it offered a reasonable accommodation or, if it did not offer an accommodation, that doing so would have resulted in undue hardship.

We follow the district court in assuming, *arguendo,* that Cloutier established a *prima facie* case sufficient to shift the burden to Costco to demonstrate that it offered a reasonable accommodation or that it could not do so without suffering undue hardship.

1. Reasonable accommodation

The parties dispute when Costco first offered Cloutier an accommodation, but we view the facts on summary judgment in the light most favorable to Cloutier. Cloutier was terminated on July 14, 2001. She maintains that Costco did not extend any offer of accommodation until August 10, 2001, approximately one month later, during a meeting that was part of the EEOC mediation process. The district court acknowledged this time line but asserted that "this delay in making the offer after Cloutier had been terminated does not justify denial of the motion for summary judgment." The court offered three explanations for this statement: (1) Costco may have offered Cloutier back pay, (2) "the delay in transmitting the offer emerged as much from a failure of cooperation by plaintiff as from any intransigence on the part of the defendant," and (3) the assumption that Cloutier would not bring the case to trial over four weeks' salary. Unpersuaded that the first and third points are relevant to our reasonable accommodation inquiry, we question the district court's dismissal of this timing difficulty.

Courts in at least two of our sister circuits have ruled that an accommodation offered after an adverse employment action does not shield an employer from liability under Title VII. Courts have also acknowledged that the opposite rule, treating as reasonable a post-termination offer extended during the EEOC mediation process, would "encourage the making of such offers, thus furthering Title VII's important statutory policy favoring voluntary reconciliation." Yet, as the Tenth Circuit has noted, this rule would also leave employers' conduct "virtually unregulated" when conflicts first arise. As a consequence, "Title VII would provide employees no protection until after the fact, an important consideration given the impact a suspension, termination, or rejection may have on an individual's life."

Even this limited discussion illustrates that the question of whether a post-termination offer extended during the EEOC mediation process can be a reasonable accommodation raises difficult issues. We have yet to consider this question directly and decline to do so here on the limited summary judgment record. Our affirmance rests instead on an alternative ground advanced by Costco — namely, that the only accommodation Cloutier considers reasonable would impose an undue hardship on Costco.

2. Undue hardship

Cloutier asserts that the CBM mandate to be a confident role model requires her to display all of her facial piercings at all times. In her view, the only reasonable accommodation would be exemption from the no-facial-jewelry policy. Costco maintains that such an exemption would cause it to suffer an undue hardship, and that as a result it had no obligation to accommodate Cloutier.

An accommodation constitutes an "undue hardship" if it would impose more than a *de minimis* cost on the employer. This calculus applies both to economic costs, such as lost business or having to hire additional employees to accommodate a Sabbath observer, and to non-economic costs, such as compromising the integrity of a seniority system.

Cloutier argues that Costco has not met its burden of demonstrating that her requested accommodation would impose an undue hardship. She asserts that she did not receive complaints about her facial piercings and that the piercings did not affect her job performance. Hence, she contends that any hardship Costco posits is merely hypothetical and therefore not sufficient to excuse it from accommodating her religious practice under Title VII.

Courts are "somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice." "Nevertheless, it is possible for an employer to prove undue hardship without actually having undertaken any of the possible accommodations." It can do so by "examining the specific hardships imposed by specific accommodation proposals." Here, Costco has only one proposal to evaluate (allowing Cloutier to wear and display her body jewelry as she demands) and has determined that it would constitute an undue hardship.

The district court acknowledged that "Costco has a legitimate interest in presenting a workforce to its customers that is, at least in Costco's eyes, reasonably professional in appearance." Costco's dress code, included in the handbook distributed to all employees, furthers this interest. The preface to the code explains that, "Appearance and perception play a key role in member service. Our goal is to be dressed in professional attire that is appropriate to our business at all times. All Costco employees must practice good grooming and personal hygiene to convey a neat, clean and professional image."

It is axiomatic that, for better or for worse, employees reflect on their employers. This is particularly true of employees who regularly interact with customers, as Cloutier did in her cashier position. Even if Cloutier did not personally receive any complaints about her appearance, her facial jewelry influenced Costco's public image and, in Costco's calculation, detracted from its professionalism.

Costco is far from unique in adopting personal appearance standards to promote and protect its image. As the D.C. Circuit noted, "Perhaps no facet of business life is more important than a company's place in public estimation. Good grooming regulations reflect a company's policy in our highly competitive business environment. Reasonable requirements in furtherance of that policy are an aspect of managerial responsibility."

Courts have long recognized the importance of personal appearance regulations, even in the face of Title VII challenges. Such regulations are often justified with regard to safety concerns. *E.g., Bhatia v. Chevron U.S.A., Inc.,* 734 F.2d 1382 (9th Cir.1984) (affirming summary judgment for employer who refused to exempt a Sikh employee from the requirement that all machinists be clean-shaven, where the policy was based on the necessity of being able to wear a respirator with a gas-tight face seal because of potential exposure to toxic gases).

Courts considering Title VII religious discrimination claims have also upheld dress code policies that, like Costco's, are designed to appeal to customer preference or to promote a professional public image. The majority of religious discrimination cases in this arena appear to involve policies regulating facial hair.

But we are not the first court to consider a religious discrimination claim involving jewelry. In *Daniels v. City of Arlington,* 246 F.3d 500 (5th Cir.2001), a former police officer claimed that his dismissal for wearing a gold cross pin on his uniform in violation of the police department's no-pin policy violated Title VII. The only reasonable accommodation that Daniels cited was to exempt him from the no-pin policy. The Fifth Circuit granted summary judgment for the police department, concluding that "the only accommodation Daniels proposes is unreasonable and an undue hardship for the city as a matter of law."

The assessment of what constitutes an undue hardship may be somewhat different for a private employer than for a police department. Still, we are faced with the similar situation of an employee who will accept no accommodation short of an outright exemption from a neutral dress code. Granting such an exemption would be an undue hardship because it would adversely affect the employer's public image. Costco has made a determination that facial piercings, aside from earrings, detract from the "neat, clean and professional image" that it aims to cultivate. Such a business determination is within its discretion. As another court has explained, "Even assuming that the defendants' justification for the grooming standards amounted to nothing more than an appeal to customer preference, it is not the law that customer preference is an insufficient justification as a matter of law."

Cloutier argues that regardless of the reasons for the dress code, permitting her to display her facial jewelry would not be an undue hardship because Costco already overlooks other violations of its policy. In support of her position, she cites affidavits from two Costco employees identifying co-workers who "were allowed to wear facial piercings and were not disciplined." Costco responds that any employees who displayed facial jewelry did so without its permission or knowledge, noting that constant monitoring is impossible in a facility with several hundred employees.

We find Cloutier's contention, and the affidavits underlying it, unpersuasive. To the extent that the ambiguous term "allowed" implies that Costco was aware of the piercings, the affidavits are marred by an evidentiary flaw: the affiants do not appear to have personal knowledge of Costco's awareness. And to the extent that the affidavits suggest that other employees' piercings went unnoticed, we do not believe that such isolated violations diminish the hardship Costco would suffer if it were forced to exempt Cloutier from its no-facial-jewelry policy.

Cloutier appears to reason that because other employees have violated the no-facial-jewelry policy, it would not be an additional burden on Costco's effort to present a professional workforce for her to display her piercings as well. But there is an important distinction between an employee who displays facial jewelry unnoticed in violation of the dress code and one who does so under an exemption from the dress code. In the first scenario, Costco can instruct an employee to remove facial jewelry as soon as it becomes aware of a violation. In the second scenario, Costco forfeits its ability to mandate compliance and thus loses control over its public image. That loss, as we have discussed, would constitute an undue hardship.

Hogan v. Forsyth Country Club Co., 340 S.E.2d 116 (N.C. App. 1986)

MARTIN, Judge.

Plaintiffs assert error with respect to the entry of summary judgment dismissing each of their multiple claims. For the reasons which follow, we conclude that April Cornatzer is entitled to a trial upon two of the three claims which she asserts. However, with respect to her claim for wrongful discharge from employment and to each of the claims of Marlene Hogan and Sonya Mitchell, we affirm the judgment of the trial court.

II

The first issue raised by each of the plaintiffs involves the entry of summary judgment dismissing her claim for intentional infliction of emotional distress. Each plaintiff contends that her forecast of evidence is sufficient to raise genuine issues of material fact with respect to her claim sufficient to survive summary judgment.

The tort of intentional infliction of mental or emotional distress was formally recognized in North Carolina by the decision of our Supreme Court in *Stanback v. Stanback,* 297 N.C. 181 (1979). The claim exists "when a defendant's 'conduct exceeds all bounds usually tolerated by decent society' and the conduct 'causes mental distress of a very serious kind.'" The elements of the tort consist of: (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress.

> The tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress. Recovery may be had for the emotional distress so caused and for any other bodily harm which proximately results from the distress itself.

III

A

The evidence with respect to April Cornatzer's claim for intentional infliction of emotional distress, taken in the light most favorable to her, tends to show that in September 1982, Hans Pfeiffer began making sexual advances toward her. At her deposition, and in an affidavit, Cornatzer maintained that Pfeiffer made sexually suggestive remarks to her while she was working, coaxing her to have sex with him and telling her that he wanted to "take" her. He would brush up against her, rub his penis against her buttocks and touch her buttocks with his hands. When she refused his advances, he screamed profane names at her, threatened her with bodily injury, and on one occasion, advanced toward her with a knife and slammed it down on a table in front of her. As a result of Pfeiffer's actions toward her, Cornatzer maintains that she became very nervous, anxious, humiliated and depressed, to the extent that she was required to seek medical treatment for ulcers.

Defendant contends that, as a matter of law, the conduct directed toward Cornatzer by Pfeiffer was insufficiently outrageous to meet the requirement of *Dickens.* We disagree. It is a question of law for the court to determine, from the materials before it, whether the conduct complained of may reasonably be found to be sufficiently outrageous as to permit recovery. However, once conduct is shown which may be reasonably regarded as extreme and outrageous, it is for the jury to determine, upon proper instructions, whether the conduct complained of is, in fact, sufficiently extreme and outrageous to result in liability.

That Cornatzer's forecast of evidence shows sufficiently outrageous conduct directed toward her by Pfeiffer to entitle her to go to the jury strikes us as irrefutable. No person should have to be subjected to non-consensual sexual touchings, constant suggestive remarks and on-going sexual harassment such as that testified to by Cornatzer, without being afforded remedial recourse through our legal system. Such conduct, if found by a jury to have actually existed, is beyond the "bounds usually tolerateds by decent society" and would permit Cornatzer to recover, at least as against Pfeiffer.

Defendant argues further, however, that even if Pfeiffer would be liable, it should not be held liable for his intentional or wanton acts committed against Cornatzer because the acts were not committed for any purpose connected with the work he was employed to do. On the other hand, Cornatzer argues that defendant may be held liable for Pfeiffer's conduct under the doctrine of *respondeat superior.*

As a general rule, liability of a principal for the torts of his agent may arise in three situations: (1) when the agent's act is expressly authorized by the principal; (2) when the agent's act is committed within the scope of his employment and in furtherance of the principal's business; or (3) when the agent's act is ratified by the principal. There is no contention that defendant expressly authorized Pfeiffer's conduct; if defendant is to be held liable, there must be some evidence that Pfeiffer was acting within the scope of his employment or that defendant ratified his wrongful conduct.

It is well settled in this State that "if the act of the employee was a means or method of doing that which he was employed to do, though the act be unlawful and unauthorized or even forbidden, the employer is liable for the resulting injury, but he is not liable if the employee departed, however briefly, from his duties in order to accomplish a purpose of his own, which purpose was not incidental to the work he was employed to do." this Court stated that "the principal is liable for the acts of his agent, whether malicious or negligent, and the employer for similar acts of his employees. The test is whether the act was done within the scope of his employment and in the prosecution and furtherance of the business which was given him to do."

Although Pfeiffer's acts against Cornatzer were committed while both were at their jobs on defendant's premises, we can find no evidence, and Cornatzer points us to none, which would support a finding that Pfeiffer was acting within the scope of his employment or in the furtherance of any purpose of the defendant in committing the acts. Rather, it appears that he was acting in pursuit of some corrupt or lascivious purpose of his own.

However, we are constrained to hold that Cornatzer has presented a sufficient showing of ratification of Pfeiffer's conduct by defendant to warrant submission of the question to the jury. Cornatzer's evidence, considered in the light most favorable to her, indicates that she complained to Richard Brennan, defendant's general manager, several times concerning Pfeiffer's conduct and that Brennan did nothing to prevent further sexual harassment by Pfeiffer. "The designation 'manager' implies general power and permits a reasonable inference that he was vested with the general conduct and control of defendant's business, and his acts are, when committed in the line of his duty and in the scope of his employment, those of the company." Thus, Brennan, whose responsibilities as manager included his duty to oversee all aspects of defendant's business and to supervise defendant's employees, was vested with authority to act on behalf of defendant and if, by his actions, he ratified Pfeiffer's wrongful conduct, such ratification would be imputed to defendant. In order to show that the wrongful act of an employee has been ratified by his employer, it must be shown that the employer had knowledge of all material facts and circumstances relative to the wrongful act, and that the employer, by words or conduct, shows an intention to ratify the act. Whether Brennan's actions, consisting of retaining Pfeiffer in defendant's employ, declining to intervene to prevent his further offensive behavior toward Cornatzer, and ultimately terminating Cornatzer from employment, amount to a course of conduct signifying an intention to acquiesce in, approve and ratify Pfeiffer's acts is a question for the jury. For the foregoing reasons, we hold that summary judgment dismissing Cornatzer's claim for intentional infliction of mental distress was improvidently granted.

B

We do not reach the same result, however, with respect to the claims of Marlene Hogan and Sonya Mitchell for intentional infliction of mental distress. Hogan's evidence tends to show that Pfeiffer screamed and shouted at her, called her names, interfered with her supervision of waitresses under her charge, and on one occasion threw menus at her. She also testified that she shouted back at Pfeiffer. This conduct lasted during the period from 22 June 1983 until her termination on 24 July 1983. The general manager, Clifford Smith, received complaints from both Hogan and Pfeiffer concerning the temper of the other. His attempt to discuss the situation with both employees was unsuccessful because Pfeiffer walked out.

While we do not condone Pfeiffer's intemperate conduct, neither do we believe that his alleged acts "exceed all bounds usually tolerated by a decent society," so as to satisfy the first element of the tort, requiring a showing of "extreme and outrageous conduct."

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.
>
> The liability clearly does not extend to mere insults, indignities, threats. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate or unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.

We hold Pfeiffer's conduct, as shown by Hogan's forecast of evidence, was not such as to be reasonably regarded as "extreme and outrageous" so as to permit Hogan to recover for intentional infliction of mental distress.

Sonya Mitchell bases her claim for intentional infliction of emotional distress upon the alleged conduct and acts of Richard Brennan. Mitchell's evidence, if accepted as true by a jury, would show that Brennan refused to grant her a pregnancy leave of absence, directed her to carry objects such as trash bags, vacuum cleaners, and bundles of linen weighing more than 10 pounds. He cursed at her on one occasion. When she requested, on 10 July 1983, to be allowed to leave work to go to the hospital, Brennan refused to grant permission. When she left without his permission, he terminated her from employment.

We find that Brennan's alleged conduct, though unjustified under the circumstances apparent from Mitchell's testimony, was not so "extreme and outrageous" as to give rise to a claim for intentional infliction of mental or emotional distress.

1.2 Protected Concerted Activity

Stericycle, Inc., 372 NLRB No. 113 (N.L.R.B. Aug. 2, 2023)

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, WILCOX, AND PROUTY

Today, after previously issuing a notice and invitation for briefing, we adopt a new legal standard to decide whether an employer's work rule that does not expressly restrict employees' protected concerted activity under Section 7 of the National Labor Relations Act (Act) is facially unlawful under Section 8(a)(1) of the Act. Here, an administrative law judge found that the Respondent violated Section 8(a)(1) by maintaining certain rules for its employees that addressed personal conduct, conflicts of interest, and confidentiality of harassment complaints. In making those findings, the judge applied the standard established by a divided Board in *Boeing Co.*, 365 NLRB No. 154 (2017), which sua sponte reversed the standard announced in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

Given the ubiquity of work rules and the importance of ensuring that such rules do not operate to undermine employees' exercise of their rights under the Act, we sought public input on the standard adopted in *Boeing*, then purportedly clarified in *LA Specialty Produce* Co., 368 NLRB No. 93 (2019), and applied in subsequent cases where the Board found that several types of work rules were categorically lawful for employers to maintain, essentially without regard to how the particular rules were drafted.

Accordingly, we invited the parties and interested amici to address the following questions:

1. Should the Board continue to adhere to the standard adopted in *Boeing Co.* and revised in *LA Specialty Produce Co.*?

2. In what respects, if any, should the Board modify existing law addressing the maintenance of employer work rules to better ensure that:

    a. the Board interprets work rules in a way that accounts for the economic dependence of employees on their employers and the related potential for a work rule to chill the exercise of Section 7 rights by employees;

    b. the Board properly allocates the burden of proof in cases challenging an employer's maintenance of a work rule under Section 8(a)(1); and

    c. the Board appropriately balances employees' rights under Section 7 and employers' legitimate business interests?

3. Should the Board continue to hold that certain categories of work rules– such as investigative-confidentiality rules, non-disparagement rules, and rules prohibiting outside employment–are always lawful to maintain?

Having carefully considered the briefs of the parties and amici, as well as the Board's past experiences regarding these issues and the view of our dissenting colleague, we have decided to adopt an approach to assessing facial challenges to employer work rules under Section 8(a)(1) that builds on and revises the *Lutheran Heritage* standard. As we will explain, the primary problem with the standard from *Boeing* and *LA Specialty Produce* is that it permits employers to adopt overbroad work rules that chill employees' exercise of their rights under Section 7 of the Act, which include the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . ., and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. To begin, the current standard fails to account for the economic dependency of employees on their employers. Because employees are typically (and understandably) anxious to avoid discharge or discipline, they are reasonably inclined both to construe an ambiguous work rule to prohibit statutorily protected activities and to avoid the risk of violating the rule by engaging in such activity. In turn, *Boeing* gives too little weight to the burden a work rule could impose on employees' Section 7 rights. At the same time, *Boeing*'s purported balancing test gives too much weight to employer interests. Crucially, *Boeing* also condones overbroad work rules by not requiring the party drafting the work rules–the employer–to narrowly tailor its rules to only promote its legitimate and substantial business interests while avoiding burdening employee rights.

The standard we adopt today remedies these fundamental defects. We adopt a modified version of the basic framework set forth in *Lutheran Heritage*, which recognized that overbroad workplace rules and polices may chill employees in the exercise of their Section 7 rights and properly focused the Board's inquiry on NLRA-protected rights. During the 13 years when the *Lutheran Heritage* standard was in place, reviewing courts repeatedly and uncontroversially applied and upheld the standard. No court rejected the *Lutheran Heritage* standard or held that the Board was, in fact, applying some standard other than the one it articulated. However, although *Lutheran Heritage* implicitly allowed the Board to evaluate employer interests when considering whether a particular rule was unlawfully overbroad, the standard itself did not clearly address how employer interests factored into the Board's analysis. The modified standard we adopt today makes explicit that an employer can rebut the presumption that a rule is unlawful by proving that it advances legitimate and substantial business interests that cannot be achieved by a more narrowly tailored rule. Because we overrule *Boeing*, *LA Specialty Produce*, and the work rules cases relying on them, including those that placed rules into an "always lawful" category based simply on their subject matter, we reject *Boeing*'s categorical approach, instead returning to a particularized analysis of specific rules, their language, and the employer interests actually invoked to justify them.

As under *Lutheran Heritage*, our standard requires the General Counsel to prove that a challenged rule has a reasonable tendency to chill employees from exercising their Section 7 rights. We clarify that the Board will interpret the rule from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected concerted activity. Consistent with this perspective, the employer's intent in maintaining a rule is immaterial. Rather, if an employee could reasonably interpret the rule to have a coercive meaning, the General Counsel will carry her burden, even if a contrary, noncoercive interpretation of the rule is also reasonable. If the General Counsel carries her burden, the rule is presumptively unlawful, but the employer may rebut that presumption by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule. If the employer proves its defense, then the work rule will be found lawful to maintain.

I.

Applying Section 8(a)(1) of the Act, the Board has long and consistently recognized that an employer's mere maintenance of a work rule may unlawfully interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. The Supreme Court long ago confirmed the Board's authority to regulate employer work rules, as part of the flexibility the Board requires "to accomplish the dominant purpose" of the Act: to protect "the right of employees to organize for mutual aid without employer interference." Because overbroad and ambiguous work rules may have a coercive effect on employees, the Board and courts have long acknowledged that the regulation of work rules "serves an important prophylactic function: it allows the Board to block rules that might chill the exercise of employees' rights by cowing the employees into inaction, rather than forcing the Board to 'wait until that chill is manifest,' and then try to 'undertake the difficult task of dispelling it.'"

In its decisions carrying out this important function, the Board has grappled with two interrelated issues. The first has been determining the appropriate interpretive principles to apply in evaluating the potentially deleterious impact of a work rule on employees' exercise of their Section 7 rights. In doing so, the Board regularly has assessed work rules to determine "the reasonably foreseeable effects of the wording of the rule on the conduct of the employees," observing that "where the language is ambiguous and may be misinterpreted by the employees in such a way as to cause them to refrain from exercising their statutory rights, then the rule is invalid even if interpreted lawfully by the employer in practice." The second issue for the Board has been determining how to ensure that the rule minimizes any potential impact on employee rights, notwithstanding the legitimate business interests that the employer may be trying to advance by maintaining its rule.

Over the past nearly 25 years, the Board has attempted to articulate and consistently apply a generally applicable test under Section 8(a)(1) for assessing facial challenges to work rules. For almost half that time, the *Lutheran Heritage* standard provided the interpretive principles relevant to assessing the impact of a given rule on employees' rights. We detail the Board's recent history below with an eye toward explaining why a modified version of the *Lutheran Heritage* standard is the best approach to evaluating facial challenges to work rules in light of the Board's experience and long-established statutory principles. Our decision today does not disturb the Board's long-established doctrines covering work rules that address union (or other protected) solicitation, distribution, or insignia. Consistent with the Board's decisions in both *Lutheran Heritage* and *Boeing*, we preserve Board precedent in those areas.

A. Lafayette Park

The recent history of the Board's approach to work rules begins with *Lafayette Park Hotel* (1998). There, a full Board considered facial challenges to rules defining various types of "unacceptable conduct." The Board identified "the appropriate inquiry" as "whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights" and that, where there is a likely chilling effect, "the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." For that standard, the Board referred to the Supreme Court's decision in *Republic Aviation*, quoting its admonition that assessing the challenged rules involves "working out an adjustment between the undisputed right of self-organization assured to employees under the Act and the equally undisputed right of employers to maintain discipline in their establishments." Member Hurtgen, disagreeing with the majority, expressed his view that "if a rule reasonably chills the exercise of Sec. 7 rights, it can nonetheless be lawful if it is justified by significant employer interests."

In analyzing the challenged rules' impact on employees under its announced standard, the *Lafayette Park* Board did consider the employer's interests in maintaining its rules, if not in the manner Member Hurtgen sought. l use of certain of the employer's facilities, the Board noted the "legitimate business reasons for such a rule" and its view that "employees would recognize the rule for its legitimate purpose." Similarly, when assessing the employer's rule forbidding fraternization between employees and customers, the Board noted that employees "would recognize the legitimate business reasons for which such a rule was promulgated, and would not reasonably believe that it reaches Section 7 activity." Although the Board considered the employer's interests (as effectively communicated to employees), it did so in the course of interpreting a rule and assessing its potential chilling effect on employees.

The *Lafayette Park* Board was divided, too, in how to correctly apply the announced standard to particular rules. In a partial dissent, Members Fox and Liebman thought the majority merely paid "lip service" to the applicable interpretive principles in upholding rules that, in their view, had "the likely effect of chilling Section 7 activity." In response, Chairman Gould characterized their dissenting approach as one that improperly "parsed out certain words and createed theoretical definitions" for rules "that differ from the obvious ones." He asserted that the Board should not "focus on whether any language in the rules could theoretically encompass Section 7 activity" but, instead, should focus on "whether a reasonable employee could believe that the rule prohibits protected activity."

B. Lutheran Heritage

A few years later, in another full-Board decision, *Lutheran Heritage* (2004), the majority construed Lafayette Park to mean that the relevant inquiry "begins with the issue of whether the rule explicitly restricts activities protected by Section 7." If it does not, a violation "is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Under the first of these prongs, the majority instructed that the Board "must refrain from reading particular phrases in isolation," "must not presume" that a rule will cause "improper interference with employee rights," and should not conclude "that a reasonable employee would read a rule to apply to Section 7 activity simply because the rule could be interpreted that way."

In an effort to refine the standard applied in *Lafayette Park*, the Board in *Lutheran Heritage* observed that it was not enough to establish a violation of Section 8(a)(1) merely because a rule "could conceivably be read to cover Section 7 activity," but in referring to how a reasonable employee ""would read" the rule, the majority did not expressly hold that the coercive meaning must be the only reasonable interpretation of the rule or the most reasonable interpretation. The *Lutheran Heritage* Board acknowledged that the rules it was scrutinizing "serve legitimate business purposes" and that reasonable employees "would realize the lawful purpose of the challenged rules"–thereby suggesting that such considerations had informed its conclusions–but again the *Lutheran Heritage* majority did not clearly explain how employer interests factored into the analysis. Finally, *Lutheran Heritage* rejected a categorical approach to work rules. The majority acknowledged the case-by-case nature of the Board's work rules decisions, noting that it did "not consider it necessary or appropriate to decide in this case what rules in a future hypothetical case would be unlawful."

In dissent, Members Liebman and Walsh raised the issue of balancing. They argued that in Lafayette Park the Board had recognized that "determining the lawfulness of an employer's work rules requires balancing competing interests," and they accused the majority of "ignoring the employees' side of the balance." The dissenters agreed that employers have legitimate business interests that warrant protection through the maintenance of work rules but contended that the employer must do so "subject to the requirement that employers articulate those rules with sufficient specificity that they do not impinge on employees' free exercise of Section 7 rights."

Lutheran Heritage, then, again demonstrated the Board's ongoing efforts to develop a standard that grappled with the two key questions posed in work rules cases: (1) how to interpret a rule and (2) whether and how employer interests factor into the analysis.

C. Aftermath of Lutheran Heritage

Following *Lutheran Heritage*, the Board decided many work rules cases, and reviewing courts consistently applied and upheld the standard.8 However, there was some degree of confusion and disagreement about some aspects of its proper application, in particular whether, and if so, how, to consider an employer's reasons for maintaining a challenged rule.

For instance, in *Flagstaff Medical Center* (2011), a panel majority found a hospital employer's rule restricting employees' use of cameras lawful, in part because of the employer's "significant interest" in having the rule to prevent the disclosure of patient health information. The majority there viewed the employer's interest in maintaining the rule relevant to the analysis insofar as it informed the majority's assessment that reasonable employees would recognize that employer interest and view the rule "as a legitimate means of protecting the privacy of patients and their hospital surroundings, not as a prohibition of protected activity."

But in a separate decision issued on the same day, a different panel majority assessed an employer's maintenance of certain work rules and made no mention of the employer's interests. Instead, the majority determined that the "only question" relevant was whether the employees "would reasonably construe the . . . rules to prohibit Section 7 activity" and did not mention the employer's interests for maintaining the rules as part of its analysis resolving that question. Courts occasionally regarded the Board's implicit approach to addressing employer interests under *Lutheran Heritage* as placing a rebuttal burden on the employer, once it was established that a rule had a reasonable tendency to chill employees' exercise of Section 7 rights.9

D. William Beaumont

In *William Beaumont Hospital* (2016), a majority consisting of then-Member McFerran and Member Hirozawa struck down a hospital employer's rule prohibiting conduct that "impedes harmonious interactions and relationships" because employees would reasonably understand that it could encompass interactions protected by Section 7. The majority also found a rule prohibiting "negative or disparaging comments" unlawful because it would reasonably be construed to prohibit protected expressions of concern about working conditions.

In dissent, Member Miscimarra contended that the *Lutheran Heritage* standard foreclosed consideration of employers' justifications for their rules. In his view, the "'reasonably construe' standard entailed a single-minded consideration of NLRA-protected rights, without taking into account the legitimate justifications of particular policies, rules and handbook provisions." He advocated a revised approach whereby, in every case challenging an employer's maintenance of a work rule, the Board would determine “the potential adverse impact of the rule on NLRA-protected activity” and “the legitimate justifications an employer may have for maintaining the rule.” Once the competing interests were identified, the Board should then balance them such that “a facially neutral rule should be declared unlawful only if the justifications are outweighed by the adverse impact on Section 7 activity.”

In response, the *William Beaumont* majority acknowledged that assessing work rules was a “difficult area of labor law,” particularly because of “the remarkable number, variety, and detail of employer work rules.” But the majority also noted that, in the years since the Board had decided *Lutheran Heritage*, no court of appeals had rejected the standard that the Board regularly applied in work-rules cases. The majority further explained that the *Lutheran Heritage* standard did, in fact, “take into account employer interests.” It did so by leaving employers free to protect their legitimate business interests by adopting more narrowly tailored rules while not infringing on Section 7 rights. The majority noted that when the Board found that a rule was not unlawfully overbroad, “it was typically because the rule was tailored such that the employer’s legitimate business interest in maintaining the rule was sufficiently apparent to a reasonable employee.”

E. Boeing and LA Specialty Produce

Less than 2 years later, without being asked and without seeking any public input, a newly constituted Board effectively incorporated the William Beaumont dissent into the majority opinion in *Boeing Co.* (2017). The *Boeing* majority held that, when deciding the lawfulness of maintaining a ““facially neutral” work rule, the Board “will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.” Those two factors would be balanced against each other. According to the majority, the *Lutheran Heritage* standard did not permit the Board to consider an employer’s legitimate business reasons for maintaining a rule; to distinguish between more and less important Section 7 interests; to differentiate among industries, work settings, or specific circumstances reflected in a given rule; or to produce consistent rulings in work-rules cases. And the majority claimed that past Board decisions specifying criteria for assessing the lawfulness of specific types of rules–like rules concerning workplace solicitation and distribution of literature–comport with its standard, which permitted accommodating employer interests, but not under *Lutheran Heritage*, which it asserted did not.

The majority also created a categorical classification system for evaluating rules under its standard. In "Category 1"– rules that were always lawful to maintain–it would put rules that, as a type, did not interfere with Section 7 rights and rules where the adverse impacts on Section 7 rights were outweighed by justifications associated with such rules. In "Category 2"–rules that were sometimes lawful to maintain–it would put rules that "warrant scrutiny in each case." And in "Category 3"–rules that were always unlawful to maintain–it would put rules that, given their impact on protected activity, could never be justified by an employer. The purported intent of this categorical approach was to "provide far greater clarity and certainty" for regulated parties.

Applying its new standard, the *Boeing* majority upheld a rule maintained by the employer, a manufacturer of military and commercial aircraft, restricting the use of cameras in the workplace because any "adverse impact" on Section 7 rights was "comparatively slight" and was "outweighed by substantial and important justifications associated with *Boeing*'s maintenance of the no-camera rule." Without further explanation, it deemed all rules of that type always lawful for employers to maintain no matter the circumstances. Remarkably, the *Boeing* Board also designated all rules "requiring employees to abide by basic standards of civility"–of the sort at issue in *William Beaumont*, but not at issue in *Boeing*–as always lawful.

Then-Member McFerran and Member Pearce both dissented, expressing similar views. Member McFerran asserted that, as the Board had recently explained in *William Beaumont*, the standard under *Lutheran Heritage* did allow for consideration of an employer's legitimate business justifications for its work rules. But Member McFerran contended that the majority's approach here went too far, privileging an employer's interests over the rights of employees, who, because of their economic dependence on employers, reasonably take a cautious approach when interpreting work rules for fear of running afoul of a rule whose scope is unclear. Member McFerran also criticized the majority's assertion that its approach would provide more "certainty and clarity," as she noted that it failed to identify which Section 7 rights and which employer interests are entitled to more or less weight in its balancing.

As to the majority's categorical approach, Member McFerran noted that designating a type of rule as always lawful to maintain improperly forgoes particularized scrutiny of a similar rule in an altogether different workplace by finding it lawful without addressing what particular Section 7 rights are at stake, what justifications an employer might actually offer for its rule, and what industry or work setting is involved.

Member Pearce expressed similar criticisms. He found "particularly troubling" the majority's designation of civility rules as always lawful to maintain. He pointed out that no civility rules were at issue in the case and that, in any event, civility rules threatened to chill the sort of heated expression that was not uncommon when employees engage in Section 7 activity.

Less than 2 years later, in *LA Specialty Produce Co.* (2019), a Board majority observed that *Boeing* needed to be buttressed with some "points of clarification." One ostensible clarification addressed how rules should be interpreted. The majority asserted that the reasonable employee does "not view every employer policy through the prism of the NLRA," such that "a challenged rule may not be found unlawful merely because it could be interpreted, under some hypothetical scenario, as potentially limiting some type of Section 7 activity." A second ostensible clarification addressed the burden of proof to demonstrate a work rule's impact on Section 7 rights, holding that "it is the General Counsel's initial burden in all cases to prove that a facially neutral rule would in context be interpreted by a reasonable employee . . . to potentially interfere with the exercise of Section 7 rights." The majority also attempted to clarify the categorical approach by explaining that a rule should be placed in Category 1, and thus deemed always lawful to maintain, when the "general" employer interests in maintaining such a rule outweigh the potential impact on the exercise of Section 7 rights.

Member McFerran dissented. As a threshold matter, she summarized what she deemed to be the primary defects in the reasoning of the *Boeing* Board. Those included (1) that the Board, in rejecting *Lutheran Heritage* and announcing a new standard, did so sua sponte and without public input; (2) that the standard under *Lutheran Heritage* already permitted the Board to consider an employer's legitimate business justifications for its work rules; (3) that the *Boeing* standard fails to properly assess rules from the perspective of a reasonable employee because it does not consider the economic dependence of employees on employers, which increases the chilling potential of ambiguous rules; and (4) that *Boeing*'s categorical approach dispenses with individualized scrutiny for rules by ignoring their wording, whether they were narrowly tailored, and their context.

Member McFerran also disagreed with the clarifications that *LA Specialty Produce* purported to make to *Boeing*. Specifically, she argued that the majority's description of a reasonable employee ignored employees' economic dependence on the employer and the resulting reasonable tendency to interpret work rules as coercive, even where a disinterested person would not. She also faulted the majority's requirement that the General Counsel must prove that a work rule "would in context be interpreted . . . to potentially interfere with the exercise of Section 7 rights" as effectively (but not explicitly) requiring a showing that the coercive interpretation of a rule is the only reasonable interpretation. As for the balancing test, Member McFerran noted that the majority failed to explain which party has the burden of proof with respect to the balancing, and that its endorsement of a "general" balancing approach eliminated consideration of the language of a particular rule or the requirement of narrow tailoring.

F. Aftermath of Boeing and LA Specialty Produce

Since *Boeing* was decided, both before and after the Board's attempted clarification of it in *LA Specialty Produce*, the Board has applied its new standard in a number of cases. The Board has usually found work rules lawful to maintain and, generally, has categorically deemed all similar rules to be lawful to maintain, no matter the specific wording of any particular rule or the specific workplace context in which they are maintained.

II.

Having considered the valuable perspectives of the parties and amici, as well as the Board's past experience and the views of our dissenting colleague, we have decided the better approach is a modified version of the framework set forth in *Lutheran Heritage* for evaluating facial challenges to employer work rules that do not explicitly restrict Section 7 activity by employees and were not promulgated in response to such activity, as clarified herein. As explained, the key issues presented are: (1) defining the interpretive principles to apply to discern when work rules have a reasonable tendency to chill employees' exercise of their statutory rights and (2) working out the proper adjustment between protecting employee rights and accommodating employers' legitimate and substantial business interests in maintaining their rules. Although Lafayette Park and *Lutheran Heritage* established the Board's proper interpretive focus–the perspective of a reasonable employee subject to the rule–they did not sufficiently (or clearly) articulate how employers' interests fit into the analysis. While *Boeing* and *LA Specialty Produce*, in turn, appropriately recognized that employer interests should factor into the Board's analysis, they adopted interpretive principles that failed to reflect the true coercive potential of work rules. In addition, those decisions gave too little weight to employees' Section 7 rights and too much weight to employer interests, in particular by failing to require employers to narrowly tailor their work rules to minimize as much as reasonably possible, if not altogether eliminate, any infringement of employee rights.

The approach we adopt today seeks to preserve the insights of the Board's prior decisions while addressing their shortcomings. Given the wide range of work rules, the varying language they use, and the many different employment contexts in which they arise, we do not expect our new standard to provide complete certainty and predictability in this area of the law. That abstract goal–as the Board's experience under *Boeing* suggests–could be achieved only by arbitrarily expanding the universe of work rules deemed always lawful to maintain, at the obvious expense to employees' ability to exercise the rights guaranteed to them by the Act.

Our approach is focused on furthering what the Supreme Court many decades ago defined as the "dominant purpose" of the Act: protecting "the right of employees to organize for mutual aid without employer interference." In the context of this case, achieving the Act's purpose means ensuring that the Board does not condone employer work rules that chill employees' exercise of their statutory rights for fear of discipline or discharge if they violate them. The potential for intimidation is great precisely because of what the Supreme Court has described as "the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." This fact of workplace life should be reflected in the Board's treatment of work rules under Section 8(a)(1) of the Act, just as the Supreme Court has required with respect to the analysis of employers' arguably coercive statements to employees.

But "equally undisputed," as the Supreme Court has also observed, is the "right of employers to maintain discipline in their establishments" and otherwise protect their legitimate and substantial business interests by regulating employees' workplace conduct. Accordingly, in the work-rules context, as in other situations governed by Section 8(a)(1) of the Act, the Board must fulfill its duty to protect employees' Section 7 rights while also considering employers' legitimate and substantial business interests. As we will explain, our new standard gives employers the necessary leeway to maintain rules of their own choosing to advance legitimate and substantial business interests. They simply need to narrowly tailor those rules to significantly minimize, if not altogether eliminate, their coercive potential. If employers do so, their rules will be lawful to maintain.

A.

It has long been established that the test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether they have a reasonable tendency to interfere with, restrain, or coerce employees who may engage in activities protected by Section 7. The General Counsel, of course, has the burden of establishing a violation of the Act. As we now explain, our initial focus in the work-rules context is on whether the General Counsel has proven that a rule has a reasonable tendency to interfere with, restrain, or coerce employees who contemplate engaging in protected activity. To discern that tendency, the Board–as in all other Section 8(a)(1) contexts– appropriately "views employer statements 'from the standpoint of employees over whom the employer has a measure of economic power.'"

Interpreting a work rule from the perspective of the economically dependent employee who contemplates engaging in Section 7 activity is consistent with workplace reality–employees ordinarily do not wish to risk their jobs by violating their employers' rules–and with the employee-protective purposes of the Act. As suggested, this frame of reference is entirely consistent with, and arguably compelled by, the Supreme Court's decision in *Gissel*, which considered whether certain statements made by an employer to his employees violated Section 8(a)(1). Addressing the employer's argument that its statements were protected by Section 8(c) of the Act, the *Gissel* Court explained that "an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8(a)(1)." The Court reasoned that "any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." These "obvious principles," in the Court's words, should be central to our analysis when the Board evaluates a work rule. Accordingly, in interpreting a rule, the Board will take the perspective of the "economically dependent employee" who contemplates engaging in Section 7 activity. Such an employee is readily inclined to avoid violating a rule, and so readily inclined to interpret it more broadly to restrict or prohibit Section 7 activity than a disinterested observer might. Being discharged might mean–to take just two very real examples–being unable to pay rent or put food on the table. For purposes of the Act, then, the coercive potential of a work rule is inextricably intertwined with the vulnerable position of employees.

By explicitly incorporating the perspective of the economically dependent employee into our analysis, we adopt an important interpretive principle that sometimes explicitly factored into the Board's analysis under Lafayette Park and *Lutheran Heritage*. This principle is consistent with the Board's long-established practice of construing any ambiguity in a work rule against the employer as the drafter of the rule.

Despite stating that work rules should be interpreted from "the employees' perspective," the *Boeing* Board did not base this perspective on employees' economic dependence. And, in turn, the Board in *LA Specialty Produce* obfuscated the issue by asserting–in response to the dissent's view that rules should be assessed from the perspective of an economically dependent employee–that "a reasonable employee does not presume a Section 7 violation lurks around every corner." Such rhetoric obscures the need to promote the policies of the Act, consistent with the Supreme Court's insight in Gissel about employees' economic position. For statutory purposes, the relevant reasonable employee is the employee who contemplates engaging in Section 7 activity, because this is the activity that the Act is explicitly intended to protect from employer interference. Whether some hypothetical employee only sometimes, or even never, contemplates Section 7 activity is immaterial. Indeed, if the likelihood of an employee contemplating Section 7 activity were somehow a relevant consideration, then even a rule explicitly prohibiting such activity could arguably be lawful (as not having a reasonable tendency, in fact, to interfere with the Section 7 activity of an employee who would not contemplate engaging in such activity). It is appropriate, then, for the Board to interpret an ambiguous work rule from the perspective of an employee who contemplates Section 7 activity, but who wishes to avoid the risk of being disciplined or discharged for violating the rule. The Board's goal, of course, is to ensure that employers do not maintain unlawfully overbroad work rules that have a reasonable tendency to chill employees from exercising their statutory rights.

In interpreting rules from the perspective of a reasonable employee, we believe the Board must also recognize that a typical employee interprets work rules as a layperson rather than as a lawyer. This uncontroversial principle has long been recognized by the Board, which has sensibly observed that "employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint."

In sum, going forward, the Board will begin its analysis by assessing whether the General Counsel has established that a challenged work rule has a reasonable tendency to chill employees from exercising their Section 7 rights. In doing so, the Board will interpret the rule from the perspective of the reasonable employee who is economically dependent on her employer and thus inclined to interpret an ambiguous rule to prohibit protected activity she would otherwise engage in. The reasonable employee interprets rules as a layperson, not as a lawyer. If an employee could reasonably interpret a rule to restrict or prohibit Section 7 activity, the General Counsel has satisfied her burden and demonstrated that the rule is presumptively unlawful. That is so even if the rule could also reasonably be interpreted not to restrict Section 7 rights and even if the employer did not intend for its rule to restrict Section 7 rights.

B.

For reasons already explained, in some circumstances a violation of Section 8(a)(1) may require more than a showing that an employee could reasonably interpret a work rule to restrict or prohibit Section 7 activity. In such cases, the Board must still evaluate the lawfulness of a work rule in the context of the legitimate and substantial business interests of the employer in maintaining a specific work rule under the particular circumstances. Accordingly, if the General Counsel carries her burden of demonstrating that a rule is presumptively unlawful, an employer may rebut the presumption by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule.

As we have explained, prior to *Boeing*, it was unclear precisely how the Board's work-rules standard incorporated an assessment of employer interests. Our new standard makes explicit that the Board will consider employer interests when evaluating the employer's rebuttal to the General Counsel's showing that a rule is presumptively unlawful.

The clarified standard improves on the conspicuous shortcomings of the approach adopted in *Boeing*. Under the *Boeing* standard, a challenged rule's "potential impact on NLRA rights" was balanced against "legitimate justifications associated with" the rule. But in practice, the *Boeing* balancing test was heavily weighted against employees' Section 7 rights and in favor of employer interests, because–with little if any explanation–the Board proceeded to treat employee rights as "peripheral." Although the Board under *Boeing* never explained which employee rights are "peripheral"–and there is no clear support in the Act for making such a determination–the characterization allowed the Board to regularly (and, in our view, arbitrarily) diminish the deleterious impacts of a challenged rule on Section 7 rights.

Crucially, *Boeing*'s balancing approach measured employer interests against employee interests without any requirement that a rule be narrowly tailored to serve the employer's legitimate interests in having the rule. Under *Boeing*, then, overbroad work rules are perfectly permissible. So long as the employer interests advanced by the rule are found to outweigh the burden on employees' rights, that rule is lawful to maintain–even if the employer interests could still be advanced by more narrowly crafting the rule such that it lessened or eliminated its burden on employees' rights. We believe that requiring employers to narrowly tailor their rules is a critical part of working out the proper adjustment between employee rights and employer interests in the work-rules context.

Such a requirement acknowledges employers' prerogative to craft rules that they need to advance legitimate and substantial business interests while necessarily minimizing or eliminating the burden that such rules can have on employees' exercise of their statutory rights. We impose no unreasonable burden on employers by expecting them to be aware of their employees' rights under the National Labor Relations Act, a statute enacted in 1935, more than 85 years ago, and long understood to apply in most workplaces, unionized and nonunionized alike–and to craft rules that minimize interference with their employees' exercise of these long-established federal rights. Indeed, as we have noted, it has long been uncontroversial that any ambiguity in a work rule must be construed against the employer as the drafter of the rule.

Prior to *Boeing*, the Board often applied a narrow-tailoring requirement. As the Board explained then, many of the Board's pre-*Boeing* findings that a given rule was lawful to maintain were "typically because" the rule was narrowly tailored. The courts of appeals approved of the Board's application of a narrow-tailoring requirement. After all, courts are well familiar with the concepts of facial overbreadth and the importance of narrowly tailoring a rule from the First Amendment context.

We believe that a narrow-tailoring requirement is exactly the sort of reasonable "adjustment between the undisputed right of self-organization assured to employees under the Act and the equally undisputed right of employers to maintain discipline in their establishments" that the Supreme Court has instructed us to make in comparable situations.

Under *Boeing*, even after attempting to provide clarifications in *LA Specialty Produce*, the Board never explained which party has the burden of proof with respect to the balancing test. We make clear here that, when a rule is presumptively unlawful, it is the employer's burden to prove that its legitimate and substantial business interests cannot be accomplished with a more narrowly tailored rule and that, as a result, the rule should be deemed lawful to maintain. Placing the burden on the employer is consistent with the Supreme Court's decisions in comparable circumstances. This burden allocation is no different than under our more generally applicable Section 8(a)(1) framework. See, e.g., *ANG Newspapers*, 343 NLRB 564, 565 (2004) ("Under the 8(a)(1) standard, the Board first examines whether the employer's conduct reasonably tended to interfere with Section 7 rights. If so, the burden is on the employer to demonstrate a legitimate and substantial business justification for its conduct."). This approach also does not change the General Counsel's burden of proving the unfair labor practice, but rather extends to the employer something akin to an affirmative defense that it has the burden of sustaining to overcome the presumption that a given work rule is unlawful.And allocating this burden to the employer is sensible given that the employer is in the best position to explain its legitimate and substantial business interest, how its rule advances that interest, and why a more narrowly tailored rule would fail to advance that interest.

C.

Having rescinded the standard adopted in *Boeing* and revised in *LA Specialty Produce*, we necessarily reject those decisions and their progeny, including the categorical holding that the Board has made to find certain types of work rules always lawful to maintain. Instead of that rigid–indeed, arbitrary–categorical approach, we return to a case-by-case approach, which examines the specific language of particular rules and the employer interests actually invoked to justify them.

The primary problem with *Boeing*'s categorical approach is that it was regularly applied to designate all rules of a generalized type as always lawful to maintain, no matter their specific wording, the specific industry or workplace in which the employer maintained the rule, the specific employer interests that the rule was supposed to advance, or any number of context-specific factors that may have arisen in a particular case. *Boeing* itself exemplifies the arbitrary nature of this categorical approach.

In *Boeing*, the employer was "one of the country's most prominent defense contractors." It maintained a rule that, absent a manager-approved business need and a permit issued by its security department, prohibited employees' use of the camera features of electronic devices (like smartphones) on all company property. Although the Board in *Boeing* cursorily labeled the adverse impact of this ""no camera" rule on employees' exercise of Section 7 rights "comparatively slight" (ignoring the importance of photo or video documentation of unfair labor practices, protected concerted activity, and the like), it at least acknowledged that the rule infringed on employees' exercise of their rights. Yet in applying its balancing test, the *Boeing* Board found that the employer's interests advanced by the rule outweighed the adverse impact on employee rights and so deemed the rule lawful to maintain.

The employer interests advanced by the rule included: serving as an integral component of *Boeing*'s security protocols, "which were necessary to maintain *Boeing*'s accreditation as a federal contractor to perform classified work for the United States Government"; furnishing "a fail-safe to ensure that classified information will not be released outside of *Boeing* in the event that such information finds its way into a non-classified area"; playing "a key role in ensuring that *Boeing Co.* complies with its federally mandated duty to prevent the disclosure of export-controlled information," including "'sensitive equipment, software and technology,' the export of which is controlled by the federal government 'as a means to promote our national security and foreign policy objectives'"; mitigating "documented" instances of "foreign powers" trying to steal *Boeing*'s proprietary technology; and limiting "the risk"–in light of *Boeing*'s "documented evidence" of "surveillance by potentially hostile actors"–"of *Boeing* becoming a target of terrorist attack."

All of these interests that pertained to *Boeing* are obviously unique to "one of the country's most prominent defense contractors." They have no relevance to the overwhelming majority of employers who do not deal in "classified" information, "export-controlled information," and the like. Despite that fact, and remarkably without any further justification, the *Boeing* Board put "no camera" and "no recording" rules "into Category 1," meaning that all rules of that type are always lawful for every employer to maintain. In other words, every employer can lawfully maintain a "no camera" or "no recording" rule that the *Boeing* Board admitted chills the exercise of Section 7 rights even if–as will be true for the overwhelming majority of them–those employers share none of the interests that justified *Boeing*'s maintenance of its rule. *Boeing* thus reflects an arbitrary and capricious approach to the analysis of work rules. We reject it.

In *LA Specialty Produce*, in turn, the Board purported to offer "points of clarification" for the categorical approach. The primary point of purported clarification was to state that *Boeing*'s "Category 1" balancing test involves measuring "general" employer interests advanced by a rule against the rule's interference with employees' exercise of Section 7 rights. While there may be some legitimate interests common to all employers at all times, and that are always entitled to the same weight in a balancing analysis, it is easy to see how such a broad approach can lead to giving employer interests in a particular case too much weight with too little justification, unnecessarily sacrificing Section 7 rights in the process. In endorsing "general" employer interests, *LA Specialty Produce* clearly did not effectively limit *Boeing*'s most obvious analytical flaw by leaving undisturbed *Boeing*'s holding that all "no camera" and "no recording" rules are always lawful. Confirmation of that fact is apparent in the Board's post-*LA Specialty Produce* decisions. For instance, in *AT&T Mobility, LLC*, the Board found a cellphone retail employer's rule that prohibited employees from recording conversations lawful to maintain "as a matter of law" simply because it was a "no recording" rule and thus categorically lawful to maintain. It did not matter that a cellphone retailer does not deal with classified information, export controls, documented threats of foreign interference, and the like, despite that those were the very interests that justified the categorical lawfulness of the "no camera" rule in *Boeing*. We believe that a return to "case-specific justification" better serves the purposes of the Act.

Boeing's categorical approach is also hamstrung by its elimination of any consideration of the specific language or context of particular rules. Under *Boeing*, this was done by, in a single case, analyzing whether one particular rule–including its specific wording and context–chills employees' exercise of Section 7 rights, concluding that it does not, and then broadly declaring lawful all similar rules of that general type, regardless of the specific language or context of any of those purportedly similar rules.

Our return to a case-specific approach is intended to remedy the obvious problems with *Boeing*'s categorical approach. In order to consider all important aspects of the problem posed by potentially overbroad work rules, the Board should examine the specific wording of the rule, the specific industry and workplace context in which it is maintained, the specific employer interests it may advance, and the specific statutory rights it may infringe. The case-by-case approach will not sacrifice clarity and predictability for regulated parties. As is always the norm, the Board will aim to ensure that like cases will be decided alike. The nearer the wording of a specific rule is to a rule assessed in a prior case, or the nearer the workplace context or employer interests are to those factors previously considered, the more likely the Board's determination of the rule's legality will be the same. As a consequence, more predictable outcomes will emerge over time. For instance, many of the Board's core pre-*Lafayette Park* work-rules holdings–such as those concerning maintenance of a "no solicitation" rule–that *Boeing* did not overrule and that we maintain, describe generally applicable parameters for assessing certain types of rules. But that process should not be short-circuited, as the Board plainly did in applying *Boeing*. Put somewhat differently, consistent with the Act, predictability and certainty cannot be achieved simply by giving employers broad authority to adopt work rules and by correspondingly shrinking the scope of Section 7.

III.

The Board's usual practice is to apply new policies and standards retroactively to all pending cases in whatever stage, unless doing so would amount to a manifest injustice. To determine whether retroactive application amounts to a manifest injustice, the Board considers the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application.

Here, retroactive application of the new work-rules standard will not cause manifest injustice. First, *LA Specialty Produce*'s purported "clarifications" of *Boeing*'s standard were announced less than 4 years ago, so parties have not had an extended period to rely on *Boeing*'s purportedly clarified standard. In any event, given the unclear nature of *Boeing*'s interpretive inquiry and the confusing results of its categorical classification scheme, reliance on *Boeing* as a practical matter was minimal. Second, as noted above, the standard from *Boeing* that we overrule was detached from the Act's goals, which are better promoted by the standard that we adopt today. Retroactive application is thus important to furthering the Act's purposes. Third, and last, we have identified no particular injustice arising from retroactive application. In particular, to the extent that a rule in a pending case is now found facially unlawful, even if it would have been upheld under *Boeing*, the remedy will be an order to rescind the rule, leaving the employer free to replace the rule with a more narrowly tailored substitute. For these reasons, we find that retroactive application of the standard we announce today is appropriate.

In this case, the General Counsel alleges that the Respondent unlawfully maintained overbroad work rules governing personal conduct, conflicts of interest, and confidentiality of harassment complaints. Applying *Boeing* and its progeny, the judge determined that maintenance of those rules was unlawful. Having overruled those decisions, we do not review the judge's application of them. Instead, to allow the parties an opportunity to present arguments and introduce any relevant evidence under the new standard announced today, we remand this case to the judge for further proceedings consistent with this decision.

Starbucks Corporation, Case 14–CA–29581 (N.L.R.B. Div. of Judges Sept. 21, 2023)

Robert A. Ringler, Administrative Law Judge.

This case concerns Starbucks' response to the Union's organizing campaigns at five St. Louis cafés.

Lindbergh Store–ULP Allegations

Lindbergh was led by assistant store manager David Brown and store manager Corinne Kinder. On March 30, the Union petitioned to represent the café's baristas and shift supervisors. It won the election and a *Certification of Representative* issued on June 28.

1. April 30: Threats and Disparate Enforcement of Ordering Rule by Brown

Barista Jonathan Gamache testified that the Union held a "sip-in" demonstration, which involved Union supporters and off-duty employees ordering drinks with pro-Union monikers (e.g., "Union yes" or "Union strong") in order to have their pro-Union drinks called out in the store (e.g., "latte for Union strong at the bar."). Gamache recalled this reaction from assistant manager Brown:

> A woman says union strong. And then David *Brown*, who was right on my left says, Jon, you can't put that as a name.
>
> I had never heard of this before. And we had just had sip-in where some of the drinks said union strong on the sticker I told him that's not a rule.
>
> The next time, the same thing happened. A customer said my name is union strong. David tried to say that I couldn't put the name " "because it was political," I said it's not political. I proceeded to enter the name.
>
> I did it one more time.
>
> As I put the name into the computer on the register, David turned to me and said, "Jon, if you keep taking that as a name, I'm going to send you home".

After this exchange, Brown began announcing generic drink orders, e.g., café latte, venti dark roast. Gamache added that it was previously permissible for customers to provide fun fake names, e.g., Spartacus, Batman, Mickey Mouse, etc.

On the same date, Starbucks responded by posting this *Marking and Calling Customer Orders* rule on the back portion of the pastry case, which was only viewable to employees:

> Marking and calling items within customer orders enables partners to personalize the Starbucks Experience.
>
> Starbucks prohibits the writing or printing of content on items that is inappropriate, offensive or otherwise does not align with Our Missions & Values. **Partners should also not write or print content on items that advocates for a political, religious or a personal issue, even if requested by a customer.** When marking customer items and calling orders:
>
> • Do not write phrases that do not represent Our Missions & Values ....
>
> • When a customer requests that you write something on an item that is inappropriate, offensive or not in alignment with Our Mission & Values, respectfully mark the name of the item that was ordered.

In *Stericycle, Inc.*, the Board recently held that challenged work rules are subject to the following standard:

> The Board will begin its analysis by assessing whether the General Counsel has established that a challenged work rule has a reasonable tendency to chill employees from exercising their Section 7 rights. In doing so, the Board will interpret the rule from the perspective of the reasonable employee who is economically dependent on her employer and thus inclined to interpret an ambiguous rule to prohibit protected activity she would otherwise engage in. The reasonable employee interprets rules as a layperson, not as a lawyer. If an employee could reasonably interpret a rule to restrict or prohibit Section 7 activity, the General Counsel has satisfied her burden and demonstrated that the rule is presumptively unlawful. That is so even if the rule could also reasonably be interpreted not to restrict Section 7 rights and even if the employer did not intend for its rule to restrict Section 7 rights.
>
> Accordingly, if the General Counsel carries her burden of demonstrating that a rule is presumptively unlawful, an employer may rebut the presumption by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule.

Starbucks violated §8(a)(1), by implementing its *Marking and Calling Customer Orders* rule. The GC established that the rule "has a reasonable tendency to chill employees from exercising their Section 7 rights." A reasonable employee would construe this rule as broadly barring sip-ins or other in-store organizing activities, where members of the public serve as proxies for §7 activities by voicing their support for their organizing efforts. A reasonable employee would similarly find that the rule undermines their §7 activities by barring them from calling out orders supporting their §7 activities, e.g., ""Union yes," "Union strong." The rule is, accordingly, presumptively unlawful under *Stericycle*, given that it "has a reasonable tendency to chill employees from exercising their Section 7 rights," as discussed above.

In advancing its defense, Starbucks failed to "prove that the rule advances a legitimate and substantial business interest and that it is unable to advance that interest with a more narrowly tailored rule." Its reported business interest is to bar discourse in its stores that "advocates for a political, religious or a personal issue." This fails the *Stericycle* test is two is significant ways. *First*, the rule is written in the broadest possible terms, inasmuch its key terms, "political" and "personal" expansively cover virtually anything that a given manager takes issue with. Hence, Starbucks failed to create a narrowly tailored rule under *Stericycle*; it contrarily created a deeply expansive and subjective rule. *Second*, its rule fails to advance a "legitimate and substantial business interest." In reality, Starbucks does not genuinely seek to bar "political" or "personal" discourse in its cafés, *nor should it*, given that cafés are akin to public gathering places, where political and personal ideas are ordinarily exchanged. Starbucks even promotes "political" and "personal" discourse on several praiseworthy topics in its cafés (e.g., "Black Lives Matter," Pride networks, LGBTQ+ rights, disability rights, etc.) by selling t-shirts to employees on Coffeegear.com and then encouraging them to wear such shirts as part of their uniforms. These actions demonstrate that Starbucks is not genuinely interested in barring "political" or "personal" discourse, when the very same folks who serve its customers are simultaneously prompting exchanges on several exemplary "political" or "personal" themes in its cafés via its usage of employee t-shirts. At best, this is inconsistent, and at worst, this is hypocrisy. It appears, as a result, that Starbucks' litmus test is not the ""political" or "personal" realm, which it justifiably embraces on certain subjects. Its actual litmus test is designed to only bar "political" and ""personal" topics that it disapproves of because such discourse might encourage unionization. This argument suggests that Starbucks' espoused business interest is nothing more than a smokescreen to hinder §7 activities; this fails *Stericycle*. In sum, the *Marking and Calling Customer Orders* rule is unlawful in substance, context and application.

2. Union T-shirt Disciplines and Firing

Starbucks also unlawfully banned Lindbergh employees from wearing Union t-shirts under its *Dress Code* policy. The *Dress Code* policy provides that:

> Failure to adhere to the dress code may result in corrective action, including separation from employment.
>
> **General Appearance, Colors and Materials**
>
> Clothing colors must fall within a general color palette that includes white (for tops only), black, gray, navy blue, brown or khaki (tan). Other colors are only allowed as a small accent on shoes or for accessories (ties. Scarves, socks, etc.).
>
> **Shirts, Sweaters and Jackets**

> Shirts may have a small manufacturer's logo, but must not have other logos, writings or graphics. The base shirt color must be within the color palette (black, gray, navy blue, brown, khaki or white). These same colors may be the base color for a subdued, muted pattern. Starbucks®-issued promotional shirts may be worn for events or when still relevant for product marketing.
>
> Starbuckscoffeegear.com offers reasonably priced, dress-code approved shirts for sale.

On August 15, the Lindbergh employees read aloud a letter in the café to assistant manager Brown and store manager Kinder, while wearing Union t-shirts. Employees alternated reading paragraphs, which complained about understaffing and other labor relations issues. On August 17, Barge wore her Union t-shirt again. This prompted this assistant manager Brown to warn her that the Union shirt was barred under the *Dress Code* policy. On August 19, Barge, Moore, Gamache and Rohlf again wore their Union t-shirts to work. Store Managers Kinder and Tricia Dillon met with each of them and advised them that they were violating the *Dress Code* policy. On September 24, the Lindbergh employees presented a strike notice to management. The strike protested a unilateral change in work hours and an unfair labor practice charge connected to bad faith bargaining. The strike ended at the close of the workday, with employees tendering their unconditional offer to return to work.

On September 28, i.e., just 4 days after the strike, Starbucks issued its first round of *Dress Code* policy disciplines; they are summarized below:

Employee	Dress Code Violations	Disciplinary Action
Barge	August 17, 19, 30, 31 and September 5, 8, 9 (graphic t-shirt violations)	Documented Coaching
Sudekum	August 31 and September 6 (graphic t-shirt violations)	Documented Coaching
Gamache	August 19, 20, 22, 26, 27, 31 and September 1, 3, 7, 8 and 23 (graphic t-shirt violations)	Documented Coaching

Employee	Dress Code Violations	Disciplinary Action
Rohlf	August 19, 22, 23, 26, 27, 29, 30, 31 and September 2, 3, 5, 7 (graphic t-shirt violations)	Final Written Warning

On October 14 and 31, Starbucks issued these additional *Dress Code* disciplines:

Employee	Dress Code Violations	Disciplinary Action
Barge	September 29 and October 4, 11 (graphic t-shirt violations)	Written Warning
Sudekum	October 3 and 4 (graphic t-shirt violations), and October 15 and 20 (color palette violations)	Written Warning
Gamache	October 1, 4, 6, 7, 8, 12, 13 (graphic t-shirt violations)	Written Warning

On October 21, Rohlf received a *Notice of Separation* on the basis of his: (1) failure to follow the *Partner Symptom Check* (PSC) policy "on multiple occasions, even after repeated reminders," and (2) "wearing of a graphic t-shirt out of dress code. Rohlf did not debate that he wore his Union t-shirt.

Store Manager Dillon testified that Lindbergh generally failed to comply with the *Dress Code*, PSC and other workplace policies. She recollected that she started coaching employees on these issues in April. She recalled that, in May, Sudekum wore a red shirt that was barred by the *Dress Code*, which resulted in an informal counseling. She related that her practice was that, once she discussed a *Dress Code* violation was raised and the employee continued to violate the rule, she issued discipline. She related that she coached several shift supervisors on PSC issues before issuing discipline. Starbucks personnel records demonstrated that, at Lindbergh, *Dress Code* disciplines were also issued to these employees:

Employee	Date	Discipline	Summary
B. Freeman	November 14	Documented Coaching	Patterned pants, graphic tee, skirt length
D. Floyd	January 3, 2023	Written warning	Lateness, no call no show, graphic tee, leggings, hooded top

The parties stipulated that there were no other disciplines issued for *Dress Code* violations at Lindbergh from August 1, 2021 to the present. (

Brown testified that he previously served as Lindbergh's assistant store manager. He recalled counseling and repeatedly coaching partners about not following the *Dress Code*. Store manager Katrina Raithel began managing Lindbergh in June, left for a maternity leave on August 13 and returned in February 2023. She confirmed that she discussed the *Dress Code* and PSC policies with partners in June before taking maternity leave.

The GC does not challenge the validity of Starbucks' *Dress Code* rule itself; the GC only challenges its disparate application to Union supporters. The Board has held that, even if an employer's rule is facially lawful, the disparate enforcement of that rule against union or other protected concerted activity violates the Act.

Starbucks disparately enforced its *Dress Code* policy against Barge, Sudekum, Gamache and Rohlf by issuing them an array of documented coachings, written warnings, final written warnings, and in the case of Rohlf, a notice of separation. As a threshold matter, there is little debate that the GC made out of prima facie case under *Wright Line*, inasmuch as the GC demonstrated that these employees wore Union t-shirts (i.e., engaged in a core Union activity), and Starbucks disciplined them for wearing these shirts (i.e., had knowledge of their activities). There is also ample evidence of Union animus in this case in the form of multiple threats, solicitation of grievances and the implementation of the *Marking* *and Calling Customer Orders* rule. As a result, the GC abundantly demonstrated a causal relationship between the disciplines at issue and employees' §7 activities.

Starbucks failed to demonstrate that it would have taken the same disciplinary actions against Barge, Sudekum, Gamache and Rohlf, even in the absence of their protected activities. *First*, the record demonstrates that Starbucks did not discipline a single employee at Lindbergh for wearing a graphic t-shirt prior to issuing discipline to Gamache, Barge, Rohlf and Sudekum on September 28 for wearing their Union t-shirts, which Starbucks categorized as graphic t-shirts barred by the *Dress Code*. Given that it is virtually certain that many employees over the course of Lindbergh's history previously wore graphic t-shirts in the presence of management prior to September 28, and that if discipline for such employees actually existed, management's legal counsel would have presented these comparators, it logically follows that management previously turned a blind eye to graphic t-shirts of all varieties. It, therefore, appears that what was previously accepted (i.e., wearing graphic t-shirts as a general matter) suddenly became unacceptable, once employees began wearing Union graphic t-shirts, began organizing and went on strike. This disparate treatment, which was not designed to validly bar all graphic shirts under the *Dress Code* policy, sought to bar employees from wearing only Union t-shirts and engaging in protected activities. *Second*, there is strong and extremely close timing between Starbucks's commencement of discipline for Union adherents Gamache, Barge, Rohlf and Sudekum on September 28 and their September 24 strike. Simply put, it took Starbucks just 4 days to discipline these strikers, once they showed up at work wearing Union t-shirts; this close, almost lockstep, timing is suspect. It, as a result, can be concluded that the triggering event for management's concern about the Union t-shirts was not the shirts themselves or their graphic nature, but the strike and employees' §7 activities, which is unlawful. In sum, Starbucks' decision to newly enforce a *Dress Code* policy that was never previously enforced, within 4 short days of the Union's strike, against only those employees wearing Union t-shirts smacks of invidious intent.

Mexican Radio Corp. v. NLRB, No. 18-1509 (2d Cir. Oct. 15, 2019)

Mexican Radio Corporation ("Company") petitions for review, and the Board cross-petitions for enforcement, of the Board's decision and order entered on April 20, 2018 determining that the Company violated Section 8(a)(1) of the National Labor Relations Act ("NLRA") by reprimanding and discharging four employees based on their protected concerted activity. We assume the parties' familiarity with the facts and record of prior proceedings, which we reference only as necessary to explain our decision to affirm.

I.

The following facts are undisputed. At all relevant times, the Company operated a restaurant in New York City, where Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino (collectively, "Employees") were employed as waitresses. In August 2015, the Company hired Theodora Alfredou as the new general manager of the restaurant. The Employees and other servers immediately expressed concerns about Alfredou's disrespectful and demeaning treatment of employees. The Employees repeatedly lodged complaints about Alfredou's conduct and unsanitary conditions at the restaurant with Steve Morgan, the Company's director of operations, as well as the restaurant's owners. Perceiving no improvement in the conditions, the Employees contacted the New York City Department of Health & Mental Hygiene, which angered management.

On October 29, 2015, bartender/server Annette Polanco sent a group email to the owners, managers, and certain employees announcing her resignation and complaining about Alfredou's treatment, unsanitary working conditions, and management's failure to respond to employees' concerns. The email encouraged the remaining employees to "stand up for their rights." It also attacked the owners' business practices, made allegations of tax fraud, accused Alfredou of having improper designs on the porters, and contained obscenities.

The Employees discussed Polanco's email among themselves and individually used "reply all" to respond. Fagoth replied: "Wow Anette, gracias. Thank you for standing up for us. We will miss you." Garcia replied: "Just finished reading and I agree. Sad that things have to be this way."Palomino replied: "I agree . . . 100% as well." Santana replied: "I'm glad you said what you felt was right. I understand your point of view 100%. Thank you for being a voice for us all."

Over the course of the next two days, all four of the Employees were fired. The Company issued reprimands memorializing the reasons why the Employees were fired. Alfredou appears to have issued the first set of reprimands, each of which stated that the discharged employee demonstrated "insubordination" when she replied to an email containing "false accusations concerning both management and ownership" and "inappropriate language." Morgan wrote the second set of reprimands. Each of these reprimands stated:

> On 10/29/15 Netty Polanco sent out an e-mail to all of the upper management, ownership, store manager and selected employees of our NYC location. In this e-mail she used foul language, insulted people and wrote about untruths in a very demeaning and negative manner. She undermined the credibility of the management and company in a disparaging way. *Employee* replied to the e-mail in support of Netty. This is insubordination and will not be tolerated.

Following that statement, each of Morgan's reprimands contained several sentences detailing the particular employee's conduct. Morgan's reprimands for Garcia and Palomino stated that the "outcome" was job abandonment, while his reprimands for Fagoth and Santana stated that they were "terminated for insubordination."

II.

Following a seven-day trial, the administrative law judge ("ALJ") determined that the Employees had engaged in protected concerted activity and that their email replies were not so opprobrious as to lose the protection of the NLRA. The ALJ found that the discharges were motivated by the Employees' supportive replies to Polanco's email, rejecting the Company's assertion that the Employees were fired because they afterwards refused to meet with management or abandoned their jobs. The Board adopted the ALJ's findings and recommended order, as modified by the Board's identification of an additional violation of Section 8 by the Company that is not at issue here.

III.

"We uphold the NLRB's findings of fact if supported by substantial evidence and the NLRB's legal determinations if not arbitrary and capricious." "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

IV.

The Company principally argues that the Employees forfeited the protection of the NLRA due to the opprobrious contents of Polanco's email. The Company contends that *Atlantic Steel Co.,* 245 NLRB 814 (1979), governs our analysis of this issue. The Board has typically applied the *Atlantic Steel* factors to "direct communications, face-to-face in the workplace, between an employee and a manger or supervisor," finding *Atlantic Steel*'s "place of the discussion" factor to be inapplicable to "employees' off-duty, offsite use of social media. In recent cases involving employee comments made in a nonwork forum, such as on social media, the Board has applied a totality of the circumstances test instead of the *Atlantic Steel* factors. The Board argues that regardless of which analytical framework applies, the Employees' conduct was not so opprobrious as to lose the protection of the NLRA.

We agree with the Board. Even under the *Atlantic Steel* factors, the Employees are entitled to NLRA protection. "To determine whether an employee loses the Act's protection under *Atlantic Steel,* the Board balances four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices."

The Company argues that the "place of discussion" factor weighs against protection because in cases involving modern communication technology, the "pertinent question" is "whether or not the comments were made in front of other employees." Although the Employees' email replies were made “in front of” other employees, their replies are not comparable to the outburst on the floor of the plant in *Atlantic Steel* because the e-mail chain was limited to certain individuals and did not unfold in the workplace. To hold that the presence of a limited group of employees on an email chain weighs against a finding of NLRA protection would be antithetical to the nature of concerted action. Thus, to the extent the “place of discussion” factor is applicable, it weighs in favor of NLRA protection.

Second, the Company contends that the “subject matter of discussion” factor weighs against protection because the Employees’ replies were not “immediate outbursts made in the heat of the moment, but rather were sent hours later.” That argument is meritless. The second *Atlantic Steel* factor does not turn on the timing or emotional tenor of an employee’s outburst. Polanco’s email restated the concerns animating the Employees’ ongoing dialogue with management, including unsanitary conditions and disrespectful treatment by Alfredou, even referencing that dialogue. The subject matter of the email discussion therefore weighs in favor of protection.

Third, the Company argues that the “nature of the employee’s outburst” weighs in its favor because “the language used in Polanco’s email and adopted by Employees went well beyond ‘opprobrious.’” The Company cites no authority to support the proposition that Polanco’s language should be attributed to the Employees. NLRB decisions indicate that it would be inappropriate to do so. The Board appropriately focused on the language of the Employees’ replies, noting that the Employees “did not add to the email with any negative comments of their own,” “did not describe their feelings or animosity toward the manager and owners,” and “never cursed or made any derogatory comments toward the Company in their responses.” The third factor weighs in favor of protection.

Fourth, the Company conclusorily asserts that “there is no evidence to suggest that any unfair labor practice provoked either the email or the Employees’ actions following it.” Petitioner Br. 18. Not so. The Board determined that the emails were provoked, at least in part, by Alfredou’s remark that “if you guys don’t like how things are working here, then you can go look for another job, you can leave,” which remark amounted to an unfair labor practice because it “implicitly threatened discharge” and “clearly had the tendency to restrain and coerce employees in the exercise of their Section 7 rights." Such a threat constitutes an unfair labor practice when made in response to an employee's protected grievance.

The Company further argues, as a factual matter, that the Employees were not fired for responding to Polanco's email, but rather, for "refusing to speak with the owners and walking out" or abandoning their positions, which amounted to "gross insubordination and flat-out refusal to follow their employer's directions." The Company asserts, without any citation to the record, that the owners "simply wanted to interview employees," which "does not mean they were going to terminate them." We conclude that substantial evidence supports the Board's finding that the terminations were motivated by, and would not have occurred but for, the employees' replies to the Polanco email. The record evidence clearly demonstrates that the restaurant's managers and owners perceived the Employees' supportive replies as insubordination that could not be tolerated. Notably, all of the written reprimands reflected that motivation for firing the employees. The Company's bare factual assertions to the contrary fail to refute the Board's finding of pretext.

2. Control Outside Work

2.1 Social Media

Three D, LLC d/b/a Triple Play Sports Bar and Grille v. NLRB, 629 Fed. Appx. 33 (2d Cir. Oct. 21, 2015)

Three D, LLC, d/b/a Triple Play Sports Bar and Grille ("Triple Play") appeals a decision of the National Labor Relations Board ("NLRB" or "Board") finding that Triple Play violated Section 8(a)(1) of the National Labor Relations Act ("NLRA" or "Act") by taking certain actions against its employees, including discharge, for their Facebook activity.

Employee Discharges and Other Violations of Section 8(a)(1)

Section 7 of the Act guarantees that "employees shall have the right to self-organization, to form, join, or assist labor organizations and to engage in other concerted activities for the purpose of mutual aid or protection." Section 8(a)(1) of the Act protects employees' Section 7 rights by prohibiting an employer from "interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7."

An employee's Section 7 rights must be balanced against an employer's interest in preventing disparagement of his or her products or services and protecting the reputation of his or her business. Accordingly, an employee's communications with the public may lose the protection of the Act if they are sufficiently disloyal or defamatory. These communications may be sufficiently disloyal to lose the protection of the Act if they amount to criticisms disconnected from any ongoing labor dispute. See *NLRB v. Elec. Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953).

An employee's public statement is defamatory if made maliciously, meaning "with knowledge of its falsity, or with reckless disregard of whether it was true or false." *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966). "The mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue. Where an employee relays in good faith what he or she has been told by another employee, reasonably believing the report to be true, the fact that the report may have been inaccurate does not remove the relayed remark from the protection of the Act."

The Board determined as an initial manner that the only employee conduct at issue was (1) Spinella's "like" of LaFrance's initial status update ("Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money Wtf!!!!"); and (2) Sanzone's comment stating "I owe too. Such an asshole." Regarding this conduct, the Board concluded that, "in the context of the ongoing dialogue among employees about tax withholding," Spinella and Sanzone had at maximum endorsed LaFrance's claim that Triple Play had erred in her tax withholding. Special App'x 5. The Board declined to hold either Sanzone or Spinella responsible for any other statement posted in the Facebook discussion on ground that "neither Sanzone nor Spinella would have lost the protection of the Act merely by participating in an otherwise protected discussion in which other persons made unprotected statements."

The ALJ found and the Board agreed that the Facebook activity in this case was "concerted", because it involved four current employees and was "part of an ongoing sequence of discussions that began in the workplace about Triple Play's calculation of employees' tax withholding." The Board also adopted the ALJ's recommendation that the Facebook activity was "protected" because "the discussion concerned workplace complaints about tax liabilities, Triple Play's tax withholding calculations, and LaFrance's assertion that she was owed back wages."

After finding that Sanzone's and Spinella's Facebook activity constituted protected concerted activity, the only remaining question before the Board was whether that Facebook activity was so disloyal or defamatory as to lose the protection of the Act. The Board applied *Jefferson Standard* to conclude that Sanzone's and Spinella's Facebook activity was not so disloyal as to lose protection of the Act because "the comments at issue did not even mention Triple Play's products or services, much less disparage them." The Board further concluded that Triple Play failed to meet its burden under *Linn* to establish that the comments at issue were defamatory because "there is no basis for finding that the employees' claims that their withholding was insufficient to cover their tax liability, or that this shortfall was due to an error on Triple Play's part, were maliciously untrue."

Triple Play argues on appeal that because Sanzone's and Spinella's Facebook activity contained obscenities that were viewed by customers, the Board should have found that this activity lost the protection of the Act under *Starbucks v. NLRB*, a case in which a Second Circuit panel remanded a Board Order for reconsideration of the proper standard to apply when analyzing an employee's utterance of obscenities in the presence of customers. In Triple Play's view, the panel in *Starbucks* "strongly suggested" that an employee's obscenities uttered in the presence of customers "would not be protected in most or all circumstances."

Triple Play's reliance on *Starbucks* is misplaced. The *Starbucks* panel premised its decision on a finding that the Board had "disregarded the entirely legitimate concern of an employer not to tolerate employee outbursts containing obscenities in the presence of customers." Here, the Board stated unequivocally that its application of *Jefferson Standard* and *Linn* was based on its longstanding recognition "that an employer has a legitimate interest in preventing the disparagement of its products or services and, relatedly, in protecting its reputation from defamation."

Furthermore, accepting Triple Play's argument that *Starbucks* should apply because the Facebook discussion took place "in the presence of customers" could lead to the undesirable result of chilling virtually all employee speech online. Almost all Facebook posts by employees have at least some potential to be viewed by customers. Although customers happened to see the Facebook discussion at issue in this case, the discussion was not directed toward customers and did not reflect the employer's brand. The Board's decision that the Facebook activity at issue here did not lose the protection of the Act simply because it contained obscenities viewed by customers accords with the reality of modern-day social media use.

Triple Play further argues that, even if the Board were correct to apply *Jefferson Standard* and *Linn*, the Board's factual conclusions relating to those standards were unsupported because "no evidence in the record establishes that Sanzone's comment was limited" only to "endorsing LaFrance's complaint that she owed money on her taxes due to a tax withholding error on Triple Play's part." Triple Play would have us find that "the evidence, when taken as a whole, demonstrates that Sanzone clearly endorsed such a comment by LaFrance and that Spinella also endorsed disparaging comments about Triple Play and its owners." Triple Play also argues that the Board erred in concluding under Linn that Sanzone's comment was not defamatory because "the evidence unequivocally establishes that Sanzone's endorsement of LaFrance's complaint was knowingly false, as Sanzone did not believe that Triple Play had made any errors with respect to her income tax withholdings."

We agree with counsel for the Board that "Spinella's and Sanzone's communications, which were made to seek and provide mutual support looking toward group action, were not made to disparage Triple Play or to undermine its reputation." The Facebook discussion clearly disclosed the ongoing labor dispute over income tax withholdings, and thus anyone who saw Spinella's "like" or Sanzone's statement could evaluate the message critically in light of that dispute.

We also agree with counsel for the Board that Sanzone's comment was not defamatory under the *Linn* standard in light of the fact that she had conversations with other employees regarding their tax concerns prior to the Facebook discussion. As the Board observed, "simply because Sanzone knew that Triple Play did not make an error on her (own) tax withholdings does not mean that Sanzone's endorsement of LaFrance's complaint about Triple Play making tax withholding errors was deliberately or maliciously false." Although Sanzone may not have believed that Triple Play erroneously withheld her taxes, that has no bearing on the truth of her statement "I owe too" or her conceivable belief that Triple Play may have erroneously withheld other employees' taxes. It is certainly plausible that Sanzone truly owed taxes, even if that was not the result of an error on Triple Play's part—and even if other employees' claims regarding erroneous tax withholdings later proved inaccurate, such inaccuracies by themselves do not remove the statement from the protection of the Act.

In addition to finding that the discharges of Sanzone and Spinella violated the Act, the Board adopted the ALJ's conclusions that Triple Play violated the Act by (1) threatening employees with discharge for their Facebook activity; (2) interrogating employees about their Facebook activity; and (3) informing employees that they were being discharged for their Facebook activity. Because Sanzone's and Spinella's Facebook activity did not lose the protection of the Act, Triple Play's challenge to the other violations of Section 8(a)(1) must necessarily fail.

Ehling v. Monmouth-Ocean Hospital Service, Inc., 872 F.Supp.2d 369 (D.N.J. 2012)

WILLIAM J. MARTINI, District Judge.

Plaintiff Deborah Ehling brings this action against Monmouth-Ocean Hospital Service Corp. ("MONOC"), Vincent Robbins, and Stacy Quagliana (collectively "Defendants"), alleging violations of the Electronic Communications Privacy Act, the Family Medical Leave Act, and various state laws. This matter comes before the Court on Defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. For the reasons set forth below, Defendants' Rule 12(b)(6) motion is GRANTED in part, and DENIED in part.

I. Background

Plaintiff Deborah Ehling is a registered nurse and paramedic. Defendant Monmouth-Ocean Hospital Service Corporation ("MONOC") is a non-profit hospital service corporation dedicated to providing emergency medical services to the citizens of the State of New Jersey. Defendant Vincent Robbins is the President and CEO of MONOC. Defendant Stacy Quagliana is the Executive Director of Administration at MONOC.

Plaintiff was hired by MONOC in 2004 as a registered nurse and paramedic. In July of 2008, Plaintiff took over as the Acting President of the local union for Professional Emergency Medical Services Association — New Jersey (the "Union"). As President, Plaintiff was "very proactive in attempting to protect the rights and safety of her union members" and filed numerous complaints and charges against MONOC to that end. Plaintiff alleges that, as soon as she became President of the Union, Defendants began engaging in a pattern of retaliatory conduct against her, eventually culminating in her termination in July 2011. Although the Amended Complaint contains allegations regarding a wide range of conduct, the Court will discuss only those allegations that are relevant to the motion to dismiss.

During the 2008-2009 timeframe, Plaintiff maintained an account on Facebook, a social networking website. According to Plaintiff, if someone was not invited to be her Facebook "friend," he or she could not access and view postings on Plaintiff's Facebook "wall." Many of Plaintiff's coworkers were invited to be Plaintiff's Facebook friends. Plaintiff did not invite any members of MONOC management as friends.

Plaintiff alleges that MONOC "subsequently gained access to Ms. Ehling's Facebook account by having a supervisor(s) summon a MONOC employee, who was also one of Ms. Ehling's Facebook friends, into an office" and "coercing, strong-arming, and/or threatening the employee into accessing his Facebook account on the work computer in the supervisor's presence."

Plaintiff claims that the supervisor viewed and copied Plaintiff's Facebook postings. One such posting was a comment that Plaintiff made regarding a shooting that took place at the Holocaust Museum in Washington, DC, stating:

> An 88 yr old sociopath white supremacist opened fire in the Wash D.C. Holocaust Museum this morning and killed an innocent guard (leaving children). Other guards opened fire. The 88 yr old was shot. He survived. I blame the DC paramedics. I want to say 2 things to the DC medics. 1. WHAT WERE YOU THINKING? and 2. This was your opportunity to really make a difference! WTF!!!! And to the other guards .... go to target practice.

On June 17, 2009, MONOC sent letters regarding Plaintiff's Facebook posting to the New Jersey Board of Nursing and the New Jersey Department of Health, Office of Emergency Medical Services. The letters state that MONOC was concerned that Plaintiff's Facebook posting showed a disregard for patient safety. Plaintiff alleges that these letters were sent in a "malicious" attempt to attack Plaintiff, damage her reputation and employment opportunities, and potentially risk losing her nursing license and paramedic certification status.

III. Discussion

Defendants move to dismiss two of the nine counts in the Amended Complaint: (1) Count II, alleging a violation of the New Jersey Wiretapping and Electronic Surveillance Control Act; and (2) Count IV, alleging common law invasion of privacy. Each issue will be addressed in turn.

b. Common Law Invasion of Privacy

Plaintiff asserts a claim for common law invasion of privacy. Plaintiff's claim is premised on Defendants' alleged unauthorized "accessing of her private Facebook postings" regarding the Holocaust Museum shooter. Defendants move to dismiss, arguing that Plaintiff did not have a reasonable expectation of privacy in her Facebook posting. The Court finds that the motion to dismiss should be denied.

Under New Jersey law, to state a claim for intrusion upon one's seclusion or private affairs, a plaintiff must allege sufficient facts to demonstrate that (1) her solitude, seclusion, or private affairs were intentionally infringed upon, and that (2) this infringement would highly offend a reasonable person. "Expectations of privacy are established by general social norms" and must be objectively reasonable — a plaintiff's subjective belief that something is private is irrelevant.

Privacy in social networking is an emerging, but underdeveloped, area of case law. There appears to be some consistency in the case law on the two ends of the privacy spectrum. On one end of the spectrum, there are cases holding that there is *no* reasonable expectation of privacy for material posted to an unprotected website that anyone can view. On the other end of the spectrum, there are cases holding that there *is* a reasonable expectation of privacy for individual, password-protected online communications.

Courts, however, have not yet developed a coherent approach to communications falling between these two extremes. Although most courts hold that a communication is not necessarily public just because it is accessible to a number of people, courts differ dramatically in how far they think this theory extends. What is clear is that privacy determinations are made on a case-by-case basis, in light of all the facts presented.

In this case, Plaintiff argues that she had a reasonable expectation of privacy in her Facebook posting because her comment was disclosed to a limited number of people who she had individually invited to view a restricted access webpage. Defendants argue that Plaintiff cannot have a reasonable expectation of privacy because the comment was disclosed to dozens, if not hundreds, of people. The Amended Complaint and underlying documents do not indicate how many Facebook friends Plaintiff had at the time the comment was made; thus, there is no indication of how many people could permissibly view Plaintiff's posting.

The Court finds that Plaintiff has stated a plausible claim for invasion of privacy, especially given the open-ended nature of the case law. Plaintiff may have had a reasonable expectation that her Facebook posting would remain private, considering that she actively took steps to protect her Facebook page from public viewing. More importantly, however, reasonableness (and offensiveness) are highly fact-sensitive inquiries. As such, these issues are not properly resolved on a motion to dismiss.

Cal. Labor Code § 980

Employer Use of Social Media

(a) As used in this chapter, "social media" means an electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations.

(b) An employer shall not require or request an employee or applicant for employment to do any of the following:

> (1) Disclose a username or password for the purpose of accessing personal social media.
>
> (2) Access personal social media in the presence of the employer.
>
> (3) Divulge any personal social media, except as provided in subdivision (c).

(c) Nothing in this section shall affect an employer's existing rights and obligations to request an employee to divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations, provided that the social media is used solely for purposes of that investigation or a related proceeding.

(d) Nothing in this section precludes an employer from requiring or requesting an employee to disclose a username, password, or other method for the purpose of accessing an employer-issued electronic device.

(e) An employer shall not discharge, discipline, threaten to discharge or discipline, or otherwise retaliate against an employee or applicant for not complying with a request or demand by the employer that violates this section. However, this section does not prohibit an employer from terminating or otherwise taking an adverse action against an employee or applicant if otherwise permitted by law.

2.2 Political Activity

Truitt v. Salisbury Bank & Trust Co., 52 F.4th 80 (2d Cir. 2022)

Chin, Circuit Judge:

In this case, plaintiff-appellant William Gunnar Truitt, an employee of defendant-appellee Salisbury Bank and Trust Company (the "Bank"), announced his candidacy for a New York State Assembly seat. The Bank thereafter advised Truitt that he had to choose between running for office and continuing his employment with the Bank. Truitt decided not to discontinue his campaign, and his employment with the Bank ended.

Truitt brought this action below, contending that the Bank violated New York Labor Law § 201-d by requiring him to cease protected political activity as a condition of retaining his employment at the Bank. The statute makes it unlawful for an employer to discharge or discriminate against an employee for engaging in, *inter alia,* specified political activities outside of working hours. N.Y. Lab. Law § 201d(2)(a). Protected activities expressly include "running for public office." The district court granted summary judgment in favor of the Bank, concluding, as a matter of law, that because Truitt voluntarily resigned from his position and was not constructively discharged, his suit could not succeed. The court thereafter denied Truitt's motion for reconsideration, and this appeal followed.

For the reasons discussed below, we vacate the judgment and remand.

Background

A. The Facts

On February 26, 2018, Truitt, a part-time Dutchess County legislator, began working for the Bank as a full-time mortgage lending officer trainee. As a trainee, Truitt began a six-month training program, to be followed by a four-month secondary training program. Upon successful completion of both programs, Truitt would be promoted to a full-time mortgage loan officer position in January 2019. Truitt's employment with the Bank was at-will, and both he and the Bank could "terminate the employment relationship at any time, for any *legal* reason, with or without cause, with or without notice."

On April 12, 2018, Truitt announced on Facebook that he was running as a Republican candidate in the upcoming election for the New York State Assembly seat in the 106th District. Candidates elected to the New York State Legislature serve as part-time legislators during the legislative session, which lasts from January to June, in Albany, New York. Truitt did not let the Bank know he decided to run for the seat before he made the announcement.

The next day, after learning about the campaign announcement, Truitt's supervisor Amy Raymond asked Truitt to meet with her and Doug Cahill, the Bank's Vice President of Human Resources. In its Rule 56.1 Statement, the Bank stated that Raymond and Cahill sought to "determine what kind of time commitment such a campaign (and subsequently job) would entail." Evidence the Bank cited in support of this description does not show that Raymond and Cahill expressed concerns about the time Truitt would spend campaigning, as distinct from the time he would spend discharging the duties of an Assembly member.

The Bank has internal policies and procedures concerning outside employment opportunities for its employees. The Bank's January 2018 Employee Handbook, for instance, explains that an employee who wishes to accept outside employment must "first notify the Human Resource Administrator or the President." Outside employment, as the Bank's Code of Ethics and Conflicts of Interest Policy also provides, is then permitted only if it is approved in advance by the Board of Directors (or in the case of a non-officer employee, executive management). When deciding whether to approve the employment request, the Board of Directors will consider, *inter alia,* if the outside employment will "interfere with work assignments or performance."

Three days later, on April 16, 2018, Truitt emailed Raymond and Cahill a letter "regarding his candidacy in this November's elections." Although the letter stated he was not yet an official candidate on the ballot for the Assembly seat for the 106th District, it explained that he was "on the path" to becoming one, and that he was "officially endorsed" by the Dutchess County Republican Committee. The letter described the part-time nature of the position, included a copy of the "New York State Legislative Session Calendar for 2018," and attached a link to the state's "Standards of Conduct Relating to Outside Employment or Business Activity." Truitt's letter also explained that he had spoken "with numerous state elected officials and other experienced individuals that are familiar with working in the State Assembly," and that they "made very clear that he would be able to maintain full-time work and be very successful in his role as a Mortgage Loan Originator at the Bank while serving as Assemblyman." He also said that, if elected, he planned to no longer serve as a county legislator and would instead dedicate that role's time to his positions as an assemblymember and at the Bank.

The Bank apparently construed Truitt's notification of his candidacy as a request for approval for outside employment. Raymond, Cahill, and the Bank's CEO, Richard Cantele, reviewed Truitt's submission and determined that he would be unable to work both as an assemblymember and a mortgage lending officer. They were concerned that: (1) if Truitt was elected, he would have to be in Albany two to four business days per week during the six-month legislative session; (2) he had only 21 days of paid time off per year; (3) the Riverside Division that Truitt was hired to serve was an emerging residential lending market that would require a significant time commitment; and (4) residential lenders like Truitt often worked more than 50 hours per week. In short, Raymond, Cahill, and Cantele concluded that Truitt could not devote sufficient hours to his future Bank position if he were elected as an assemblymember. Despite these concerns relating to the demands that would be made on Truitt's time if he *served* as a member of the Assembly, Cantele did not have any information that Truitt's *campaign* was or would be interfering with Truitt's ability to do his job at the Bank. Nor did Cantele receive any information suggesting that Truitt's campaign would affect his working hours.

On or around April 26, 2018, Cahill met with Truitt to discuss his campaign. During the meeting, Cahill explained that "the Bank was concerned that Truitt could not effectively fulfill the requirements and responsibilities of his future mortgage lending officer position as well as the requirements and responsibilities of a State Assembly seat and, therefore, the Bank's management would not provide him an exception to the Bank's policy on outside employment." Cahill then told Truitt that "he needed to make a decision on whether he was going to run or not and to let the Bank know" by May 1, 2018.

The next day, on April 27, 2018, the Bank's Board of Directors met. According to the meeting notes, Cantele reported that an employee "hired as a Mortgage Originator for the Riverside Division" and "currently serving as a Dutchess County Legislator" had "announced his campaign" for a State Assembly seat. The notes stated that the Bank's management "had determined that this position the Assembly seat pays approximately $80,000 per year and requires approximately 65 days per year in Albany." Accordingly, management "intended to speak with the employee and advise him that this would be a conflict of interest and that he must make a decision whether to run for office or to continue employment with the Bank." A memorandum also dated April 27 from Cahill to the Bank's "HR/ Compensation Committee," which includes Bassin and other members of the Board of Directors, identified Truitt as the employee.The memorandum stated that the Bank's management was "reviewing whether a conflict of interest exists with the State Assembly campaign and position."

Three days later, on April 30, 2018, Truitt met with Cantele to reiterate his desire to campaign and serve as an assemblymember while he worked for the Bank. Cantele told him that the Bank "did not believe that Truitt would be able to fulfill his position as a residential originator given the responsibilities relative to the Assembly position." Cantele suggested that Truitt and the Bank consider the period from May to November 2018 as a "'time-out' period," and told Truitt that he hoped Truitt would apply for a position with the Bank in the future if he were not elected.

The next day, on May 1, 2018, Truitt emailed Cahill with the subject heading "Decision." Truitt's email stated, in part,

> I did deeply consider and weigh my options over this past weekend, and came to the conclusion that I cannot give up on a once in a lifetime opportunity such as the one that has presented itself before me. The chance to tie Teddy Roosevelt as the youngest State Assemblyman in NY history is one I cannot give up, nor can I let down my community who has asked me to run.
>
> I have learned a tremendous amount during my short two months at Salisbury Bank, and I truly appreciated how quickly everyone welcomed me into the family. I want to especially thank you Doug, for our initial interview and for your help along the way, and also Rick for his leadership and his willingness to meet with me yesterday.
>
> I have a few items that I need to return, including a laptop, a key-fob and a Poughkeepsie parking garage badge. Let me know how you would like me to return those in to you, and I will bring them as soon as possible.

Less than an hour later, Truitt sent another email, with the subject heading “Update,” to Raymond and Andrea MacArthur, his supervisors. It began by stating that “it has been confirmed” by Cahill and Cantele that Truitt’s “employment with Salisbury Bank would not be continued if he pursued election to the New York State Assembly.” Truitt’s email identified as the Bank’s “main concern” that “if elected, he would not have the necessary time it takes” to be successful at the Bank, but it stated that he “disagreed with that sentiment entirely.” Further, the email noted that he had “thought deeply” about the decision but that running for the Assembly was a “once in a lifetime opportunity.” The email concluded by thanking his supervisors and noting the possibility of returning to the Bank as an employee if his campaign was not successful.

The Bank recorded Truitt’s last date of employment as April 30, 2018. Truitt did not win the election.

B. Proceedings Below

On August 24, 2018, Truitt filed this action in state court against the Bank and its parent company, defendant-appellee Salisbury Bancorp, Inc., alleging that he had been discharged by the Bank in violation of New York Labor Law § 201-d. The Bank then removed the action to federal court on diversity jurisdiction grounds.

On January 28, 2020, following discovery, the Bank moved for summary judgment. The district court granted the motion on July 21, 2020. The court concluded that "even when drawing all inferences from the record in Truitt's favor, his departure from the Bank was best classified as a resignation." Further, the court concluded that the resignation did not amount to a constructive discharge because the Bank did not subject Truitt to intolerable working conditions and "there was no indication that Truitt would be fired no matter what he decided," or that the Bank "forced him to decide between termination or resignation." Judgment was entered on July 21, 2020.

Two weeks later, on August 4, 2020, Truitt timely moved for reconsideration of the district court's July 21, 2020, order. The court denied the motion on March 22, 2021. The district court did not reach the issue of whether Truitt was discharged for his political activity because it concluded that he voluntarily resigned and thus was not subjected to an adverse employment action and, in any event, he was "at the beginning stages of his campaign."

Discussion

B. Applicable Law

Under New York Labor Law § 201-d, an employer may generally not refuse to hire, discharge, or otherwise discriminate "in compensation, promotion or terms, conditions or privileges of employment" against an employee for, among other things, engaging in "political" or "recreational" activity if such activity is legal and occurs outside of working hours. N.Y. Lab. Law § 201-d(2). The statute expressly provides that an employee may sue an employer who violates the statute for "equitable relief and damages."

Section 201-d was enacted in 1992 to "prohibit employers from discriminating against employees for engaging in certain off-duty activities," including "political or recreational activity, use of legal consumable products, or union activities." The bill, commonly referred to as the "Legal Activities Bill," sought, for instance, to protect those who smoked and used tobacco products outside of working hours "against the extensive vigilantism" of their employers.

This case involves "political activities," which the statute defines as "(i) running for public office, (ii) campaigning for a candidate for public office, or (iii) participating in fund-raising activities for the benefit of a candidate, political party or political advocacy group."

C. Application

On appeal, Truitt makes two principal arguments. First, he contends that the Bank unlawfully "forced" him to decide between "termination or his protected political activity" and that, as a result, his departure from the Bank was involuntary. Second, he argues that the Bank has only proffered as a reason for its actions his statutorily "protected political activities." The Bank responds that Truitt "*chose* to resign" and "therefore did not suffer an adverse employment action." The Bank also argues that, even assuming Truitt had suffered such an adverse action, its reason for denying his request was legitimate, non-discriminatory, and not pretextual.

Two issues are thus presented: whether Truitt presented evidence from which a reasonable jury could find that he suffered an adverse employment action, and, if so, whether the Bank demonstrated, as a matter of law, that it had a legitimate, non-discriminatory reason for its employment decision.

1. Did Truitt Suffer an Adverse Employment Action?

Whether Truitt suffered an adverse employment action hinges on whether the Bank could lawfully require him to choose between his political campaign and his job. Section 201-d makes it unlawful for "any employer to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against any individual in compensation, promotion or terms, conditions or privileges of employment because of" an employee's political activities. Although the district court recognized that adverse employment actions may take many forms, it granted summary judgment on the basis that Truitt could not demonstrate that he had been constructively discharged.

The district court concluded that Truitt was not discharged because he voluntarily resigned after his request to engage in outside employment was denied. This was error, for a reasonable jury could find that the Bank discriminated against Truitt when it forced upon him an impermissible choice between keeping his job and engaging in statutorily protected political activity. Courts have held that offering this type of impermissible choice can constitute a discriminatory adverse employment action. On this basis, a reasonable jury could find that the Bank subjected Truitt to an adverse employment action when it forced an ultimatum upon him "because of" his political activities. A reasonable jury could also find that, in requiring Truitt to abandon his campaign as a condition of retaining his employment, the Bank "discriminated" against him in the conditions of his employment, in violation of the terms of the statute.

Truitt began campaigning for the Assembly seat, and his campaign was not interfering with his work. The managers at the Bank were not aware of any complaints from his colleagues that he was unable to perform his work responsibilities because of the campaign. Nevertheless, he was given less than a week to decide between continuing his campaign *or* continuing to work for the Bank. It was apparent that the Bank was not going to permit him do both. Cahill and Cantele made clear that "if he was running he could no longer continue working for the bank." As Truitt's May 1 email noted, Cahill and Cantele both "confirmed" that his employment with the Bank would "not be continued" if he pursued the campaign. And that "ultimatum," Truitt explained, made him understand that he "had to pick one or the other." Thus, a reasonable jury could find that he was given an illegal choice between continuing his employment and exercising his right to engage in statutorily protected political activities, and that he was discharged "because of" his choice to continue his campaign.

We are not persuaded by the Bank's argument that it gave Truitt a genuine choice and that he voluntarily resigned. The Bank determined that a job as an assemblymember was incompatible with Truitt's job as a mortgage lending officer and that it would "not provide Truitt with an exception to the Bank's policy on out-side employment." The Bank therefore asked Truitt, on or around April 26, 2018, to decide by May 1 whether he "wanted to continue with his campaign for the Assembly." The Bank asserts that it "may have had to make a decision whether to terminate Truitt's employment if his campaigning interfered with his employment or if Truitt was elected to office" but that it made no such decision before "Truitt resigned from his position." Even though the Bank claims that it had not decided to discharge Truitt when it learned of his "Decision," on this record a reasonable jury could find that the Bank had already concluded that Truitt would be discharged if he did not give up his campaign.

For these reasons, a reasonable jury could find that Truitt suffered an adverse employment action by being forced to choose between his campaign and his job in violation of New York Labor Law § 201-d.

2. Was There a Legitimate, Non-Discriminatory Basis for the Bank's Adverse Employment Action?

Next, we turn to whether the Bank's argument that it demonstrated a legitimate, non-discriminatory reason for the adverse employment action. With respect to Truitt's campaigning for office, we conclude that it did not.

The district court chose not to proceed to the second step of a *McDonnell Douglas*-style burden-shifting framework because it held Truitt had "failed to establish that he was terminated." It concluded that summary judgment was warranted because executives of the Bank had "proffered significant testimony and evidence that established that the basis for their decision was that management did not feel that Truitt could handle the rigors of his job and a campaign for, and potential elected position within, the New York State Assembly." The district court erred, as a matter of law, in granting summary judgment on this basis.

A reasonable jury could find that the Bank failed "to come forward with admissible evidence showing that Truitt's political activities did not play a substantial part in its decision" subjecting Truitt to an adverse employment action. The district court erred because it erroneously conflated evidence concerning the possibility Truitt might *serve* as an assemblymember with evidence concerning his *campaign* for the Assembly. The district court disregarded this distinction because it did not "see how it was relevant." But, as explained above, the distinction is relevant because New York law specifically protects employees running for political office from discrimination. Moreover, even assuming the Bank might have had a legally permissible reason to bar Truitt from serving as an assemblymember while employed at the Bank, terminating his employment if he won election would not have required the Bank to bar him from campaigning for office.

To be sure, the record does include evidence that the Bank considered the time commitment required to *serve* as an assemblymember. Likewise, the Bank argues before us that its executives were primarily concerned about the time Truitt would have to commit to his duties as a member of the Assembly. Truitt, contrariwise, argues that he would have been able to serve as an assemblymember outside of his working hours at the Bank. We need not address that factual dispute because, regardless of whether Truitt could have served in the Assembly without interference with his working hours or performance, the record does not include evidence that the Bank had any reason to believe that Truitt's campaign would cause such interference.

The Bank points to Truitt's deposition testimony, claiming that he "acknowledged that, prior to the election, he would engage in a campaign for the seat and that his campaigning would continue even after he would be elected." But, as the Bank conceded at oral argument, no evidence in the record suggests that Truitt was campaigning during working hours. The Bank also points to the four months Truitt took off to campaign from a job as a finance officer at a construction company, which he secured *after* his employment with the Bank ended. The record, however, does not show that Truitt had requested, or that the Bank determined that he would need, time off to campaign while working at the Bank.

While the Bank's evidence includes some stray references to campaigning, most of these references concern not the campaigning process itself but rather the desired effect of campaigning, *i.e.,* winning the election; other references concern whether Truitt could handle additional, future campaigns if he was elected to office. For instance, Cahill testified during his deposition that his concern with Truitt "running for the Assembly" was that Truitt would "potentially be away from the bank anywhere from two to four days a week for six months of the year, essentially 60 days that it's in session." Cantele testified during his deposition that if Truitt were to "take this other job which required him to be out of the bank for at least sixty days a year," then "common sense would say, given this job, that there would be campaigning to be done."

For these reasons, a reasonable jury could find that the Bank's actions violated New York Labor Law § 201-d because the bank failed to demonstrate a legitimate, non-discriminatory reason for the adverse employment action it took against Truitt. We conclude that the district court erred in granting summary judgment dismissing Truitt's New York Labor Law § 201-d claim.

NY Labior Code § 201-d

Discrimination against the engagement in certain activities.

1. Definitions. As used in this section:

a. "Political activities" shall mean (i) running for public office, (ii) campaigning for a candidate for public office, or (iii) participating in fund-raising activities for the benefit of a candidate, political party or political advocacy group;

b. "Recreational activities" shall mean any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material;

c. "Work hours" shall mean, for purposes of this section, all time, including paid and unpaid breaks and meal periods, that the employee is suffered, permitted or expected to be engaged in work, and all time the employee is actually engaged in work. This definition shall not be referred to in determining hours worked for which an employee is entitled to compensation under any law including article nineteen of this chapter;

d. "Political matters" shall mean matters relating to elections for political office, political parties, legislation, regulation and the decision to join or support any political party or political, civic, community, fraternal or labor organization;

e. "Religious matters" shall mean matters relating to religious affiliation and practice and the decision to join or support any religious organization or association.

2. Unless otherwise provided by law, it shall be unlawful for any employer or employment agency to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of:

a. an individual's political activities outside of working hours, off of the employer's premises and without use of the employer's equipment or other property, if such activities are legal, provided, however, that this paragraph shall not apply to persons whose employment is defined in paragraph six of subdivision (a) of section seventy-nine-h of the civil rights law, and provided further that this paragraph shall not apply to persons who would otherwise be prohibited from engaging in political activity pursuant to chapter 15 of title 5 and subchapter III of chapter 73 of title 5 of the USCA;

b. an individual's legal use of consumable products, including cannabis in accordance with state law, prior to the beginning or after the conclusion of the employee's work hours, and off of the employer's premises and without use of the employer's equipment or other property;

c. an individual's legal recreational activities, including cannabis in accordance with state law, outside work hours, off of the employer's premises and without use of the employer's equipment or other property;

d. an individual's membership in a union or any exercise of rights granted under Title 29, USCA, Chapter 7 or under article fourteen of the civil service law; or

e. an individual's refusal to: (i) attend an employer-sponsored meeting with the employer or its agent, representative or designee, the primary purpose of which is to communicate the employer's opinion concerning religious or political matters; or (ii) listen to speech or view communications, the primary purpose of which is to communicate the employer's opinion concerning religious or political matters.

3. The provisions of subdivision two of this section shall not be deemed to protect activity which:

a. creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest;

b. with respect to employees of a state agency as defined in sections seventy-three and seventy-four of the public officers law respectively, is in knowing violation of subdivision two, three, four, five, seven, eight or twelve of section seventy-three or of section seventy-four of the public officers law, or of any executive order, policy, directive, or other rule which has been issued by the attorney general regulating outside employment or activities that could conflict with employees' performance of their official duties;

c. with respect to employees of any employer as defined in section twenty-seven-a of this chapter, is in knowing violation of a provision of a collective bargaining agreement concerning ethics, conflicts of interest, potential conflicts of interest, or the proper discharge of official duties;

d. with respect to employees of any employer as defined in section twenty-seven-a of this chapter who are not subject to section seventy-three or seventy-four of the public officers law, is in knowing violation of article eighteen of the general municipal law or any local law, administrative code provision, charter provision or rule or directive of the mayor or any agency head of a city having a population of one million or more, where such law, code provision, charter provision, rule or directive concerns ethics, conflicts of interest, potential conflicts of interest, or the proper discharge of official duties and otherwise covers such employees; and

e. with respect to employees other than those of any employer as defined in section twenty-seven-a of this chapter, violates a collective bargaining agreement or a certified or licensed professional's contractual obligation to devote his or her entire compensated working hours to a single employer, provided however that the provisions of this paragraph shall apply only to professionals whose compensation is at least fifty thousand dollars for the year nineteen hundred ninety-two and in subsequent years is an equivalent amount adjusted by the same percentage as the annual increase or decrease in the consumer price index.

4. Notwithstanding the provisions of subdivision three of this section, an employer shall not be in violation of this section where the employer takes action based on the belief either that: (i) the employer's actions were required by statute, regulation, ordinance or other governmental mandate, (ii) the employer's actions were permissible pursuant to an established substance abuse or alcohol program or workplace policy, professional contract or collective bargaining agreement, or (iii) the individual's actions were deemed by an employer or previous employer to be illegal or to constitute habitually poor performance, incompetency or misconduct.

4-a. Notwithstanding the provisions of subdivision three or four of this section, an employer shall not be in violation of this section where the employer takes action related to the use of cannabis based on the following:

(i) the employer's actions were required by state or federal statute, regulation, ordinance, or other state or federal governmental mandate;

(ii) the employee is impaired by the use of cannabis, meaning the employee manifests specific articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position, or such specific articulable symptoms interfere with an employer's obligation to provide a safe and healthy work place, free from recognized hazards, as required by state and federal occupational safety and health law; or

(iii) the employer's actions would require such employer to commit any act that would cause the employer to be in violation of federal law or would result in the loss of a federal contract or federal funding.

5. Nothing in this section shall apply to persons who, on an individual basis, have a professional service contract with an employer and the unique nature of the services provided is such that the employer shall be permitted, as part of such professional service contract, to limit the off-duty activities which may be engaged in by such individual.

6. Nothing in this section shall prohibit an organization or employer from offering, imposing or having in effect a health, disability or life insurance policy that makes distinctions between employees for the type of coverage or the price of coverage based upon the employees' recreational activities or use of consumable products, provided that differential premium rates charged employees reflect a differential cost to the employer and that employers provide employees with a statement delineating the differential rates used by the carriers providing insurance for the employer, and provided further that such distinctions in type or price of coverage shall not be utilized to expand, limit or curtail the rights or liabilities of any party with regard to a civil cause of action.

7.

> a. Where a violation of this section is alleged to have occurred, the attorney general may apply in the name of the people of the state of New York for an order enjoining or restraining the commission or continuance of the alleged unlawful acts. In any such proceeding, the court may impose a civil penalty in the amount of three hundred dollars for the first violation and five hundred dollars for each subsequent violation.
>
> b. In addition to any other penalties or actions otherwise applicable pursuant to this chapter, where a violation of this section is alleged to have occurred, an aggrieved individual may commence an action for equitable relief and damages.

8. Nothing in this section shall prohibit: (i) an employer or its agent, representative or designee from communicating to its employees any information that the employer is required by law to communicate, but only to the extent of such legal requirement; (ii) an employer or its agent, representative or designee from communicating to its employees any information that is necessary for such employees to perform their job duties; (iii) an institution of higher education, or any agent, representative or designee of such institution, from meeting with or participating in any communications with its employees that are part of coursework, any symposia or an academic program at such institution; (iv) casual conversations between employees or between an employee and an agent, representative or designee of an employer, provided participation in such conversations is not required; or (v) a requirement limited to the employer's managerial and supervisory employees.

9. The provisions of this section shall not apply to a religious corporation, entity, association, educational institution or society that is exempt from the requirements of Title VII of the Civil Rights Act of 1964 pursuant to 42 USC 2000e-1(a) with respect to speech on religious matters to employees who perform work connected with the activities undertaken by such religious corporation, entity, association, educational institution or society.

10. Every employer shall post a sign in every workplace at the location or locations where notices to employees are normally posted, to inform employees of their rights pursuant to this section.

2.3 Other Personal Activity

Brunner v. Al Attar, 786 S.W.2d 784 (Tex. App. 1990)

SAM BASS, Justice.

Farouk Al Attar and Rima Al Attar are husband and wife, and partners in a general partnership, known as Apollo Paint & Body. Brunner states that Farouk's actions are the basis of this suit, and that Rima and Apollo are vicariously liable. Brunner alleged that Farouk terminated her, because he feared that she would catch and spread the Acquired Immune Deficiency Syndrome (AIDS) to employees. Appellees urged that Brunner was terminated because of her refusal to work during the hours required, her request to be terminated, and her failure, inability and/or refusal to perform the work expected of her.

Brunner stated that she had neither contracted AIDS, nor been infected with the human immunodeficiency virus which causes AIDS.

Appellees moved for summary judgment, alleging that Brunner did not state a cause of action, and could not amend her pleadings to state a cause of action.

Brunner testified by deposition that she was terminated from Apollo Paint & Body because she was a volunteer with the AIDS Foundation. Brunner had told Farouk that she would be volunteering in her free time on Saturdays and Sundays, and in the evenings. Brunner promised that her volunteer work would not interfere with her position at Apollo, and stated that there was no danger to the employees at Apollo Paint & Body, because Brunner could not catch AIDS from the patients' touching, sneezing, or breathing on her. She further stated that the only way to catch AIDS is through sexual contact or blood transfusions. Brunner told Farouk that his customers did not have to know about her volunteer work. Farouk responded by saying that he could not allow Brunner to perform volunteer work at the AIDS Foundation and work at Apollo. Farouk told Brunner that he did not want to place himself, his family, and the office workers in jeopardy. Farouk urged Brunner to resign, and she refused.

Rima told another supervisor not to let Farouk fire Brunner. In a later discussion, Farouk asked Brunner to reconsider, but she would not. Farouk then said that he would have to fire Brunner.

Brunner asserts that this Court should not permit her to be terminated for performing volunteer work for the AIDS Foundation because her termination violates the public policy exception to the employment-at-will doctrine.

Brunner does not allege that her employment was governed by a contract, or that it was for a definite term. The general rule is that employment for an indefinite term may be terminated at will and without cause. In *Sabine Pilot,* the Texas Supreme Court recognized a very narrow exception to the judicially-created employment-at-will doctrine. "That narrow exception covers only the discharge of an employee for the sole reason that the employee refused to perform an illegal act." The supreme court stated that where an employee sought to invoke the public policy exception, "it is the plaintiff's burden to prove by a preponderance of the evidence that his discharge was for no reason other than his refusal to perform an illegal act."In *McClendon v. Ingersoll-Rand Co.,* the Texas supreme court announced another judicially-created exception to the employment-at-will doctrine, which permits recovery of lost future wages, mental anguish, and punitive damages, where the "plaintiff proves that the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund."

Brunner alleges that she was fired because she refused to quit her volunteer work with the AIDS Foundation; however, she has not alleged that she was terminated for refusing to perform an illegal act, or because her employer wished to avoid paying benefits under her pension fund. Brunner has failed to allege sufficient facts to place her within these two exceptions to the employment-at-will doctrine. *See Jennings v. Minco Technology Labs, Inc.,* 765 S.W.2d 497 (Tex. App. 1989) (court refused to create an exception to the doctrine on the grounds of public policy, to enable an employee to obtain declaratory and injunctive relief, restraining employer from administering random urinalysis drug tests on employees); *Berry v. Doctor's Health Facilities,* 715 S.W.2d 60 (Tex. App. 1986) (court declined to create an exception to the employment-at-will doctrine on the grounds of public policy, to encompass a cause of action asserting wrongful termination, because the employee "knew too much" about alleged improprieties within the hospital administration); *Winters v. Houston Chronicle Publishing Company,* 781 S.W.2d 408 (Tex. App. 1989) (court declined to extend *Sabine Pilot* exception to employment-at-will doctrine, where private employee alleged he was discharged for reporting to management that his upper level managers and supervisors were engaged in circulation fraud, inventory theft, and a "kickback" scheme). This Court cannot create another exception for performing volunteer work at the Houston AIDS Foundation. If such an exception is to be created, that is a matter within the province of the Texas Supreme Court.

Rulon-Miller v. International Business Machines Corp., 162 Cal.App.3d 241 (1984)

RUSHING, J.

International Business Machines (IBM) appeals from the judgment entered against it after a jury awarded $100,000 compensatory and $200,000 punitive damages to respondent (Virginia Rulon-Miller) on claims of wrongful discharge and intentional infliction of emotional distress. Rulon-Miller was a low-level marketing manager at IBM in its office products division in San Francisco. Her termination as a marketing manager at IBM came about as a result of an accusation made by her immediate supervisor, defendant Callahan, of a romantic relationship with the manager of a rival office products firm, QYX.

Factual Background

IBM is an international manufacturer of computers, office equipment and telecommunications systems. As well, it offers broad general services in the data processing field. It is reputed to be the single most successful high technology firm in the world. It is also a major force in the low technology field of typewriters and office equipment.

IBM is an employer traditionally thought to provide great security to its employees as well as an environment of openness and dignity. The company is organized into divisions, and each division is, to an extent, independent of others. The company prides itself on providing career opportunities to its employees, and respondent represents a good example of this. She started in 1967 as a receptionist in the Philadelphia Data Center. She was told that "career opportunities are available to employees as long as they are performing satisfactorily and are willing to accept new challenges." While she worked at the data center in Philadelphia, she attended night school and earned a baccalaureate degree. She was promoted to equipment scheduler and not long after received her first merit award. The company moved her to Atlanta, Georgia where she spent 15 months as a data processor. She was transferred to the office products division and was assigned the position of "marketing support representative" in San Francisco where she trained users (i.e., customers) of newly purchased IBM equipment. Respondent was promoted to "product planner" in 1973 where her duties included overseeing the performance of new office products in the marketplace. As a product planner, she moved to Austin, Texas and later to Lexington, Kentucky. Thereafter, at the urging of her managers that she go into sales in the office products division, she enrolled at the IBM sales school in Dallas. After graduation, she was assigned to San Francisco.

Her territory was the financial district. She was given a performance plan by her management which set forth the company's expectations of her. She was from time to time thereafter graded against that plan on a scale of one through five with a grade of one being the highest. After her first year on the job, she was given a rating of one and was felt by her manager to be a person who rated at the top of IBM's scale.

A little over a year after she began in San Francisco, IBM reorganized its office products division into two separate functions, one called office systems and another called office products. Respondent was assigned to office systems; again she was given ratings of one and while there received a series of congratulatory letters from her superiors and was promoted to marketing representative. She was one of the most successful sales persons in the office and received a number of prizes and awards for her sales efforts. IBM's system of rewarding salespersons has a formalistic aspect about it that allows for subtle distinctions to be made while putting great emphasis on performance; respondent exercised that reward system to its fullest. She was a very successful seller of typewriters and other office equipment.

She was then put into a program called "Accelerated Career Development Program" which was a way of rewarding certain persons who were seen by their superiors as having management potential. IBM's prediction of her future came true and in 1978 she was named a marketing manager in the office products branch.

IBM knew about respondent's relationship with Matt Blum well before her appointment as a manager. Respondent met Blum in 1976 when he was an account manager for IBM. That they were dating was widely known within the organization. In 1977 Blum left IBM to join QYX, an IBM competitor, and was transferred to Philadelphia. When Blum returned to San Francisco in the summer of 1978, IBM personnel were aware that he and respondent began dating again. This seemed to present no problems to respondent's superiors, as Callahan confirmed when she was promoted to manager. Respondent testified: "Somewhat in passing, Phil said: I heard the other day you were dating Matt Blum, and I said: Oh. And he said, I don't have any problem with that. You're my number one pick. I just want to assure you that you are my selection." The relationship with Blum was also known to Regional Manager Gary Nelson who agreed with Callahan. Neither Callahan nor Nelson raised any issue of conflict of interest because of the Blum relationship.

Respondent flourished in her management position, and the company, apparently grateful for her efforts, gave her a $4,000 merit raise in 1979 and told her that she was doing a good job. A week later, her manager, Phillip Callahan, left a message that he wanted to see her.

When she walked into Callahan's office he confronted her with the question of whether she was *dating* Matt Blum. She wondered at the relevance of the inquiry and he said the dating constituted a "conflict of interest," and told her to stop dating Blum or lose her job and said she had a "couple of days to a week" to think about it.

The next day Callahan called her in again, told her "he had made up her mind for her," and when she protested, dismissed her. IBM and Callahan claim that he merely "transferred" respondent to another division.

Discussion

Respondent's claims of wrongful discharge and intentional infliction of emotional distress were both submitted to the jury. Appellant argues that the jury should not have been permitted to consider the issue of wrongful discharge because as a matter of law the offer of reassignment cannot be considered a wrongful discharge. In developing this argument, IBM attempts to change the nature of this case from one of wrongful termination into a debate about constructive discharge through an alleged administrative reassignment.

The initial discussion between Callahan and respondent of her relationship with Blum is important. When Callahan questioned her relationship with Blum, respondent invoked her right to privacy in her personal life relying on existing IBM policies. A threshold inquiry is thus presented whether respondent could reasonably rely on those policies for job protection. Any conflicting action by the company would be wrongful in that it would constitute a violation of her contract rights.

(1) Under the common law rule codified in Labor Code section 2922, an employment contract of indefinite duration is, in general, terminable at "the will" of either party. This common law rule has been considerably altered by the recognition of the Supreme Court of California that implicit in any such relationship or contract is an underlying principle that requires the parties to deal openly and fairly with one another. This general requirement of fairness has been identified as the covenant of good faith and fair dealing. The covenant of good faith and fair dealing embraces a number of rights, obligations, and considerations implicit in contractual relations and certain other relationships. At least two of those considerations are relevant herein. The duty of fair dealing by an

employer is, simply stated, a requirement that like cases be treated alike. Implied in this, of course, is that the company, if it has rules and regulations, apply those rules and regulations to its employees as well as affording its employees their protection.

As can be seen from an analysis of other cases, this is not in any substantial way a variation from general contract law in California, for if an employee has the right in an employment contract (as distinct from an implied covenant), the courts have routinely given her the benefit of that contract. Thus, the fair dealing portion of the covenant of good faith and fair dealing is at least the right of an employee to the benefit of rules and regulations adopted for his or her protection.

(2a) In this case, there is a close question of whether those rules or regulations permit IBM to inquire into the purely personal life of the employee. If so, an attendant question is whether such a policy was applied consistently, particularly as between men and women. The distinction is important because the right of privacy, a constitutional right in California, could be implicated by the IBM inquiry. Much of the testimony below concerned what those policies were. The evidence was conflicting on the meaning of certain IBM policies. We observe ambiguity in the application but not in the intent. The "Watson Memo" (so called because it was signed by a former chairman of IBM) provided as follows:

> TO ALL IBM MANAGERS:
>
> The line that separates an individual's on-the-job business life from his other life as a private citizen is at times well-defined and at other times indistinct. But the line does exist, and you and I, as managers in IBM, must be able to recognize that line.
>
> I have seen instances where managers took disciplinary measures against employees for actions or conduct that are not rightfully the company's concern. These managers usually justified their decisions by citing their personal code of ethics and morals or by quoting some fragment of company policy that seemed to support their position. Both arguments proved unjust on close examination. What we need, in every case, is balanced judgment which weighs the needs of the business and the rights of the individual.

> Our primary objective as IBM managers is to further the business of this company by leading our people properly and measuring quantity and quality of work and effectiveness on the job against clearly set standards of responsibility and compensation. This is performance — and performance is, in the final analysis, the one thing that the company can insist on from everyone.
>
> We have concern with an employee's off-the-job behavior only when it reduces his ability to perform regular job assignments, interferes with the job performance of other employees, or if his outside behavior affects the reputation of the company in a major way. When on-the-job performance is acceptable, I can think of few situations in which outside activities could result in disciplinary action or dismissal.
>
> When such situations do come to your attention, you should seek the advice and counsel of the next appropriate level of management and the personnel department in determining what action — if any — is called for. Action should be taken only when a legitimate interest of the company is injured or jeopardized. Furthermore the damage must be clear beyond reasonable doubt and not based on hasty decisions about what one person might think is good for the company.
>
> IBM's first basic belief is respect for the individual, and the essence of this belief is a strict regard for his right to personal privacy. This idea should never be compromised easily or quickly.
>
> /s/ Tom Watson, Jr.

It is clear that this company policy insures to the employee both the right of privacy and the right to hold a job even though "off-the-job behavior" might not be approved of by the employee's manager.

IBM had adopted policies governing employee conduct. Some of those policies were collected in a document known as the "Performance and Recognition" (PAR) Manual. IBM relies on the following portion of the PAR Manual:

> "A conflict of interest can arise when an employee is involved in activity for personal gain, which for any reason is in conflict with IBM's business interests. Generally speaking, 'moonlighting' is defined as working at some activity for personal gain outside of your IBM job. If you do perform outside work, you have a special responsibility to avoid any conflict with IBM's business interests.

> Obviously, you cannot solicit or perform in competition with IBM product or service offerings. Outside work cannot be performed on IBM time, including 'personal' time off. You cannot use IBM equipment, materials, resources, or 'inside' information for outside work. Nor should you solicit business or clients or perform outside work on IBM premises.
>
> Employees must be free of any significant investment or association of their own or of their immediate family's *sic*, in competitors or suppliers, which might interfere or be thought to interfere with the independent exercise of their judgment in the best interests of IBM.

This policy of IBM is entitled "Gifts" and appears to be directed at "moonlighting" and soliciting outside business or clients on IBM premises. It prohibits "significant investment" in competitors or suppliers of IBM. It also prohibits "association" with such persons "which might interfere or be thought to interfere with the independent exercise of their judgment in the best interests of IBM."

Callahan based his action against respondent on a "conflict of interest." But the record shows that IBM did not interpret this policy to prohibit a romantic relationship. Callahan admitted that there was no company rule or policy requiring an employee to terminate friendships with fellow employees who leave and join competitors. Gary Nelson, Callahan's superior, also confirmed that IBM had no policy against employees socializing with competitors.

This issue was hotly contested with respondent claiming that the "conflict of interest" claim was a pretext for her unjust termination. Whether it was presented a fact question for the jury.

Do the policies reflected in this record give IBM a right to terminate an employee for a conflict of interest? The answer must be yes, but whether respondent's conduct constituted such was for the jury. We observe that while respondent was successful, her primary job did not give her access to sensitive information which could have been useful to competitors. She was, after all, a seller of typewriters and office equipment. Respondent's brief makes much of the concession by IBM that there was no evidence whatever that respondent had given any information or help to IBM's competitor QYX. It really is no concession at all; she did not have the information or help to give. Even so, the question is one of substantial evidence. The evidence is abundant that there was no conflict of interest by respondent.

It does seem clear that an overall policy established by IBM chairman Watson was one of no company interest in the outside activities of an employee so long as the activities did not interfere with the work of the employee. Moreover, in the last analysis, it may be simply a question for the jury to decide whether, in the application of these policies, the right was conferred on IBM to inquire into the personal or romantic relationships its managers had with others. This is an important question because IBM, in attempting to reargue the facts to us, casts this argument in other terms, namely: that it had a right to inquire even if there was no evidence that such a relationship interfered with the discharge of the employee's duties *because* it had the effect of diminishing the morale of the employees answering to the manager. This is the "Caesar's wife" argument; it is merely a recast of the principal argument and asks the same question in different terms. The same answer holds in both cases: there being no evidence to support the more direct argument, there is no evidence to support the indirect argument.

Moreover, the record shows that the evidence of rumor was not a basis for any decline in the morale of the employees reporting to respondent. Employees Mary Hrize and Wayne Fyvie, who reported to respondent's manager that she was seen at a tea dance at the Hyatt Regency with Matt Blum and also that she was not living at her residence in Marin, did not believe that those rumors in any way impaired her abilities as a manager. In the initial confrontation between respondent and her superior the assertion of the right to be free of inquiries concerning her personal life was based on substantive direct contract rights she had flowing to her from IBM policies. Further, there is no doubt that the jury could have so found and on this record we must assume that they did so find.

State v. Wal-Mart Stores, Inc., 621 N.Y.S.2d 158 (N.Y. App. Div. 1995)

MERCURE, J.

In February 1993, defendant discharged two of its employees for violating its "fraternization" policy, which is codified in defendant's 1989 Associates Handbook and prohibits a "dating relationship" between a married employee and another employee, other than his or her own spouse. In this action, plaintiff seeks reinstatement of the two employees with back pay upon the ground that their discharge violated Labor Law § 201-d(2)(c), which forbids employer discrimination against employees because of their participation in "legal recreational activities" pursued outside of work hours. Defendant moved to dismiss the complaint. The trial court denied the motion with regard to the first cause of action, concluding that "dating" while one is married "may well be 'recreational activities' within the meaning of Labor Law § 201-d(2)(c)", but granted the motion with regard to the second cause of action, predicated upon Executive Law § 63(12), which prohibits repeated or persistent illegality in the transaction of business. The parties cross-appeal.

We are not at all persuaded by the effort to force "a dating relationship" within the definition of "recreational activities" and accordingly reverse so much of its order as denied the motion to dismiss the first cause of action. Labor Law § 201-d(1)(b) defines "recreational activities" as meaning: "any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material". In our view, there is no justification for proceeding beyond the fundamental rule of construction that "where words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation". To us, "dating" is entirely distinct from and, in fact, bears little resemblance to "recreational activity". Whether characterized as a relationship or an activity, an indispensable element of "dating", in fact its raison d'être, is romance, either pursued or realized. For that reason, although a dating couple may go bowling and under the circumstances call that activity a "date", when two individuals lacking amorous interest in one another go bowling or engage in any other kind of "legal recreational activity", they are not "dating".

Moreover, even if Labor Law § 201-d(1)(b) was found to contain some ambiguity, application of the rules of statutory construction does not support Supreme Court's interpretation. We agree with defendant that, to the extent relevant, the voluminous legislative history to the enactment, including memoranda issued in connection with the veto of two earlier more expansive bills, evinces an obvious intent to limit the statutory protection to certain clearly defined categories of leisure-time activities.

Further, in view of the specific inclusion of “sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material” within the statutory definition of “recreational activities”, application of the doctrine of *noscitur a sociis* compels the conclusion that personal relationships fall outside the scope of legislative intent.

Nor is there any realistic danger that this construction will permit employers to infringe upon the right of employees to engage in protected off-hours pursuits by wrongly characterizing dispassionate recreational activity as dating. To the contrary, recognition of the distinction between “dating” and “recreational activity” imposes upon the employer the enhanced burden of establishing not only joint activity of a recreational nature, but the employees’ mutual romantic interest as well. Similarly, this construction in no way diminishes the statutory protection afforded social relationships between unmarried employees or married employees having no romantic interest or involvement with one another.

YESAWICH JR., J. (dissenting).

I respectfully dissent, for I find defendant’s central thesis, apparently accepted by the majority, that the employment policy at issue only prohibits romantic entanglements and not other types of social interaction, to be wholly without merit. While the majority encumbers the word “dating” with an “amorous interest” component, there is nothing in defendant’s fraternization policy, its application — defendant does not allege that its two former employees manifested an intimate or amatory attitude toward each other — or even in defendant’s own definition of a “date”, “a social engagement between persons of opposite sex” (Webster’s Ninth New Collegiate Dictionary 325 1988), that leads to such a conclusion.

More importantly, I do not agree that “dating”, whether or not it involves romantic attachment, falls outside the general definition of “recreational activities” found in Labor Law § 201-d(1)(b). The statute, by its terms, appears to encompass social activities, whether or not they have a romantic element, for it includes *any* lawful activity pursued for recreational purposes and undertaken during leisure time. Though no explicit definition of “recreational purposes” is contained in the statute, “recreation” is, in the words of one dictionary, “a means of refreshment or diversion" (Webster's Ninth New Collegiate Dictionary 985 1985); social interaction surely qualifies as a "diversion".

Moreover, while the majority assures that the construction it adopts "in no way diminishes the statutory protection afforded social relationships between unmarried employees", I am less sanguine, because the majority's holding implies that the statute affords no protection to any social relationship that might contain a romantic aspect, regardless of the marital status of the participants, or the impact that the relationship has on their capacity to perform their jobs.

In my view, given the fact that the Legislature's primary intent in enacting Labor Law § 201-d was to curtail employers' ability to discriminate on the basis of activities that are pursued outside of work hours, and that have no bearing on one's ability to perform one's job, and concomitantly to guarantee employees a certain degree of freedom to conduct their lives as they please during nonworking hours, the narrow interpretation adopted by the majority is indefensible. Rather, the statute, and the term "recreational activities" in particular, should be construed as broadly as the definitional language allows, to effect its remedial purpose.

And while it is true that, as a general rule of statutory construction, the breadth of an inclusory phrase is to be considered limited by the specific examples accompanying it, this principle must yield where necessary to carry out the underlying purpose of the enactment. Additionally, it is only applicable when the examples fall into a single, well-defined class, and are not themselves general in nature. Here, the list, which includes vast categories such as "hobbies" and "sports", as well as very different types of activities (e.g., exercise, reading), appears to have been compiled with an eye toward extending the reach of the statute. This, coupled with the explicit directive that the definition is *not* to be limited to the examples given, provides further indication that the term "recreational activities" should be construed expansively. Accordingly, I would affirm the denial of defendant's motion to dismiss the first cause of action.

Smith v. Manheim Remarketing, Inc., No. 5:19-CV-00086-KDB-DSC (M.D.N.C. Nov. 26, 2019)

David S. Cayer, United States Magistrate Judge

I. Factual and Procedural Background

Taking the facts of the Second Amended Complaint as true, Plaintiff is a fifty-four year old woman who worked for Defendants in their motor vehicle auction business for over fourteen years. She was terminated in February 2019. At the time of her termination, Plaintiff was a Total Resource Auction supervisor and managed seven employees. She was a loyal, reliable and respected employee.

During the last several years before her termination, Plaintiff developed chronic pain and related anxiety. A year before her termination, she was diagnosed with fibromyalgia and referred to a rheumatologist who put her on prescription medication. Those medications and their side effects are detailed in the Second Amended Complaint. Plaintiff was open with her supervisors about her health problems, including her medications and their side effects.

With her rheumatologist's knowledge and agreement, Plaintiff began using CBD oil as an alternative therapy. The oil provided Plaintiff with significant pain relief, reduced her anxiety and improved her sleep without the side effects of her prescription medications. Plaintiff bought a stronger version of the same brand CBD oil, made under the same state and federal standard of 0.3% THC or less. She would take seven or eight drops at home in the morning and enjoy significant pain relief for twenty-four hours. Plaintiff was able to wean off her prescription medications completely by early February 2019.

On February 13, 2019, Plaintiff was injured at work when a windstorm blew an open truck door against her hand. She thought her thumb was broken. Plaintiff reported the injury and went to a local medical facility for treatment. Pursuant to Defendants' drug policy related to workplace injuries, Plaintiff was required to submit to a drug screen. Plaintiff does not use illegal drugs and had tested negative throughout her employment. She was shocked to learn that she tested positive for THC at the level of 20 ng/dl and faced possible termination. The threshold level for a positive THC test under Federal Department of Transportation regulations is 50 ng/dl. Plaintiff learned that some users of CBD oil test positive for low levels of THC.

Her direct supervisor as well as the Assistant General Manager and Human Resources representative wanted Plaintiff to remain employed and urged the corporate office not to terminate her. Plaintiff provided her managers with information about the CBD oil as well as her doctor's agreement that she take it to treat her fibromyalgia. Plaintiff also offered to discontinue the CBD oil and resume her prescription medication. Defendants' corporate officials rejected that proposal and insisted she be terminated. Plaintiff's appeal to the corporate office for reinstatement was denied.

On May 22, 2019, Plaintiff filed a wrongful discharge claim in Iredell County Superior Court alleging that she was terminated for using CBD oil outside of work, in violation of the public policy set forth in N.C.Gen. Stat. §95-28.2.

Defendants removed the case to this Court on July 1, 2019 and moved to dismiss Plaintiff's Complaint.

III. Discussion

A. Wrongful Termination for Use of Lawful Product Claim

Plaintiff alleges that Defendants terminated her employment for using a lawful product, CBD oil, outside of work in violation of the public policy of North Carolina set forth in N.C. Gen. Stat. §95-28.2. Defendants move to dismiss this claim by arguing that the THC in CBD oil remains illegal. Defendants further argue that Plaintiff was not meeting the reasonable expectations of her employer by having "high levels" of THC at work and failing to comply with their valid workplace drug policy.

In order to adequately plead a wrongful discharge claim under this Act, Plaintiff must show that: (i) she was using a lawful product, (ii) her use of that product was lawful, and (iii) Defendants' restriction of her use did not relate to a bona fide occupational requirement reasonably related to employment activities.

Since 2015, North Carolina has legalized "industrial hemp." N.C. Gen. Stat. § 106-568.51. This statute allows for the cultivation and sale of products made from a variety of Cannabis sativa (L.) with a THC1 concentration of not more than 0.3 percent on a dry weight basis, and specifically includes "seed oil" as one type of "hemp" product. The statute defines THC,(8), and legalizes "propagules" or seeds that have THC levels below the federal standards for legal THC. The Legislature also amended the list of Controlled Substances to exclude industrial hemp as legalized in N.C. Gen. Stat. § 106-568.51 from the definition of "marijuana."

The NC industrial hemp statute expired in 2022. Hemp cultivation is now governed by the federal Agriculture Improvements Act of 2018, discussed in the opinion below. See N.C. Dept. of Agriculture & Consumer Services, Hemp in North Carolina.

The federal standards for hemp mirror North Carolina's standards. In the Agriculture Improvement Act of 2018, Congress defined "hemp" as any part of the Cannabis sativa L. plant "with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." This legislation also removed "hemp" from the Schedule I definition of "marijuana" under the Controlled Substances Act. Marijuana remains a Schedule I controlled substance under 21 U.S.C. § 812(c)(c)(10). THC also remains on schedule I, "except for tetrahydrocannabinols in hemp (as defined under section 1639o of Title 7)."

Defendants argue that Plaintiff's use of CBD oil is still unlawful under state law because THC remains a Schedule VI substance under N.C. Gen. Stat. § 90-94(2). Plaintiff argues that Defendants reading of N.C. Gen. Stat. § 90-94(2), would nullify the statutes legalizing hemp with THC of less than 0.3 percent by dry weight.

It is a well-established principle of statutory construction that statutes in pari materia must be read in context with each other. Plaintiff argues that the hemp statutes would not make sense if the THC allowed by those statutes remained illegal under § 90-94(2). And statutes specific in nature control over more general legislation. "Where one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability." Based upon these principles, the Court concludes that the specific legislative exceptions legalizing CBD oil derived from industrial

Statutes pertaining to the same subject matter.

hemp made from cannabis with 0.3% or less of THC control over the general prohibition in § 90-94(2).

Under these nearly identical state and federal provisions, the Court finds that hemp-based CBD oil made from Cannibis sativa L. containing less than 0.3% THC by dry weight is not an illegal drug but a lawful commercial product. In Plaintiff's Second Amended Complaint, she alleges that the CBD oil she used was manufactured and labelled under the lawful 0.3 percent standard. Therefore, Plaintiff has alleged that she was she was using a lawful product and that her use of that product was lawful.

Defendants also argue that Plaintiff used a commercial CBD oil that exceeded the state and federal THC standards for industrial hemp products and that use of the higher concentrated THC was unlawful under N.C. Gen. Stat. § 90-94.1. At this stage of the proceedings, the Court must construe Plaintiff's factual allegations in the light most favorable to her. The Court cannot find from the face of the Second Amended Complaint that Plaintiff purchased and used CBD oil that exceeded the 0.3 percent THC level for industrial hemp. Plaintiff has expressly pled that the label of the product she used stated that it was manufactured under the industrial hemp standard and was a lawful product.

Defendants argue that even if Plaintiff was engaged in the lawful use of a lawful product, her wrongful discharge claim must still be dismissed because her use of CBD oil with detectable levels of THC conflicted with the bona fide occupational requirement of their drug testing policy. The Court disagrees. Defendants' drug testing policy states that "testing positive for substances that are illegal under state or federal law may result in corrective action, up to and including separation from employment." Plaintiff has alleged that she did not test positive for an illegal substance in violation of that policy, but for the legal substance of CBD oil made from Cannibis sativa L. containing less than 0.3 percent THC by dry weight. Plaintiff has further alleged that the threshold level for a positive THC test under Federal Department of Transportation regulations is 50 ng/dl and that she tested positive for THC at the level of 20 ng/dl.

Accordingly, the undersigned respectfully recommends that Defendants' Motion to Dismiss Plaintiff's wrongful termination for use of a lawful product claim be denied.

NCGS § 95-28.2

Discrimination against persons for lawful use of lawful products during nonworking hours prohibited.

(a) As used in this section, “employer” means the State and all political subdivisions of the State, public and quasi-public corporations, boards, bureaus, commissions, councils, and private employers with three or more regularly employed employees.

(b) It is an unlawful employment practice for an employer to fail or refuse to hire a prospective employee, or discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the prospective employee or the employee engages in or has engaged in the lawful use of lawful products if the activity occurs off the premises of the employer during nonworking hours and does not adversely affect the employee’s job performance or the person’s ability to properly fulfill the responsibilities of the position in question or the safety of other employees.

(c) It is not a violation of this section for an employer to do any of the following:

> (1) Restrict the lawful use of lawful products by employees during nonworking hours if the restriction relates to a bona fide occupational requirement and is reasonably related to the employment activities. If the restriction reasonably relates to only a particular employee or group of employees, then the restriction may only lawfully apply to them.
>
> (2) Restrict the lawful use of lawful products by employees during nonworking hours if the restriction relates to the fundamental objectives of the organization.

(3) Discharge, discipline, or take any action against an employee because of the employee's failure to comply with the requirements of the employer's substance abuse prevention program or the recommendations of substance abuse prevention counselors employed or retained by the employer.

(d) This section shall not prohibit an employer from offering, imposing, or having in effect a health, disability, or life insurance policy distinguishing between employees for the type or price of coverage based on the use or nonuse of lawful products if each of the following is met:

(1) Differential rates assessed employees reflect actuarially justified differences in the provision of employee benefits.

(2) The employer provides written notice to employees setting forth the differential rates imposed by insurance carriers.

(3) The employer contributes an equal amount to the insurance carrier on behalf of each employee of the employer.

(e) An employee who is discharged or otherwise discriminated against, or a prospective employee who is denied employment in violation of this section, may bring a civil action within one year from the date of the alleged violation against the employer who violates the provisions of subsection (b) of this section and obtain any of the following:

(1) Any wages or benefits lost as a result of the violation;

(2) An order of reinstatement without loss of position, seniority, or benefits; or

(3) An order directing the employer to offer employment to the prospective employee.

(f) The court may award reasonable costs, including court costs and attorneys' fees, to the prevailing party in an action brought pursuant to this section.

Chapter 5: Employee Duties to Employers

1. Confidentiality

1.1 Confidentiality Policies

Lowe's Home Centers, LLC v. NLRB, 850 Fed.Appx. 886 (5th Cir. March 15, 2021)

Per Curiam

Lowe's workplace policy prohibits disclosure of confidential information, and an employee challenged the policy under Section 8(a)(1) of the National Labor Relations Act, which prevents employers from limiting employees' discussions of their wages. The administrative law judge ("ALJ") concluded that Lowe's policy violated the Act. Lowe's appealed to the National Labor Relations Board, and the Board affirmed. We AFFIRM.

I. FACTUAL AND PROCEDURAL HISTORY

Employee Amber Frare filed an unfair labor practice claim against Lowe's. She alleged that a section of Lowe's employee code violated 29 U.S.C. § 158(a)(1) by interfering with employees' right to discuss wages. The relevant part of the Lowe's policy reads as follows:

> Employees must maintain the confidentiality of information entrusted to them by Lowe's, its suppliers, its customers, or its competitors, except when disclosure is authorized by the Chief Compliance Officer or required by law. Employees must consult with the Chief Compliance Officer before disclosing any information that could be considered confidential.
>
> Confidential information includes, but is not limited to:
>
> • material non-public information; and
>
> • proprietary information relating to Lowe's business such as customer, budget, financial, credit, marketing, pricing, supply cost, personnel, medical records or salary information, and future plans and strategy.

III. DISCUSSION

1. "Reasonably construe" standard

In *Boeing*, the Board adopted a more flexible standard for assessing whether a facially neutral employment rule violates Secion 8(a)(1).

> When a facially neutral rule, reasonably interpreted, would not prohibit or interfere with the exercise of NLRA rights, maintenance of the rule is lawful without any need to evaluate or balance business justifications, and the Board's inquiry into maintenance of the rule comes to an end. Even under Lutheran Heritage–in which legality turned solely on a rule's potential impact on protected rights–a rule could lawfully be maintained whenever it would not 'reasonably' be construed to prohibit NLRA-protected activity, even though it 'could conceivably be read to cover Section 7 activity.' Conversely, when a rule, reasonably interpreted, would prohibit or interfere with the exercise of NLRA rights, the mere existence of some plausible business justification will not automatically render the rule lawful. Again, the Board must carefully evaluate the nature and extent of a rule's adverse impact on NLRA rights, in addition to potential justifications, and the rule's maintenance will violate Section 8(a)(1) if the Board determines that the justifications are outweighed by the adverse impact on rights protected by Section 7.

In other words, when a facially neutral rule cannot reasonably be interpreted to violate the NLRA, the rule is lawful. There is no need to examine the employer's justifications for the rule. When a facially neutral rule is reasonably interpreted to violate the NLRA, the rule's lawfulness is uncertain, and further analysis is required.

Here, the Board concluded that Lowe's policy was facially neutral and could be reasonably construed to restrict employees' wage discussions. The policy prohibits employees from discussing confidential information which explicitly includes "salary information." We thus agree with the Board's conclusion that the policy can be reasonably construed to limit employees' rights under the NLRA. We now turn to Lowe's legitimate justifications for the policy.

2. Lowe's Legitimate Justifications

Under *Boeing*, the Board created three categories of rules. Category 1 rules are per se lawful, either because they cannot be reasonably interpreted to interfere with employees' rights or because the adverse impacts on rights is outweighed by justifications for the rule. Category 2 rules warrant individualized scrutiny in each case, and the Board must weigh the adverse impacts on NLRA rights with employer's legitimate justifications.

Category 3 rules are generally unlawful because they "would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another."

The Board reasonably construed Lowe's policy as limiting the exercise of NLRA rights and looked to Lowe's justifications. Lowe's argues that its policy was justified by its need to prevent employees from disseminating its confidential information. The Board recognized that employers have legitimate interests in maintaining confidential records but concluded that those "circumstances were not present in this case" because Lowe's policy was overly broad. The policy was not tailored to address only those employees with special access to confidential information.

We find no error in the Board's analysis. Lowe's policy falls within the Category 3 rules contemplated by *Boeing* because the policy can be reasonably construed to limit employees' wages and because Lowe's justification does not save the policy. The policy is too broad to be justified by Lowe's interest in preventing employees from sharing confidential information.

Tesla, Inc., 370 NLRB No. 101 (March 25, 2021)

By CHAIRMAN MCFERRAN and MEMBERS EMANUEL and RING

For the reasons discussed below, we find that the Respondent violated Section 8(a)(1) by maintaining a media-contact provision in its Confidentiality Agreement.

I. Media-Contact Provision

A. Relevant Facts

In October and November 2016, the Respondent required its employees to sign the following Confidentiality Agreement:

> In response to recent leaks of confidential Tesla information, we are reminding everyone who works at Tesla, whether full-time, temporary or via contract, of their confidentiality obligations and asking them to reaffirm their commitment to honor them.
>
> These obligations are straightforward. Provided that it's not already public information, everything that you work on, learn about or observe in your work about Tesla is confidential information under the agreement that you signed when you first started. This includes information about products and features, pricing, customers, suppliers, employees, financial information, and anything similar. Additionally, regardless of whether information has already been made public, it is never OK to communicate with the media or someone closely related to the media about Tesla, unless you have been specifically authorized in writing to do so.
>
> Unless otherwise allowed by law or you have received written approval, you must not, for example, discuss confidential information with anyone outside of Tesla, take or post photos or make video or audio recordings inside Tesla facilities, forward work emails outside of Tesla or to a personal email account, or write about your work in any social media, blog, or book. If you are unsure, check with your manager, HR, or Legal. Of course, these obligations are not intended to limit proper communications with government agencies.

> The consequence for careless violation of the confidentiality agreement, could include, depending on severity, loss of employment. Anyone engaging in intentional violation of the confidentiality agreement will be held liable for all the harm and damage that is caused to the company, with possible criminal prosecution. These obligations remain in place even if no longer working at Tesla.
>
> By acknowledging, I affirm my agreement to comply with my confidentiality obligations to Tesla. I also represent that at no time over the past 12 months have I disclosed any Tesla confidential information outside of Tesla unless properly authorized to do so.

The Respondent created the Confidentiality Agreement in response to leaks of its confidential information, including a leak to the media of an August 29, 2016 email from the Respondent's CEO, Elon Musk, to all employees, discussing the Respondent's financial position and future projections. The Respondent requires employees to sign documents that include confidentiality obligations when they are hired and had previously reminded employees by email not to disclose confidential information to anyone outside of the Respondent. However, the Respondent had not previously required employees to reaffirm their confidentiality obligations.

The Respondent initially tried to have every employee physically sign a copy of the Confidentiality Agreement in the presence of a human resources (HR) partner. When that method proved to be logistically difficult, the Respondent, through a November 2, 2016 email sent by Vice President of Human Resources Mark Lipscomb, instructed all employees to electronically sign the Confidentiality Agreement in Workday. Lipscomb's email stated that "it's absolutely critical that we maintain strict confidentiality on all internal matters as any leak can have a negative impact on our company," and that "in order to reinforce the importance of confidentiality, we are asking everyone to sign an updated confidentiality agreement."

B. Legal Standard

In *Boeing Co.*, the Board set out a new standard for determining whether a facially neutral work rule or policy, reasonably interpreted, would unlawfully interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. The Board in *Boeing* held:

> When evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.

In conducting this evaluation, the Board will strike the proper balance between the employer's asserted business justifications for the policy against the extent to which the policy interferes with employee rights under the Act, viewing the rule or policy from the employees' perspective. Ultimately, the Board places work rules into one of three categories:

> Category 1 will include rules that the Board designates as lawful to maintain, either because (a) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (b) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.
>
> Category 2 will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
>
> Category 3 will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

However, these categories "will represent a classification of results from the Board's application of the new test" and "are not part of the test itself."

The General Counsel has the initial burden to prove that a facially neutral rule or policy would, when read in context, be interpreted by a reasonable employee as potentially interfering with the exercise of Section 7 rights. If the General Counsel fails to meet this initial burden, the Board does not need to address the employer's legitimate justifications for the rule. Instead, the rule is lawful and fits within *Boeing* Category 1(a). Conversely, if the General Counsel does meet the initial burden of proving that a reasonable employee would interpret a rule as potentially interfering with the exercise of Section 7 rights, the Board will then balance that potential interference against the employer's legitimate justifications for the rule. When the balance favors general employer interests, the rule at issue will be lawful and will fit within *Boeing* Category 1(b). When the potential interference with Section 7 rights generally outweighs any possible employer justification, the rule at issue will be unlawful and will fit within *Boeing* Category 3. Finally, "in some instances, it will not be possible to draw any broad conclusions about the legality of a particular rule because the context of the rule and the competing rights and interests involved are specific to that rule and that employer"; such rules will fit within *Boeing* Category 2.

C. Discussion

The Board has applied *Boeing* to analyze media-contact rules in two recent cases. In *LA Specialty*, the Board found the following media-contact rule to be lawful:

> Employees approached for interview and/or comments by the news media, cannot provide them with any information. Our President, Michael Glick, is the only person authorized and designated to comment on Company policies or any event that may affect our organization.

The Board acknowledged that "Section 7 generally protects employees when they speak with the media about working conditions, labor disputes, or other terms and conditions of employment" and that a rule would be facially unlawful if employees would reasonably interpret it to infringe on their Section 7 right to express their personal opinion about those topics to the media. The Board found, however, that employees would have reasonably interpreted the media-contact rule at issue there to provide "only that when employees are approached by the news media for comment, they cannot speak on the employer's behalf." "The phrase 'authorized and designated' was key" because it signified that the employer's president was its "spokesperson, i.e., the only person authorized to comment about company matters on the employer's behalf." Thus, employees would have reasonably interpreted the media-contact rule merely to prohibit them from speaking to the media on the employer's behalf. The Board ultimately concluded that because employees do not have a Section 7 right to speak to the media on their employer's behalf, the media-contact rule at issue did not potentially interfere with the exercise of Section 7 rights and was therefore lawful. The Board placed rules that prohibit employees from speaking to the media on their employer's behalf in *Boeing* Category 1(a).

In *Maine Coast Regional Health Facilities, d/b/a Maine Coast Memorial Hospital*, the Board found the following media policy to be unlawful:

> No EMHS employee may contact or release to news media information about EMHS, its member organizations or their subsidiaries without the direct involvement of the EMHS Community Relations Department or of the chief operating officer responsible for that organization. Any employee receiving an inquiry from the media will direct that inquiry to the EMHS Community Relations Department, or Community Relations staff at that organization for appropriate handling.

The Board agreed with the judge that the media policy above "significantly burdened the employees' protected rights to communicate with third parties about labor disputes in order to seek improvements in their working conditions, and that the restrictions on Section 7 rights far outweighed the employer's proffered justifications." In finding that the media policy significantly burdened the exercise of Section 7 rights, the Board observed that it was "not limited to communications about confidential or proprietary information, or to circumstances when the employees purport to speak on behalf of the employer."

In *Maine Coast*, the Board also analyzed the employer's amended media policy and found that it was lawful because the employer added the following "savings clause" to the unlawful media policy above: "This Policy does not apply to communications by employees, not made on behalf of EMHS or a Member Organization, concerning a labor dispute or other concerted communications for the purpose of mutual aid or protection protected by the National Labor Relations Act." The Board found that based on the clear language of that "savings clause," employees would not reasonably interpret the amended media policy to interfere with their Section 7 rights, and it placed the amended media policy in *Boeing* Category 1(a).

As to the media-contact provision at issue here, we disagree that employees would reasonably interpret the media-contact provision to apply only to confidential information. The Confidentiality Agreement defines confidential information, in part, as information that is "not already public." The media-contact provision states that "it is never OK to communicate with the media" about the Respondent "regardless of whether information has already been made public." Because the express language of the media-contact provision clearly indicates that it applies to information beyond the Confidentiality Agreement's definition of confidential information, employees would not reasonably interpret the media-contact provision to apply only to communications with the media regarding confidential information. That is so even when the media-contact provision is read in the context of the statement in the first paragraph of the Confidentiality Agreement that it was created "in response to recent leaks of confidential Tesla information." That general statement does not change the meaning of the plain language of the media-contact provision, which employees would reasonably interpret to apply to communications with the media about any matter regarding the Respondent, including working conditions, labor disputes, or other terms and conditions of employment.

Further, unlike the media-contact rule in *LA Specialty*, the employees here would not reasonably interpret the media-contact provision to apply only to statements made to the media on the Respondent's behalf because the media-contact provision does not include any language designating a company spokesperson that would logically lead employees to read the provision in that manner. We do not agree with the Respondent that the phrase "unless you have been specifically authorized in writing to do so" would have the same effect as the language designating a company spokesperson in the *LA Specialty* media-contact rule because employees would not reasonably interpret the authorization language in the media-contact provision here to designate a company spokesperson. Instead, employees would reasonably interpret that language to require that they receive authorization before communicating with the media about any matter regarding the Respondent, including working conditions, labor disputes, or other terms and conditions of employment. The Respondent may not lawfully require its employees to receive preauthorization before engaging in such Section 7 activity.

Additionally, we reject the Respondent's argument that employees would understand that the media-contact provision does not apply to Section 7 activity because the first sentence of the paragraph directly following the media-contact provision begins with the phrase "unless otherwise allowed by law." When read in context, that phrase does not appear to apply to the media-contact provision because it is in a separate paragraph and specifically applies to a list of prohibited activities, which does not mention speaking to the media. In any event, even if employees would interpret the phrase "unless otherwise allowed by law" to apply to the media-contact provision, such vague, generalized language would require employees to meticulously determine the state of the law for themselves, and employees therefore cannot be expected to interpret that language to exclude Section 7 activity from the coverage of the media-contact provision. The media-contact provision simply does not contain any language comparable to the “savings clause” that rendered the amended media policy lawful in *Maine Coast*.

Rather, the media-contact provision here is similar to the other media policy that the Board analyzed–and ultimately found unlawful–in *Maine Coast*. As in *Maine Coast*, because the media-contact provision is not limited to communications regarding confidential information or circumstances in which employees purport to speak on the Respondent’s behalf, the General Counsel met his initial burden by proving that employees would reasonably interpret the media-contact provision to potentially interfere with the exercise of their Section 7 right to communicate with the media concerning working conditions, labor disputes, or other terms and conditions of employment.

We acknowledge that the Respondent has a legitimate and, indeed, weighty interest in protecting its confidential information. However, the right of employees to communicate with the media concerning labor disputes and terms and conditions of employment–and to do so without having to obtain preauthorization from their employer–is “central to the Act,” and employees would reasonably interpret the media-contact provision to wholly preclude them from exercising that right. As in *Maine Coast*, we find that the media-contact provision’s potential impact on Section 7 rights outweighs the Respondent’s justification.

Based on the foregoing, we find that the media-contact provision in the Respondent’s Confidentiality Agreement is unlawful and that the Respondent therefore violated Section 8(a)(1) by maintaining it. Further, we place rules that prohibit employees from communicating with the media regardless of whether the communications concern confidential information or the employees purport to speak on the employer’s behalf in *Boeing* Category 3.

In *Lowe's Home Centers* and *Tesla*, the NLRB evaluated the employers' confidentiality policies under the standard adopted in *Boeing Co.*, 365 NLRB No. 154 (2017) and *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019). In *Stericycle, Inc.*, 372 NLRB No. 113 (N.L.R.B. Aug. 2, 2023) (see Chap. 4), the NLRB overruled *Boeing* and "adopt[ed] a new legal standard to decide whether an employer's work rule that does not expressly restrict employees' protected concerted activity under Section 7 of the National Labor Relations Act (Act) is facially unlawful under Section 8(a)(1) of the Act." Because the standard under *Stericycle* is less deferential to employer interests and more protective of employee rights, the outcome in cases like *Lowe's Home Centers* and *Tesla*, holding employer rules illegal under *Boeing*, would likely be the same.

1.2 Confidential Settlement Agreements

Zorn-Hill v. A2B Taxi, LLC, Nos. 19-CV-1058 & 18-CV-11165 (S.D.N.Y. September 17, 2020)

KENNETH M. KARAS, United States District Judge

Plaintiff Kenneth Zorn-Hill ("Zorn-Hill") filed a Complaint against A2B Taxi LLC ("A2B"), Everald Gilliard, and Trevonne Gilliard (collectively, "Defendants"), pursuant to the Fair Labor Standards Act of 1938 ("FLSA") and New York Labor Law Article 6 § 190 *et seq* ("NYLL").

Similarly, on November 30, 2018, Plaintiff Christopher Hunlock ("Hunlock") filed a Complaint against A2B and Everald Gilliard, pursuant to the FLSA and NYLL.

The Parties now seek approval of their proposed settlement. For the reasons that follow, the Parties' application is denied without prejudice.

I. Background

According to the Complaints, A2B provides non-emergency medical transportation services. Plaintiffs allege that they were not (1) informed of their right to overtime pay, (2) paid overtime for work in excess of 40 hours per week, or (3) provided with an appropriate wage notice. Plaintiffs seek damages, liquidated damages, pre- and post-judgment interest, further relief available under the FLSA and NYLL, and attorney fees.

II. Discussion

Under Fed. R. Civ. P. 41(a)(1)(A), a plaintiff's ability to dismiss an action without a court order is made "subject to … any applicable federal statute." "Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." The Second Circuit has confirmed that the FLSA is an "applicable federal statute," such that "Rule 41(a)(1)(A)(ii) stipulated dismissals settling FLSA claims with prejudice require the approval of the district court or the Department of Labor to take effect." Consequently, "the Parties must satisfy the Court that their agreement is 'fair and reasonable.'"

As a number of courts have recognized, although a court should consider the totality of the circumstances, the most significant factors include:

> (1) the plaintiff's range of possible recovery; (2) the extent to which the settlement will enable the parties to avoid anticipated burdens and expenses in establishing their respective claims and defenses; (3) the seriousness of the litigation risks faced by the parties; (4) whether the settlement agreement is the product of arm's-length bargaining between experienced counsel; and (5) the possibility of fraud or collusion.

Conversely, factors which weigh against finding a settlement fair and reasonable include:

> (1) the presence of other employees situated similarly to the claimant; (2) a likelihood that the claimant's circumstance will recur; (3) a history of FLSA non-compliance by the same employer or others in the same industry or geographic region; and (4) the desirability of a mature record and a pointed determination of the governing factual or legal issue to further the development of the law either in general or in an industry or in a workplace.

C. Non-Disparagement Clause

The Court finds that the Proposed Settlement's non-disparagement clause is reasonable. In this clause, the Parties mutually "agree not to say or publicize things that are insulting or disparaging about the other Party." The clause also contains a carve-out: "each of the parties are free to make truthful statements about their experience litigating their case (except as to statements made at the confidential mediation held on July 9, 2020)." Non-disparagement clauses are valid, so long as they contain such a carve-out. Thus, the Court approves the non-disparagement clause.

D. Non-Publicity Clause

The Court finds that the Proposed Settlement's non-publicity cause imposes reasonable restrictions on affirmative contact with media, but unreasonable restrictions on use of social media. This clause states that "Plaintiffs, on behalf of themselves and their counsel, agree not to take affirmative steps to contact the media or utilize social media to publicize the Proposed Settlement or its terms." The clause contains two specific carve-outs. First, "if contacted by the media regarding the Proposed Settlement, Plaintiffs and Plaintiffs' Counsel are free to make truthful statements about their experience litigating their case." Second, Plaintiffs' Counsel is permitted to post a brief description of the lawsuit and settlement to its website, including a hyperlink to the case dockets.

"The overwhelming majority of courts reject the proposition that FLSA settlement agreements can be confidential." This is because "a provision that prohibits Plaintiff's right to discuss the settlement is incompatible with the purposes of the FLSA, namely, to ensure that workers are aware of their rights.

Courts are split on whether agreements that limit plaintiffs' ability to contact media are permissible. *Compare Chun Lan Guan v. Long Island Bus. Instute, Inc.* (E.D.N.Y.2020) (approving media restriction because "although these provisions do place some limits on Plaintiffs' ability to discuss the settlements, the limits are not absolute and do not restrict Plaintiffs' general ability to discuss the settlements"); *Pucciarelli v. Lakeview Cars, Inc.* (E.D.N.Y. 2017) ("The confidentiality provision is not highly restrictive because it pertains only to the agreement...."); *Lola v. Skadden, Arps, Meagher, Slate & Flom LLP* (S.D.N.Y. 2016) (same, and also noting that "since no one can force Plaintiffs to opine on the case in the future anyway, it is by no means irrational or improper for Plaintiffs to compromise words for dollars as part of a global, arms-length settlement"); *with Garcia v. Good for Life by 81, Inc.* (S.D.N.Y. 2018) ("Barring plaintiffs from contacting the media is thus not a trivial infringement on their ability to spread the word to other workers who may then be able to vindicate their statutory rights."). Courts are also split on whether FLSA settlements may limit plaintiffs' ability to post to social media. *Compare Burczyk v. Kemper Corp. Servs., Inc.* (E.D.N.Y. 2017) (rejecting proposed social media restriction because "considering the commonality of which individuals communicate over the internet, preventing Plaintiffs from posting 'on any social media, website, blog or other form or Internet activity' places a substantial burden on their ability to openly discuss their experience"); *Chung v. Brooke's Homecare LLC* (S.D.N.Y. 2018) (finding "too broad" a provision that applied restrictions to social media); *with Flores v. Studio Castellano Architect, P.C.* (S.D.N.Y. 2017) (approving a non-disclosure provision "limited to an agreement not to publicize the terms of the settlement in news or social media"); *Lola* (finding restriction on social media "is not absolute" and does not limit "plaintiffs' general ability to discuss the settlement").

Here, the restriction on affirmative steps to communicate with the media is permissible. First, it does not prevent Plaintiffs from discussing the Proposed Settlement with their colleagues and friends who may face similar uncompensated overtime. Second, it limits Plaintiffs' ability to speak with the media only about the Proposed Settlement itself. Plaintiffs may still take affirmative steps to contact the media about matters outside the Proposed Settlement, such as their allegations. Third, the Proposed Settlement allows Plaintiffs to respond to media inquiries with "truthful statements about their experience litigating their case." This restriction is significantly less onerous than no-media restrictions approved by other courts, which in at least two cases required a scripted response to media inquiries. *See Daniels v. Haddad* (S.D.N.Y. 2018) (requiring the plaintiffs, if contacted by the media, to "simply refer the inquirer to the public dockets"); *Lola* (requiring the plaintiffs to say "no comment" or "the matter has been resolved").

The Court finds that the restriction on use of social media is impermissible. Since individuals regularly use the internet to communicate with friends, colleagues, and family, restricting Plaintiffs ability to use it "places a substantial burden on their ability to openly discuss their experience litigating the lawsuit and entering into the Proposed Settlement." This is incompatible with the statutory purpose to "ensure that workers are aware of their rights." It is true that the Proposed Settlement restricts only efforts "to publicize" the agreement. However, this provides little comfort "given the broad range of meanings which can be imputed to the word 'publicize.'"

III. Conclusion

For the foregoing reasons, the Parties' request for approval of their Proposed Settlement is denied without prejudice. The Parties may reapply for approval of a settlement that eliminates or tailors the provision restricting use of social media.

Maclaren Macomb, 372 NLRB No. 58 (Feb. 21, 2023)

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* and *IGT d/b/a International*

Game Technology 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, 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. In June, the Respondent permanently furloughed those 11 employees 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 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.

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 exercise of their Section 7 rights. 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. 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." The Board accordingly concluded that the proffer of the severance agreement to Brocklehurst was unlawful. 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. 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 Section 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.

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. 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.

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 required the signer to agree not to "pursue, assist, or participate in any claim" against Baylor and to keep a broad swath of information confidential. 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. The *Baylor* Board overruled prior decisions to the extent they held to the contrary.

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." 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." The *IGT* Board underscored that *Baylor* had "overruled" *Shamrock Foods*, *Clark Distribution Systems*, and *Metro Networks*.

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. In this respect the *Baylor* Board "entirely failed to consider an important aspect of the problem," making its decision arbitrary.

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. *Baylor* thus held that absent such unlawful 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.

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 "there 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."

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.” 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.

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. Agreements between employers and employees that restrict employees from engaging in activity protected by the Act, or from filing unfair labor practice charges with the Board, assisting other employees in doing so, or assisting the Board’s investigative process, 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." 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.

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. 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, and the Board has repeatedly affirmed that such rights extend to former employees. 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. These channels include administrative, judicial, legislative, and political forums, newspapers, the media, social media, and communications to the public that are part of and related to an ongoing labor dispute. 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.

The Board is tasked with safeguarding the integrity of its processes for employees exercising their Section 7 rights. "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." "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.'" "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.'" 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."

It is through the lens of this broad grant of rights and the Board's duty to protect them that the Board scrutinizes 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. 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. 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. 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. 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." 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.

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 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. 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.)*. 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."

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 "at 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. In sum, it places a broad restriction on employee protected Section 7 conduct. We accordingly find that the proffer of the nondisparagement provision violates Section 8(a)(1) of the Act.

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." 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. 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.

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. 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. 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. We accordingly find that the proffer of the confidentiality provision violates Section 8(a)(1) of the Act.

Note on Confidential Settlement Agreements

Two states, California and Washington, have enacted legislation against provisions in settlement agreements that restrict disclosure of factual information related to sexual assault, sexual harassment, and other workplace discrimination and harassment. Cal. Code of Civil Procedure, § 1001; Wash, Sess. Laws, Chapter 133, Laws of 2022. The Washington law also applies to settlement agreements related to wage and hour violations. Similar legislation has been introduced in the U.S. Congress. Accountability for Workplace Misconduct Act, H.R. 4802.

1.3 Trade Secrets

TSG Finishing, LLC v. Bollinger (I), 767 S.E.2d 870 (N.C. App. 2014)

ROBERT C. HUNTER, Judge.

TSG Finishing, LLC ("plaintiff" or "TSG") appeals from an order denying its motion for a preliminary injunction aimed at preventing its former employee, Keith Bollinger ("defendant"), from breaching a non-competition and confidentiality agreement ("the non-compete agreement") and misappropriating TSG's trade secrets. On appeal, plaintiff contends that the trial court erred by denying its motion for a preliminary injunction because: (1) it has demonstrated a likelihood of success on the merits of its claims for breach of contract and misappropriation of trade secrets; and (2) it would suffer irreparable harm without issuance of the preliminary injunction.

After careful review, we reverse the trial court's order and remand with instructions to issue the preliminary injunction.

Background

TSG is in the business of fabric finishing. It has three plants in Catawba County, North Carolina. Rather than manufacturing fabrics, TSG applies chemical coatings to achieve whichever result is desired by the customer, such as coloring, stiffening, deodorizing, and abrasion resistance.

Defendant began working in the field of fabric finishing for Geltman Corporation after graduating from high school in 1982. He has no formal education beyond high school. TSG, Incorporated ("TSG, Inc.") acquired Geltman in 1992, and defendant stayed on to work for TSG, Inc. By the late 1990's, defendant was promoted to Quality Control Manager.

Defendant was responsible for assessing a customer's finishing needs and developing a finishing protocol for that customer. Defendant also helped in the creation of a "style data card" for each customer. The style data cards contained information on each step of the finishing process, such as: (1) the chemical finish compound, 70 percent of which was proprietary to TSG; (2) "cup weight" density; (3) needle punch technique; (4) type of machine needed for the needle punch technique; (5) speed of needle punch; (6) types of needles used; (7) needle punch depths; (8) method of compound application; (9) speed of compound application; (10) blade size; (11) fabric tension; and (12) temperature and type of drying required.

Defendant testified during deposition that some of these factors required trial and error to achieve a customer's desired result. For example, on one of the style data cards used to explain defendant's work-related duties during the deposition, defendant had marked a number of changes to the various factors listed and signed his initials to the changes. He testified that he changed the data entered by the customer because subsequent testing revealed different and more efficient methods to achieve the result. He also testified that the results of the trials he conducted and the knowledge he gained regarding how to achieve these results were not known outside of TSG. Michael Goldman, the Director of Operations at TSG, filed an affidavit in which he asserted that some of the customer projects that defendant worked on required over a year's worth of trial and error to achieve a customer's desired result.

TSG expends great effort to keep its customer and finishing information confidential. Specifically, it uses a code system in its communications with customers that allows the customer to identify the type of finish it wants, but does not reveal the chemicals or processes involved in creating that finish. TSG has confidentiality agreements in place with many of its customers. Third parties must sign confidentiality agreements and receive a temporary identification badge when visiting TSG's facilities. TSG's computers are password protected, with additional passwords being required to access the company's production information.

In 2007, TSG, Inc. and defendant entered into a non-disclosure and non-compete agreement. In exchange for an annual increase in compensation of $1,300.00 and a $3,500.00 signing bonus, defendant agreed not to disclose TSG, Inc.'s confidential or proprietary trade secrets and further assented to employment restrictions after his tenure at the company ended.

TSG, Inc. filed for bankruptcy in 2009. By a plan approved by the United States Bankruptcy Court on 1 May 2011, TSG, Inc. transferred its interests to plaintiff, a wholly owned operating subsidy of TSG, Inc., which remained in operation. According to defendant, every aspect of his day-to-day job remained the same after bankruptcy reorganization.

In July 2013, defendant and a direct competitor of TSG, American Custom Finishing, LLC ("ACF"), began negotiations regarding defendant's potential to leave TSG and work for ACF. According to TSG, defendant resigned from his position on 21 November 2013 and announced that he was leaving to become plant manager for ACF at a plant five miles away from TSG. Defendant claims that he gave TSG two weeks' notice on 21 November 2013 but was terminated immediately and escorted off of the premises. Defendant began working for ACF the following Monday, on 25 November 2013. During his deposition, defendant testified that TSG and ACF shared certain customers, and that defendant is responsible for performing similar customer evaluations for ACF as he did at TSG.

TSG filed suit against defendant on 16 January 2014, alleging claims for breach of contract, misappropriation of trade secrets, and unfair and deceptive practices. TSG also moved for a preliminary injunction to prevent defendant from breaching the non-compete and misappropriating TSG's trade secrets. A confidential hearing was held on plaintiff's motion, and by order entered 20 February 2014, the trial court denied the motion for preliminary injunction. Plaintiff filed timely notice of appeal.

We must first address the interlocutory nature of plaintiff's appeal. Orders granting or denying preliminary injunctions are "interlocutory and thus generally not immediately reviewable. An appeal may be proper, however, in cases, including those involving trade secrets and non-compete agreements, where the denial of the injunction deprives the appellant of a substantial right which he would lose absent review prior to final determination."

Accordingly, because both a non-compete and the potential misappropriation of trade secrets are implicated by this case, we conclude that plaintiff has succeeded in demonstrating how a substantial right may be lost without immediate appellate review; thus, we will reach the merits of the appeal.

Discussion

I. Misappropriation of Trade Secrets

Plaintiff first argues that the trial court erred by concluding that it has not demonstrated a likelihood of success on the merits of its claim for trade secret misappropriation. After careful review, we agree.

> As a general rule, a preliminary injunction is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court,

> issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

The Trade Secrets Protection Act ("TSPA") allows for a private cause of action where a plaintiff can prove the "acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret."

> "Trade secret" means business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C. Gen.Stat. § 66-152(3) (2013). To determine what information should be treated as a trade secret for the purposes of protection under the TSPA, the Court should consider the following factors:

> (1) the extent to which the information is known outside the business;
>
> (2) the extent to which it is known to employees and others involved in the business;
>
> (3) the extent of measures taken to guard secrecy of the information;
>
> (4) the value of the information to business and its competitors;
>
> (5) the amount of effort or money expended in developing the information; and
>
> (6) the ease or difficulty with which the information could properly be acquired or duplicated by others.

"Actual or threatened misappropriation of a trade secret may be preliminarily enjoined during the pendency of the action and shall be permanently enjoined upon judgment finding misappropriation." N.C. Gen. Stat. § 66-154(a).

> Misappropriation of a trade secret is prima facie established by the introduction of substantial evidence that the person against whom relief is sought both:
>
> (1) Knows or should have known of the trade secret; and
>
> (2) Has had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner.

N.C. Gen.Stat. § 66-155.

Here, the trial court determined that plaintiff failed to demonstrate likelihood of success on the merits of its misappropriation of trade secrets claim for the following reasons: (1) plaintiff asserted that its finishing process "as a whole" was the trade secret for which it sought protection, and under the holding of *Analog Devices, Inc. v. Michalski,* 157 N.C.App. 462 (2003), general processes are too vague to receive TSPA protection; and (2) defendant's familiarity with customer preferences was "more akin to general knowledge and skill acquired on the job than any trade secret maintained by plaintiff." For the following reasons, we disagree with the trial court's conclusions.

First, contrary to the trial court's assessment of the preliminary injunction hearing, plaintiff did not "continually assert" that it was the "combination of the components," or the "process as a whole," for which it sought protection. Although TSG's Chief Executive Officer Jack Rosenstein ("Rosenstein") did say that the entire equation of processes was a trade secret in and of itself, he also testified that the particular steps in the process were also trade secrets. As an example, Rosenstein highlighted the needle punch technique on a style data card that defendant had worked on during his time at TSG. The customer initially requested that the fabric be put through the needle punch machine one time at a specific setting. Through trial and error, defendant discovered that the customer's desired result could not be accomplished by running the needle punch machine one time at this setting, so he changed the process after experimenting with varying settings. Rosenstein testified the needle punch research for this client, in addition to the similar types of experimentation done to various processes throughout the finish equation, were trade secrets. Specifically, he testified as follows:

> ROSENSTEIN: That's all part of the trade secrets. That's all part of what defendant, in his own mind when he's looking at a new fabric, needs to determine—which Latex should be used, what density needs to be used, whether it needs to be needle punched or not and then within that which—which needle punch, what depth of penetration—exactly what the parameters are. Then he needs to determine what range it needs to go on, what speed needs to be run, what the finish is.
>
> Q: And so each one of those variables impacts the other variables in the equation?
>
> ROSENSTEIN: Yes.

Therefore, it was not just the process as a whole, but the specific knowledge defendant gained as to each discrete step in the process, that TSG sought to protect.

Based on *Analog Devices, Inc.,* the trial court concluded that plaintiff had failed to "put forward enough facts to support trade secret protection over the process as a whole or any particular component such that the trial court would be justified in granting the injunction sought." However, the *Analog Devices, Inc.* Court upheld the denial of a preliminary injunction in part because the differences between the defendant's former and new employers "rendered the alleged trade secrets largely non-transferable." Furthermore, the Court determined that the plaintiff did not carry its burden of producing evidence specifically identifying the trade secrets it sought to protect. The evidence before the Court showed that some of the plaintiff's production techniques were "easily and readily reverse engineered," while others were "either generally known in the industry, are process dependent so as to preclude misappropriation, or are readily ascertainable by reverse engineering." Finally, regarding the processes used by the plaintiff, the Court found that there was substantial differences between the products of the two companies that would "require new experimentation and development of new ways to effectively identify efforts that will lead to successful development." Thus, the Court affirmed the trial court's denial of the preliminary injunction.

The facts of this case are readily distinguishable from *Analog Devices, Inc.,* and they demonstrate that TSG would likely prevail on the merits of its claim for misappropriation of trade secrets. Using the factors enunciated by *Area Landscaping, L.L.C. v. Glaxo-Welcome, Inc.,* 586 S.E.2d 507 (N.C. App. 2003), TSG presented sufficient evidence on its specific trade secrets to warrant protection. First, Rosenstein testified that the company spends $500,000.00 per year on research and development in order to create unique finishes and applications for his customers. Defendant testified that the results of his experimentation at TSG regarding specific process refinements were not known outside of TSG. Rosenstein also testified that defendant's work was not something that anyone else in the industry would know without years of trial and error by experienced technicians. Security measures were in place such that only top-level employees were familiar with the proprietary information defendant was in charge of developing. The trial court acknowledged in its order that TSG "maintains significant security measures over its finishing process." Indeed, TSG made its employees, customers, and facility visitors sign confidentiality forms to protect this information. Additionally, Rosenstein testified that defendant's disclosure of the trade secrets would give ACF the opportunity to save "untold amounts of hours, days, weeks, and months to come up with these finishes and these applications." Rosenstein testified that defendant could help ACF achieve their customers' desired results, which they sometimes shared with TSG, without spending the money on research and development that TSG invested. Defendant admitted as much in his deposition when he testified that he performs many of the same duties for ACF for some of the same customers that he formerly served at TSG. Therefore, unlike in *Analog Devices, Inc.,* there was significant evidence showing that TSG's trade secrets were transferrable to ACF. Over the past two decades, TSG invested millions of dollars to develop and protect the information defendant compiled through his years of employment. The director of operations at TSG testified in deposition that defendant would sometimes work for more than a year on a process in order to achieve a desired result. There is no indication in the record that these process are able to be "reverse engineered" like those in *Analog Devices, Inc.,* and it is undisputed that they are not generally known throughout the industry.

In sum, each of the factors identified by the *Area Landscaping, L.L.C.* Court weigh in plaintiff's favor. Plaintiff specifically identified the production factors for which it claims trade secret protection. Defendant acknowledged during his deposition that he performed research and development for these factors during his time at TSG and was responsible for keeping customer- and fabric-specific proprietary information regarding these processes on the style data cards. Therefore, we conclude that plaintiff has carried its burden of presenting evidence sufficient to identify the specific trade secrets protected by the TSPA.

Additionally, we hold that plaintiff presented *prima facie* evidence of misappropriation of its trade secrets. “Direct evidence is not necessary to establish a claim for misappropriation of trade secrets; rather, such a claim may be proven through circumstantial evidence.” Defendant testified that he is being asked to perform similar duties for ACF that he did at TSG, including evaluating customer needs and organizing production processes. Defendant acknowledged that TSG and ACF share customers and that he is currently working with multiple customers for ACF that he served at TSG. Specifically, he admitted that he had done independent research and experimentation for TSG on the needle punch, finish, and heating processes for one specific customer that he now serves at ACF, and that he talks about the various components of the TSG style data cards with ACF management personnel. This is precisely the type of threatened misappropriation, if not actual misappropriation, that the TSPA aims to prevent through issuance of a preliminary injunction.

Based on the foregoing, we conclude that plaintiff demonstrated a likelihood of success on the merits of his claim for trade secret misappropriation.

2. Loyalty

2.1 Disloyalty as a Defense to Employee Claims

MikLin Enterprises, Inc. v. NLRB, 861 F.3d 812 (8th Cir. 2017)

LOKEN, Circuit Judge, with whom SMITH, Chief Judge, WOLLMAN, RILEY, GRUENDER, and SHEPHERD, Circuit Judges, join.

MikLin Enterprises, Inc. ("MikLin") petitions for review of a National Labor Relations Board ("Board") Order holding that MikLin violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("NLRA" or "the Act") when it (i) discharged and disciplined employees who publicly distributed posters suggesting that MikLin's "Jimmy John's" sandwiches posed a health risk to consumers; (ii) solicited employees to aid in removing the posters; (iii) encouraged employees to disparage a union supporter; and (iv) removed union literature from in-store bulletin boards. MikLin argues that the Board misapplied governing law and its decision is not supported by substantial evidence. The Board cross-petitions for enforcement of its Order. A divided panel enforced the Order in its entirety. We granted rehearing en banc and vacated the panel decision. We now conclude that the means the disciplined employees used in their poster attack were so disloyal as to exceed their right to engage in concerted activities protected by the NLRA, as construed in a controlling Supreme Court precedent, *NLRB v. Local Union No. 1229, IBEW*, 346 U.S. 464 (1953) ("Jefferson Standard"). We therefore decline to enforce the determination that MikLin violated the Act by disciplining and discharging those employees and by soliciting removal of the unprotected posters. We enforce the remainder of the Order, as so modified.

I. Background.

A. The "Sick Day Posters" Campaign.

MikLin is a family enterprise that owns and operates ten Jimmy John's sandwich-shop franchises in the Minneapolis-St. Paul area. Michael Mulligan is president and co-owner; Robert Mulligan, his son, is vice-president. In 2007, several MikLin workers began an organizing campaign seeking representation by the Industrial Workers of the World ("IWW") union. The IWW lost a Board-conducted election in October 2010, filed unfair labor practice charges and objections to the election with the Board, and continued its organizing campaign by urging MikLin to provide employees holiday pay in late 2010. On January 10, 2011, MikLin and the IWW settled the IWW's objections. MikLin admitted no wrongdoing but agreed to a Board-conducted rerun election if the IWW filed for the election after sixty days but not later than after eighteen months.

With the holiday season passed, the IWW decided its next "march on the boss" group action would be to demand paid sick leave. The IWW concluded that the approach of flu season was a good time to raise the issue. At this time, MikLin's handbook required any employee who would be absent from a shift to find a replacement and notify the store manager. Rule 11 of Jimmy John's Rules for Employment, which employees received when hired, stated: "Find your own replacement if you are not going to be at work. We do not allow people to simply call in sick! We require our employees and managers to find their own replacement! NO EXCEPTIONS!" Failure to follow this procedure resulted in termination. MikLin did not offer paid leave for sick employees, though an employee with sufficient tenure was entitled to paid leave to care for a sick child.

Organizers of the IWW sick leave campaign began their attack in late January and early February 2011 by designing and posting on community bulletin boards in MikLin stores posters that prominently featured two identical images of a Jimmy John's sandwich. Above the first image were the words, "YOUR SANDWICH MADE BY A HEALTHY JIMMY JOHN'S WORKER." The text above the second image said, "YOUR SANDWICH MADE BY A SICK JIMMY JOHN'S WORKER." "HEALTHY" and "SICK" were in red letters, larger than the surrounding text in white. Below the pictures, white text asked: "CAN'T TELL THE DIFFERENCE?" The response, in red and slightly smaller: "THAT'S TOO BAD BECAUSE JIMMY JOHN'S WORKERS DON'T GET PAID SICK DAYS. SHOOT, WE CAN'T EVEN CALL IN SICK." Below, in slightly smaller white text, was the warning, "WE HOPE YOUR IMMUNE SYSTEM IS READY BECAUSE YOU'RE ABOUT TO TAKE THE SANDWICH TEST." Text at the bottom of the poster asked readers to help the workers win paid sick days by going to their website.

MikLin managers quickly removed the posters from store bulletin boards. On the morning of March 10 — the day before the IWW could request a rerun election — IWW supporters distributed a press release, letter, and the sandwich poster to more than one hundred media contacts, including local newspapers and major news outlets such as the Associated Press, Reuters, Bloomberg, and NBC News. The press release highlighted "unhealthy company behavior." Its second sentence framed the message: "As flu season continues, the sandwich makers at this 10-store franchise are sick and tired of putting their health and the health of their customers at risk." The release declared: "According to findings of a union survey, Jimmy John's workers have reported having to work with strep throat, colds and even the flu." The release ended with a threat: if Robert and Michael Mulligan would not talk with IWW supporters about their demands for paid sick leave, the supporters would proceed with "dramatic action" by "plastering the city with thousands of Sick Day posters."

Employees attached to the press release a "sick leave letter" to the Mulligans which asserted that health code violations occur at MikLin stores nearly every day. The employees complained: "By working sick, we are jeopardizing the entirety of the company's image and risking public safety." The letter accused MikLin of refusing to put customers first, risking customers' health, and "shoving customers to the bottom of the well of importance." Like the press release, the letter concluded with a threat: if the Mulligans would not meet the employees' demands, the campaign would "move forward with its Sick Day posters by posting them not only in stores, but on the University's Campus, in hospitals, on street corners, and any other place where postings are common, citywide."

Also on March 10, four organizers met with Robert Mulligan. They told Mulligan that MikLin's attendance policy and low wages pressured employees to work while sick. Mulligan said MikLin was in the process of reforming its policies. The organizers provided Mulligan a printed version of their letter and press release and warned that, unless MikLin took action to fix the sick day policy within ten days, employees would display sandwich posters throughout the area. Employees who attended felt they had achieved some "common ground."

MikLin posted a new sick leave policy in each store on March 16. The new policy provided a sliding scale of disciplinary points for absences. An employee who did not report but found a replacement would receive no points. An absent employee who could not find a replacement but notified the store manager at least one hour before shift start would receive one point. An absent employee without a replacement who called less than one hour prior to shift start would receive two points. An absent employee who did not call the manager and did not find a replacement would receive three points. An employee who received four disciplinary points within a twelve-month period would be terminated. The policy emphasized: "With regard to absenteeism due to flu like symptoms, Team Members are not allowed to work unless and until those symptoms have subsided for 24 hours." Between March 10 and March 20, MikLin posted a notice in its stores reminding workers: "for those who 'don't feel good' we have a policy that expects them to find a replacement for their shift. The record clearly shows that we have demonstrated flexibility with regard to excusing those who cannot find replacements."

On March 20, IWW supporters implemented their threat to plaster the city with a new version of the Sick Day posters they had placed in MikLin stores in January and February. The bottom of the publicly distributed posters incorporated one change: rather than asking for support of the employees' request for paid sick leave, the public posters listed Robert Mulligan's personal telephone number and instructed customers to call him to "LET HIM KNOW YOU WANT HEALTHY WORKERS MAKING YOUR SANDWICH!" A copy of the publicly distributed posters appears as Appendix A to this opinion. Organizers placed posters in various locations near MikLin stores, including lampposts, trash cans, and mailboxes. Robert Mulligan testified that he was "bombarded by phone calls" for close to a month from people who thought it was unsafe to eat at Jimmy John's. Concerned about the effect on MikLin's business, Mulligan and some managers took down the public posters. On March 22, MikLin fired six employees who coordinated the attack and issued written warnings to three who assisted.

The IWW continued its sick leave attack. In a press release issued a day after the terminations, a discharged employee stated: "It just isn't safe — customers are getting their sandwiches made by people with the flu, and they have no idea. Rather than safeguard public health and do the right thing for their employees and their customers, Jimmy John's owners Mike and Rob Mulligan are trying to silence us." On March 30, the IWW issued another press release stating that "customers have a right to know that their sandwich could be filled with germs," that IWW members have a duty to speak out on this "public health issue," and that employees "blew the whistle by posting 3000 copies of a poster advising the public of health risks at the sandwich chain." The release quoted one employee as stating: "The unfettered greed of franchise owner Mike Mulligan and Jimmy John Liautaud himself jeopardizes the health of thousands of customers and workers almost every day. We will speak out until they realize that no one wants to eat a sandwich filled with cold and flu germs."

B. The NLRB Proceedings.

Following a two-day evidentiary hearing, the Board's Administrative Law Judge ("ALJ") concluded that MikLin violated Sections 8(a)(1) and 8(a)(3) of the Act. Citing prior Board decisions, the ALJ ruled that "Section 7 29 U.S.C. § 157 protects employee communications to the public that are part of and related to an ongoing labor dispute," such as the Sick Day posters and related press releases, unless they are "so disloyal, reckless, or maliciously untrue as to lose the Act's protections." To lose Section 7 protection, "an employee's public criticism must evidence 'a malicious motive'" or be made with knowledge of the statements' falsity or with reckless disregard for their truth or falsity.

The ALJ found that the Sick Day posters were not maliciously untrue. While "it is not literally true that employees could not call in sick," the ALJ observed, employees "are subject to discipline if they call in sick without finding a replacement." Thus, the assertion, "SHOOT, WE CAN'T EVEN CALL IN SICK," was "protected hyperbole." The ALJ acknowledged record evidence that MikLin had served more than six million sandwiches over its ten-year existence and had been investigated by the Minnesota Department of Health only two times for food borne disease — once in 2006 and once in 2007, when the investigating sanitarian "noted overall compliance with food code requirements and no critical violations." The ALJ found, however, "it is at least arguable that MikLin's sick leave policy subjects the public to an increased risk of food borne disease," and MikLin "could have waged its own publicity campaign" to attract consumers. The ALJ made no mention of the false assertion in the open letter accompanying the IWW press release that health code violations occurred at MikLin stores nearly every day. Nor did the ALJ even attempt to analyze and apply the disloyalty principle of Jefferson Standard.

A divided panel of the Board affirmed the ALJ's findings and conclusions. The majority concluded "that neither the posters nor the press release were shown to be so disloyal, reckless, or maliciously untrue as to lose the Act's protection." The public communications "were clearly related to the ongoing labor dispute concerning the employees' desire for paid sick leave. Indeed, any person viewing the posters and press release would reasonably understand that the motive for the communications was to garner support for the campaign to improve the employees' terms and conditions of employment by obtaining paid sick leave rather than to disparage MikLin or its product." Nor were any of the statements maliciously untrue.

Turning to the question of disloyalty, the majority noted that "Board law has developed considerably in its approach to the question of employee disloyalty." "To lose the Act's protection as an act of disloyalty, an employee's public criticism of an employer must evidence a malicious motive," even if the public communication "raises highly sensitive issues such as public safety." Accepting the majority's summary of prior Board decisions, the dissenting Member would nonetheless have held the Sick Day posters and press release unprotected, because "it is well established that employees lose the Act's protection if their means of protest are 'flagrantly disloyal, wholly incommensurate with any grievances which they may have, and manifested by public disparagement of the employer's product or undermining of its reputation,'".

II. "Sick Day" Poster Issues.

It is well established that an employer commits an unfair labor practice if it discharges employees for engaging in concerted activities that are protected by Section 7 of the NLRA, including communications to third parties or to the public that seek to "improve their lot as employees through channels outside the immediate employee-employer relationship." Section 10(c) of the Act, however, expressly limits the Board's broad authority to remedy unlawful employee discharges: "No order of the Board shall require the reinstatement of any individual as an employee if such individual was suspended or discharged for cause." The interplay between Section 7 and Section 10(c) was the critical question the Supreme Court addressed in Jefferson Standard.

A. In Jefferson Standard, the Court upheld the Board's decision that a broadcasting station did not violate the Act when it fired technicians who distributed handbills "making a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." After bargaining negotiations broke down, employees first picketed the station for treating its employees unfairly. When this tactic failed, the employees distributed thousands of handbills, signed "WBT Technicians," criticizing the station's poor programming quality and asserting that Jefferson Standard did not value its customers and considered the local city to be a "second-class community." The Board found the employee handbills unprotected because the technicians "deliberately undertook to alienate their employer's customers by impugning the technical quality of his product." Though the technicians' purpose was "to extract a concession from the employer with respect to the terms of their employment," the Board found that they lost the Act's protection when they failed to disclose their interests as employees. The Board reasoned that the technicians lost the Act's protection because "the gist of the technicians' appeal to the public was that the employer ought to be boycotted because he offered a shoddy product to the consuming public — not because he was 'unfair' to the employees who worked on that product." The Board declined to decide whether the product disparagement in the handbills would justify discharge "had it been uttered in the context of a conventional appeal for support of the union in the labor dispute."

The Supreme Court, in affirming the Board, decided the case on broader grounds. After quoting the "for cause" language of Section 10(c), the Court declared that "there is no more elemental cause for discharge of an employee than disloyalty to his employer." Congress in the NLRA "did not weaken the underlying contractual bonds and loyalties of employer and employee." Absent a labor controversy, the technicians' conduct "unquestionably would have provided adequate cause for their disciplinary discharge within the meaning of § 10(c). The fortuity of the coexistence of a labor dispute affords these technicians no substantial defense.” Thus, the handbill attack targeting “the quality of the company’s product was as adequate a cause for the discharge of its sponsors as if the labor controversy had not been pending.” Though the Court noted several times that the technicians failed to disclose a connection between their labor dispute and the handbill attack, the Court declined to remand for further consideration of whether the handbills were an “appeal for support in the pending dispute,” rather than “a concerted separable attack,” because the attack would be unprotected either way:

> Even if the attack were to be treated, as the Board has not treated it, as a concerted activity wholly or partly within the scope of those mentioned in § 7, the means used by the technicians in conducting the attack have deprived the attackers of the protection of that section, when read in the light and context of the purpose of the Act.

The Supreme Court’s decision not to remand in Jefferson Standard made clear that the Court’s disloyalty ruling includes communications that otherwise would fall within Section 7 protection, if those communications “make a sharp, public, disparaging attack upon the quality of the company’s product and its business policies, in a manner reasonably calculated to harm the company’s reputation and reduce its income.” In *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), the Court confirmed that Section 10(c) “cannot mean that an employer is at liberty to punish a man by discharging him for engaging in concerted activities which § 7 of the Act protects.” But the Court explained that Jefferson Standard “denied the protection of § 7 to activities characterized as ‘indefensible’ because they were there found to show a disloyalty to the workers’ employer which the Court deemed unnecessary to carry on the workers’ legitimate concerted activities.” Thus, we reject the dissent’s suggestion that Jefferson Standard does not apply in this case because the employees’ disparaging communications “expressly referenced ongoing labor disputes.”

B. Board decisions applying Jefferson Standard initially recognized that employers may protect their businesses from detrimental product disparagement whether or not an employee attack referenced a labor dispute. *See Patterson-Sargent Co.*, 115 N.L.R.B. 1627 (1956) (employees’ handbill asserting replacement workers produced defective paint was unprotected “public disparagement of the quality of the employer’s product"); *Coca Cola Bottling Works, Inc.*, 186 N.L.R.B. 1050 (1970) (employees' leaflet warning that inexperienced workers could leave objects such as roaches, bugs, and dead mice in the company's bottles was "the very type of disparaging conduct" held unprotected in Jefferson Standard).

Though the Supreme Court's interpretation of the NLRA in Jefferson Standard remains unchanged, "Board law has developed considerably in its approach to the question of employee disloyalty." In 1987, the Board articulated its modern interpretation: "Jefferson Standard held that employees may engage in communications with 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." Although Jefferson Standard did not involve employee public communications that were reckless or maliciously untrue, we do not question the Board's view that such communications are not entitled to the protection of Section 7 as limited by Section 10(c).

The issue in this case is the Jefferson Standard disloyalty principle — Section 10(c) permits an employer to fire an employee for "making a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." On this issue, while always purporting to apply Jefferson Standard's holding, the Board has migrated to a severely constrained interpretation of that decision. "To lose the Act's protection as an act of disloyalty, an employee's public criticism of an employer must evidence a malicious motive." "Even communications that raise highly sensitive issues such as public safety are protected where they are sufficiently linked to a legitimate labor dispute and are not maliciously motivated to harm the employer."

In our view, the Board fundamentally misconstrued Jefferson Standard in two ways. First, while an employee's subjective intent is of course relevant to the disloyalty inquiry — "sharp, public, disparaging attack" suggests an intent to harm — the Jefferson Standard principle includes an objective component that focuses, not on the employee's *purpose,* but on the *means* used — whether the disparaging attack was "reasonably calculated to harm the company's reputation and reduce its income," to such an extent that it was harmful, indefensible disparagement of the employer or its product. By holding that *no* act of employee disparagement is unprotected disloyalty unless it is “maliciously motivated to harm the employer,” the Board has not interpreted Jefferson Standard — it has overruled it.

Second, the Board’s definition of “malicious motive” for these purposes excludes from Jefferson Standard’s interpretation of Section 10(c) all employee disparagement that is part of or directly related to an ongoing labor dispute. While the employees “may have anticipated that some members of the public might choose not to patronize MikLin’s restaurants after reading the posters or press release,” the Board ruled, their public communications were protected activity because “there is no evidence that their purpose was to inflict harm on MikLin.” Rather, “they were motivated by a sincere desire to improve their terms and conditions of employment.” In other words, the Board refuses to treat as “disloyal” any public communication intended to advance employees’ aims in a labor dispute, regardless of the manner in which, and the extent to which, it harms the employer. As the Court held in Jefferson Standard that its disloyalty principle would apply even if the employees had explicitly related their public disparagement to their ongoing labor dispute, once again the Board has not interpreted Jefferson Standard — it has overruled it.

By requiring an employer to show that employees had a subjective intent to harm, and burdening that requirement with an overly restrictive need to show “malicious motive,” the Board has effectively removed from the Jefferson Standard inquiry the central Section 10(c) issue as defined by the Supreme Court — whether the means used reflect indefensible employee disloyalty. This is an error of law. Our prior cases confirm that an employee’s disloyal statements can lose Section 7 protection without a showing of actual malice. In *St. Luke’s*, we expressly rejected the contention that public disparagement of an employer “was protected activity unless maliciously false.” We explained that cases interpreting Jefferson Standard “establish that an employee exceeds the boundaries of protected activity when she falsely and publicly disparages her employer or its products and services.” By requiring proof that disloyal conduct was the product of a malicious motive, the Board fundamentally misinterpreted both Jefferson Standard and our decisions construing and applying Jefferson Standard.

Rather than employee motive, the critical question in the Jefferson Standard disloyalty inquiry is whether employee public communications reasonably targeted the employer's labor practices, or indefensibly disparaged the quality of the employer's product or services. The former furthers the policy of the NLRA; the latter does not. This distinction focuses on the type of harm employees' methods cause. When employees convince customers not to patronize an employer because its labor practices are unfair, subsequent settlement of the labor dispute brings the customers back, to the benefit of both employer and employee. By contrast, sharply disparaging the employer's product or services as unsafe, unhealthy, or of shoddy quality causes harm that outlasts the labor dispute, to the detriment of all employees as well as the employer.

D. Turning to the merits of this case, we review the Board's factual findings for "substantial evidence on the record as a whole." Substantial evidence supports the Board's findings that the employees' Sick Day posters and press releases were related to their protected concerted effort to improve the terms and conditions of their employ by obtaining paid sick leave. Communications asking the public to support this effort may be within the protection of Section 7 even though they address a sensitive issue, like sick leave in the food service industry. Delineating the boundaries of "indefensible" third-party communications is more difficult when this connection is present. But as a matter of law, the Board erred in concluding that the employees' product disparagement was protected Section 7 activity simply because its purpose was to obtain paid sick days. Even communications connected to a labor dispute are unprotected when they constitute a "sharp, public, disparaging attack upon the quality of the company's product and its business policies."

The attack was "sharp," proceeding "in a manner reasonably calculated to harm the company's reputation and reduce its income." The posters, press releases, and letter were an effective campaign to convince customers that eating Jimmy John's sandwiches might cause them to become sick. The Sick Day poster warned that the reader was "about to take the sandwich test." Its enduring image was a MikLin-made Jimmy John's sandwich that, although appearing like any other, was filled with cold and flu germs. As in Jefferson Standard, the employees were not on strike, but continued to work and collect wages as they attempted to scare customers away from their employer and its products. "Nothing could be further from the purpose of the Act than to require an employer to finance such activities."

Allegations that a food industry employer is selling unhealthy food are likely to have a devastating impact on its business, what the D.C. Circuit called the "equivalent of a nuclear bomb" in a labor-relations dispute. MikLin's employees maximized this effect, choosing March as a "good time" to launch their attack "because it was flu season." The employees understood that MikLin's business was dependent on its "clean" public image, yet directly attacked that image. Like the technicians in Jefferson Standard, the MikLin employees accused their employer of not valuing its customers. By targeting the food product itself, employees disparaged MikLin in a manner likely to outlive, and also unnecessary to aid, the labor dispute. Even if MikLin granted paid sick leave, the image of contaminated sandwiches made by employees who chose to work while sick was not one that would easily dissipate.

The employees' public claims about their employer's product were also "materially false and misleading." The Sick Day poster graphically told customers that sandwich makers were working when sick by falsely stating, "Shoot, we can't even call in sick." The press release and open letter claimed that MikLin jeopardized customers' health by the almost daily health code violations occurring at MikLin's stores. Yet the IWW supporters knew MikLin complied with Minnesota Department of Health regulations by requiring employees to call in sick if they had experienced flu-like symptoms in the last 24 hours. As the ALJ noted: "Given MikLin's record over a 10-year period one could regard the risk of becoming ill by eating at one of its shops to be infinitesimal." This factor made the MikLin employees' attack even more "indefensible" than that at issue in Jefferson Standard, where the technicians "did not misrepresent, at least willfully, the facts they cited to support their disparaging report." As dissenting Board Member Johnson stated, "Any employee who is willing to make up allegations out of whole cloth against his or her employer is obviously far more disloyal, in any meaningful sense of that word, than one who acts upon a reasonable but mistaken belief."

From the array of possible tactics, the employees selected public communications that were sure "to harm MikLin's reputation and reduce its income." This was a "continuing attack upon the very interests which the attackers were being paid to conserve and develop." The Act does not protect such calculated, devastating attacks upon an employer's reputation and products. Although applying Jefferson Standard's disloyalty principle is often difficult, the employees' third-party communications demonstrated "such detrimental disloyalty as to provide 'cause'" for MikLin to discharge and discipline those responsible for the campaign. We decline to enforce the Board's contrary Order.

E. After learning that IWW supporters were about to "plaster" the area surrounding MikLin stores with Sick Day posters, Robert Mulligan posted this message on an employee-created "Jimmy John's Anti-Union" Facebook page:

> The IWW are threatening to put up thousands of posters that threaten our business and your jobs. They plan on doing this if we don't meet with them which we will not do. I encourage anyone to take down any posters they may see around the twin cities. These posters are defamatory.

The ALJ concluded this post violated Section 8(a)(1) because its target, the sandwich posters, was concerted activity protected by Section 7. The Board affirmed the ALJ, one member dissenting. Section 8(a)(1) forbids employers to "interfere with, restrain, or coerce" employees in the exercise of their Section 7 rights. Because we conclude the posters were not protected Section 7 activity, substantial evidence does not support the Board's decision. Soliciting employees to remove unprotected public communications did not "interfere with, restrain or coerce" employees in their exercise of Section 7 rights. We decline to enforce this portion of the Board's Order.

2.2 Disloyalty as a Basis for Employee Liability

Food Lion, Inc. v. Capital Cities/ABC, Inc., 951 F.Supp. 1224 (M.D.N.C. 1996)

TILLEY, District Judge.

This matter is before the Court on Defendants' Renewed Motion to Dismiss Plaintiff's Claims of Breach of Fiduciary Duty/Constructive Fraud and Unfair or Deceptive Trade Practices, or in the Alternative, for Summary Judgment For the reasons stated below, Defendants' Motion is DENIED.

I.

Defendants Lynne Litt and Susan Barnett are both employed by the ABC news program *Prime Time Live.* The television show at some point determined that it would prepare and broadcast a story on Food Lion stores. In an attempt to gain access to parts of Food Lion stores not generally open to the public, Litt and Barnett applied for positions of employment with Food Lion. Both provided false information to Food Lion in order to obtain a position. Barnett was eventually employed as a deli clerk in a store in South Carolina. Litt was employed as a meat wrapper in North Carolina. During the brief period of their employment, each wore a hidden camera, secreted in a wig, into work areas and recorded video footage. Some of this footage was ultimately used in a *Prime Time Live* broadcast which was highly critical of Food Lion. This lawsuit arises as a result of these actions.

Two of Food Lion's claims are at issue here. Food Lion claims that Litt and Barnett, as Food Lion employees, owed Food Lion a duty of loyalty and that they violated that duty by serving another, undisclosed, master while "working" for Food Lion. In addition, Food Lion claims that the actions of Defendants were unfair and deceptive acts which violated the North Carolina Unfair Trade Practices Act.

III.

A. Fiduciary Duty

Defendants maintain that there can be no violation of fiduciary duty because there never was a fiduciary relationship for Litt and Barnett to violate. For a fiduciary relationship to exist, according to Defendants, there must be a relationship of special confidence or access to confidential information. In some contexts, Defendants' contentions might be correct. To the contrary, however, it appears both the North Carolina and South Carolina Supreme Courts likely would recognize a broader claim.

In its Amended Complaint, Plaintiffs state that Litt and Barnett "owed Food Lion a fiduciary duty of unselfish and undivided loyalty." The complaint goes on to list poor job performance, as well as the appropriation of information, as possible violations of that duty. Under the liberal notice pleading requirements of the Federal Rules of Civil Procedure, Plaintiff's complaint can be fairly read as stating a claim for relief not confined to violation of a duty based on a confidential relationship.

Both the North Carolina and South Carolina courts seem to recognize a duty of loyalty in the employment context which is not confined to maintaining employer confidences. *See, e.g., McKnight v. Simpson's Beauty Supply, Inc.,* 358 S.E.2d 107 (N.C.Ct.App. 1987) (stating that "the law implies a promise on the part of every employee to serve his employer faithfully and discharge his duties with reasonable care and attention."); *Long v. Vertical Technologies, Inc.,* 113 N.C.App. 598, 439 S.E.2d 797 (1994) (stating that disloyalty of employees was a violation of "their fiduciary duty of good faith, fair dealing and loyalty"); *Lowndes Prods., Inc. v. Brower,* 259 S.C. 322 (stating that "an employee has a duty of fidelity to his employer apart from the question whether he has an obligation to maintain the employer's processes and systems of operation in confidence."). There is a cause of action for violation of the duty of loyalty. Since the courts recognize the existence of a duty of loyalty, it follows that they would recognize a claim for breach of that duty and that Food Lion's claim should not be dismissed under Rule 12(b)(6).

As discussed, an employee has a duty to use her efforts, while working, for the service of her employer. The potential violation of that duty here lies in Litt and Barnett being employed by Food Lion and ABC at the same time. Food Lion did not know of their affiliation with ABC. Meanwhile, ABC not only knew of the affiliation with Food Lion but in fact sent the two to work in Food Lion stores in order to serve the objectives of ABC.

The Restatement (Second) of Agency provides that "a person may be the servant of two masters at one time as to one act, if the service to one does not involve abandonment of the service to the other." A reasonable jury could find that, because of Litt's and Barnett's affiliation with and allegiance to ABC, they did not adequately perform their duties while working with Food Lion. This is a genuine issue of material fact which precludes summary judgment on this issue.

Defendants further argue that the remedy when an employee does not use her best efforts in the service of her employer is to discharge that employee. While this is one remedy, it is not the only one in this situation. The North Carolina Court of Appeals has allowed an employer to recover the fair value of the services that the plaintiffs supplied to another venture while the plaintiffs were employees of the defendant. If the jury finds that Litt and Barnett did not adequately perform their Food Lion jobs because of a motivation to serve the interests of ABC, then Defendants could be liable, at least, for the fair value of the services Litt and Barnett deprived Food Lion while serving the interests of their undisclosed master, ABC.

Plaintiff seems to contemplate a very broad duty of loyalty. For instance, Plaintiff states that "this duty applies not only to information denominated as confidential, but also to information which the employee should know that the employer would not want revealed to others." If this language were applied to the facts of this case, the result would be more far reaching than is reasonable.

In addition to the claims that Litt and Barnett were substandard employees because of their loyalty to ABC and that they disclosed information learned during the time they held their Food Lion positions, Food Lion also claims that Litt and Barnett "staged" many of the scenes which appear in the hidden camera tapes and which subsequently were broadcast on the *PrimeTime Live* broadcast. Plaintiff claims that such "staging" was a further breach of the duty of loyalty. The essence of the duty of loyalty contemplated here is that an employee has a duty to use her efforts, while on the job, in the furtherance of her employer's objectives and that a factual question may be created if the employee is attempting to serve two masters at the same time. Evidence of "staging" may be relevant to the jury's determination of whether Litt and Barnett were devoting their best efforts to Food Lion or were in fact more interested in serving the interests of ABC. Examples of conduct where Litt or Barnett disobeyed instructions or failed to adequately perform the duties of their Food Lion jobs, if they occurred, could show a breach of the duty of loyalty owed to Food Lion. Further, if these episodes were subsequently broadcast, then the jury could find part of the damage Food Lion suffered as a result of the *PrimeTime Live* story resulted from Litt's and Barnett's violation of fiduciary duty.

Dalton v. Camp, 548 S.E.2d 704 (N.C. 2001)

ORR, Justice.

This case arises out of an employer's allegations of unfair competitive activity by former employees and a new corporation formed by them. Plaintiff Robert Earl Dalton d/b/a B. Dalton & Company ("Dalton") produced, under a thirty-six month contract, an employee newspaper for Klaussner Furniture Industries ("KFI"). Dalton hired defendant David Camp ("Camp") to produce the publication and subsequently hired Nancy Menius ("Menius") to assist in the production of the employee newspaper. Near the conclusion of the contract period, Dalton began negotiations with KFI to continue publication. After the contract had expired, Dalton continued to publish the employee newspaper without benefit of a contract while talks between the parties continued. During this period, Camp, who was contemplating leaving Dalton's employ, established a competing publications entity, Millennium Communication Concepts, Inc. ("MCC"), and discussed with KFI officials the possibility of replacing Dalton as publisher of KFI's employee newspaper. Soon thereafter, Camp entered into a contract with KFI to produce the newspaper. He resigned from Dalton's employment approximately two weeks later.

In the wake of Camp's resignation, Dalton sued Camp, Menius, and MCC for breach of the fiduciary duty of loyalty, conspiracy to appropriate customers, tortious interference with contract, interference with prospective advantage, and unfair and deceptive acts or practices under chapter 75 of the North Carolina General Statutes. The trial court first dismissed Dalton's claim for tortious interference with contract and subsequently granted Camp's motion for summary judgment against Dalton for the remaining claims. In its initial review of the case, the Court of Appeals held that the trial court had properly granted summary judgment for all defendants as to the claim for unfair and deceptive trade practices. As for the claim for breach of duty of loyalty, the Court of Appeals held that summary judgment was proper for defendant Menius and improper for defendant Camp. As for Dalton's claim of tortious interference with prospective advantage, the Court of Appeals again held that summary judgment was properly granted for defendant Menius and improperly granted for defendant Camp. After this Court remanded the case to the Court of Appeals for further review, the Court of Appeals ultimately concluded that summary judgment was properly granted for: (1) all claims against Menius, and (2) the conspiracy to appropriate customers claim against Camp and MCC. The court also held that summary judgment was improperly granted for: (1) the breach of duty of loyalty claim against Camp, (2) the interference with prospective advantage claim against Camp and MCC, and (3) the unfair and deceptive trade practices claim against Camp and MCC.

For the reasons set forth below, we hold that the trial court properly granted summary judgment for all applicable claims, and we reverse those portions of the Court of Appeals opinion that hold otherwise. Thus, in sum, none of plaintiff Dalton's claims survive.

I.

We begin our analysis with an examination of Dalton's first claim against Camp which, as described in Dalton's complaint, constituted a breach of fiduciary duty, including a duty of loyalty. From the outset, we note that Dalton argues this claim from two distinct vantage points. First, he alleges that Camp breached his fiduciary duty by being disloyal. Second, he argues that a separate and distinct action for breach of duty of loyalty exists and that Camp's conduct constituted a breach of that duty. We disagree with both contentions, holding that Dalton has failed to establish: (1) facts supporting a breach of fiduciary duty, and (2) that any independent tort for breach of duty of loyalty exists under state law.

The question before us is whether the Court of Appeals properly concluded that genuine issues of material fact existed as to Dalton's claims against Camp for breach of fiduciary duty and/or breach of duty of loyalty. We address the specifics of Dalton's arguments supporting the Court of Appeals decision in successive order.

For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties. Such a relationship has been broadly defined by this Court as one in which "there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence, and 'it extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and *resulting domination and influence on the other*.'" However, the broad parameters accorded the term have been specifically limited in the context of employment situations. Under the general rule, "the relation of employer and employee is not one of those regarded as confidential." *King v. Atlantic Coast Line R.R. Co.,* 157 N.C. 44 (1911); *see also Hiatt v. Burlington Indus., Inc.,* 55 N.C.App. 523 (1982).

In applying this Court's definition of fiduciary relationship to the facts and circumstances of the instant case—in which employee Camp served as production manager for a division of employer Dalton's publishing business—we note the following: (1) the managerial duties of Camp were such that a certain level of confidence was reposed in him by Dalton; and (2) as a confidant of his employer, Camp was therefore bound to act in good faith and with due regard to the interests of Dalton. In our view, such circumstances, as shown here, merely serve to define the nature of virtually all employer-employee relationships; without more, they are inadequate to establish Camp's obligations as fiduciary in nature. No evidence suggests that his position in the workplace resulted in "domination and influence on the other Dalton," an essential component of any fiduciary relationship. Camp was hired as an at-will employee to manage the production of a publication. His duties were those delegated to him by his employer, such as overseeing the business's day-to-day operations by ordering parts and supplies, operating within budgetary constraints, and meeting production deadlines. In sum, his responsibilities were not unlike those of employees in other businesses and can hardly be construed as uniquely positioning him to exercise dominion over Dalton. Thus, absent a finding that the employer in the instant case was somehow subjugated to the improper influences or domination of his employee—an unlikely scenario as a general proposition and one not evidenced by these facts in particular—we cannot conclude that a fiduciary relationship existed between the two. As a result, we hold that the trial court properly granted defendant Camp's motion for summary judgment as to Dalton's claim alleging a breach of fiduciary duty and reverse the Court of Appeals on this issue.

As for any claim asserted by Dalton for breach of a duty of loyalty (in an employment-related circumstance) outside the purview of a fiduciary relationship, we note from the outset that: (1) no case cited by plaintiff recognizes or supports the existence of such an independent claim, and (2) no pattern jury instruction exists for any such separate action. We additionally note that Dalton relies on cases he views as defining an independent duty of loyalty, even though those cases were devoid of claims or counterclaims alleging a breach of such duty. In *McKnight v. Simpson's Beauty Supply,* 86 N.C.App. 451 (1987), the Court of Appeals held that every employee was obliged to "serve his employer faithfully and discharge his duties with reasonable diligence, care and attention." However, the rule's role in deciding the case was limited; it was but a factor in determining whether an employer was justified in terminating an employee. The circumstance and conclusion reached in *In re Burris,* 263 N.C. 793, 140 S.E.2d 408 (1965) are strikingly similar. At issue in that case was whether a civil service employee was properly discharged after he "knowingly brought about a conflict of interest between himself and his employer." In deciding the case, this Court wrote "where an employee deliberately acquires an interest adverse to his employer, he is disloyal, *and his discharge is justified*." Conspicuously absent from the *Burris* Court's consideration was any claim or counterclaim seeking damages resulting from an alleged breach of a duty of loyalty.

In our view, if *McKnight* and *Burris* indeed serve to define an employee's duty of loyalty to his employer, the net effect of their respective holdings is limited to providing an employer with a defense to a claim of wrongful termination. No such circumstance is at issue in the instant case, in which Camp resigned from Dalton's employ. Thus, we hold that: (1) there is no basis for recognizing an independent tort claim for a breach of duty of loyalty; and (2) since there was no genuine issue as to any material fact surrounding the claim as stated in the complaint (breach of fiduciary duty, including a duty of loyalty), the trial court properly concluded as a matter of law that summary judgment was appropriate for Camp.

To the extent that the holding in *Food Lion, Inc. v. Capital Cities/ABC, Inc.,* 951 F.Supp. 1224 (M.D.N.C.1996), can be read to sanction an independent action for breach of duty of loyalty, we conclude that the federal district court incorrectly interpreted our state case law by assuming that: (1) “since the state’s courts recognize the existence of the duty of loyalty, it follows that they *would* recognize a claim for breach of that duty,”; and (2) the “North Carolina Supreme Court *likely would* recognize a broader claim” for a breach of fiduciary duty. As previously explained, although our state courts recognize the existence of an employee’s duty of loyalty, we do not recognize its breach as an independent claim. Evidence of such a breach serves only as a justification for a defendant-employer in a wrongful termination action by an employee. Moreover, an examination of our state’s case law fails to reveal support for the federal district court’s contention that this Court would broaden the scope of fiduciary duty to include food-counter clerks employed by a grocery store chain.

As for the holding in *Long v. Vertical Technologies, Inc.,*, 439 S.E.2d 797 (N.C. App. 1994) we note that the corporate employer in that case was awarded damages for “a material breach of fiduciary duty of good faith, fair dealing and loyalty” by its employees. Essentially, the *Long* court determined that the employees, who originally founded the company in question and served respectively as its president and senior vice president, owed a fiduciary duty to the parent firm and that they breached that duty by taking actions contrary to the parent firm’s best interests. Thus, the claim and damages awarded in *Long* resulted from: (1) a showing of a fiduciary relationship, (2) thereby establishing a fiduciary duty, and (3) a breach of that duty. No such fiduciary relationship or duty is evidenced by the circumstances of the instant case.

II.

As for Dalton's claim against Camp and MCC for tortious interference with prospective advantage, this Court has held that "interference with a man's business, trade or occupation by maliciously inducing a person not to enter a contract with a third person, which he would have entered into but for the interference, is actionable if damage proximately ensues."

In applying the law to the circumstances of the instant case, we note the following: (1) under contract, Dalton had published a newsletter to the expressed satisfaction of KFI for thirty-six months; (2) at or about the time that the original contract expired, Dalton and KFI discussed renewing the deal; (3) such negotiations reached an impasse over two key terms (duration of the new contract and price); (4) in the aftermath of the expired original contract, the parties agreed that Dalton would continue to publish the newsletter on a month-to-month basis; (5) during this negotiating period, Camp formed a rival publishing company (MCC); and (6) while still in the employ of Dalton, Camp (representing MCC) entered into a contract with KFI to publish its newsletter. Approximately two weeks after signing the KFI deal, Camp resigned his position with Dalton, presumably in order to run MCC with his partner, Menius.

Although the facts confirm that Camp joined the negotiating fray at a time when Dalton and KFI were still considering a contract between themselves, thereby establishing a proper time frame for tortious interference, two other obstacles undermine Dalton's claim. First, there is no evidence suggesting that Camp induced, no less maliciously induced, KFI into entering a contract. According to testimony from the deposition of Mark Walker, KFI's human resources director, it was he who approached Camp about assuming the newsletter contract, not vice versa. Moreover, Dalton admitted in his own deposition that he had no personal knowledge as to the specifics of who offered what amid conversations between Camp and Walker. Thus, nothing in the record reflects an improper inducement on the part of Camp.

Second, while Dalton may have had an expectation of a continuing business relationship with KFI, at least in the short term, he offers no evidence showing that but for Camp's alleged interference a contract would have ensued. After Dalton's original contract expired, he met with

KFI to discuss terms for a possible renewal. During the negotiation period, the parties agreed that Dalton would continue publishing the newsletter on an interim basis. However, with regard to a new contract, KFI said it wanted a discount from the original contract price. In response, Dalton said he could not reduce the price as he was not making any profit on the publication. KFI, through Walker, then urged Dalton to consider the matter further and get back to the company, which, by his own admission, Dalton never did. In our view, such circumstances fail to demonstrate that a Dalton KFI contract would have ensued.

The absence of evidence supporting two essential elements of a party's allegation of interference with prospective advantage—intervenor's inducement of a third party and a showing that a contract would have ensued—exposes a fatal weakness in that claim. As a result, we hold that the trial court properly granted summary judgment for both Camp and his company, MCC, and thus reverse the Court of Appeals on this issue.

III.

Dalton additionally argues that he has presented a genuine question of material fact as to alleged unfair and deceptive trade practices of Camp and MCC. Again, we disagree.

The extent of trade practices deemed as unfair and deceptive is summarized in N.C.G.S. § 75-1.1(a) ("the Act"), which provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." The Act was intended to benefit consumers, but its protections extend to businesses in appropriate situations.

Although this Court has held that the Act does not normally extend to run-of-the-mill employment disputes, we note that the mere existence of an employer-employee relationship does not in and of itself serve to exclude a party from pursuing an unfair trade or practice claim. For example, employers have successfully sought damages under the Act when an employee's conduct: (1) involved egregious activities outside the scope of his assigned employment duties, and (2) otherwise qualified as unfair or deceptive practices that were in or affecting commerce.

In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff. A practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive. The determination as to whether an act is unfair or deceptive is a question of law for the court. As for whether a particular act was one "in or affecting commerce," we note that N.C.G.S. § 75-1.1(b) defines "commerce" inclusively as "business activity, however denominated." We also note that while the statutory definition of commerce crosses expansive parameters, it is not intended to apply to all wrongs in a business setting. Examples of business activity beyond the scope of the statutory definition include: professional services; most employer-employee disputes; and securities transactions. Moreover, "some type of *egregious* or *aggravating* circumstances must be alleged and proved before the Act's provisions may take effect."

Application of the aforementioned law to the circumstances underlying the dispute between Dalton and Camp serves a two-fold purpose. By helping to illustrate the distinguishing characteristics between the instant case and *Sara Lee Corp. v. Carter,* 351 N.C. 27 (1999)—a case in which an employer successfully pursued an unfair and deceptive trade practices claim against an employee—the analysis simultaneously demonstrates why Camp's actions did not amount to unfair or deceptive trade practices.

In *Sara Lee*, this Court concluded that "defendant's relationship to plaintiff as an employee, *under these facts,* does not preclude applicability of N.C.G.S. § 75-1.1." In the Court's view, the defendant: (1) had fiduciary duties, and (2) was entrenched in buyer-seller transactions that fell squarely within the Act's intended reach. While serving as a purchasing agent for Sara Lee, defendant was simultaneously selling parts to his employer at inflated prices, a scheme characterized by the Court as self-dealing conduct "in or affecting commerce." As a consequence, the Court held that it would not permit the defendant to use his employment status as a *de facto* defense against his employer's unfair and deceptive trade practices claim.

In contrast, the two parties in the instant case were not in a fiduciary relationship. Thus, employee Camp was unencumbered by fiduciary duties, a significant distinction between him and the employee-defendant in *Sara Lee.* Camp's duties as a production manager for Dalton were limited to those commonly associated with any employee. He simply produced a magazine—designing layouts, editing content, printing copies, etc. Unlike the *Sara Lee* defendant, who worked as a purchasing agent, Camp did not serve his employer in the capacity of either a buyer or a seller. Nor did he serve in any alternative capacity suggesting that his employment was such that it otherwise qualified as "in or affecting commerce."

We also find no evidence of attendant circumstances to indicate that Camp's conduct was especially egregious or aggravating. Camp met with a KFI representative and raised the possibility of forming his own publishing company. He and the KFI representative later discussed having Camp's new company publish KFI's magazine, talks that ultimately culminated in an exclusive publishing agreement between Camp and KFI. However, during this period, we note that Camp also continued his best efforts to publish Dalton's final issue. That he failed to inform his employer of the ongoing negotiations and resigned after signing the KFI deal may be an unfortunate circumstance; however, in our view, such business-related conduct, without more, is neither unlawful in itself, nor aggravating or egregious enough to overcome the longstanding presumption against unfair and deceptive practices claims as between employers and employees.

As a consequence of concluding that employee Camp was without fiduciary duty, that his position was not one "in or affecting commerce," and that his business actions were neither aggravating nor egregious, we conclude that the trial court properly granted summary judgment as to employer Dalton's claim under N.C.G.S. § 75-1.1. Therefore, with regard to both appellants Camp and MCC, we reverse the Court of Appeals on this issue.

N.C.G.S. § 99-A-2 – Recovery of Damages for Exceeding the Scope of Authorized Access to Property.

(a) Any person who intentionally gains access to the nonpublic areas of another's premises and engages in an act that exceeds the person's authority to enter those areas is liable to the owner or operator of the premises for any damages sustained. For the purposes of this section, "nonpublic areas" shall mean those areas not accessible to or not intended to be accessed by the general public.

(b) For the purposes of this section, an act that exceeds a person's authority to enter the nonpublic areas of another's premises is any of the following:

> (1) An employee who enters the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization captures or removes the employer's data, paper, records, or any other documents and uses the information to breach the person's duty of loyalty to the employer.
>
> (2) An employee who intentionally enters the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization records images or sound occurring within an employer's premises and uses the recording to breach the person's duty of loyalty to the employer.
>
> (3) Knowingly or intentionally placing on the employer's premises an unattended camera or electronic surveillance device and using that device to record images or data.
>
> (4) Conspiring in organized retail theft, as defined in Article 16A of Chapter 14 of the General Statutes.
>
> (5) An act that substantially interferes with the ownership or possession of real property.

(c) Any person who intentionally directs, assists, compensates, or induces another person to violate this section shall be jointly liable.

(d) A court may award to a party who prevails in an action brought pursuant to this section one or more of the following remedies:

(1) Equitable relief.

(2) Compensatory damages as otherwise allowed by State or federal law.

(3) Costs and fees, including reasonable attorneys' fees.

(4) Exemplary damages as otherwise allowed by State or federal law in the amount of five thousand dollars ($5,000) for each day, or portion thereof, that a defendant has acted in violation of subsection (a) of this section.

(e) Nothing in this section shall be construed to diminish the protections provided to employees under Article 21 of Chapter 95 or Article 14 of Chapter 126 of the General Statutes, nor may any party who is covered by these Articles be liable under this section.

(f) This section shall not apply to any governmental agency or law enforcement officer engaged in a lawful investigation of the premises or the owner or operator of the premises.

(g) Nothing in this section shall be construed to limit any other remedy available at common law or provided by the General Statutes.

Notes on N.C.G.S. § 99-A-2

1. The sponsors of N.C.G.S. § 99-A-2 explained that the purpose of the statute is to codify the holding in *Food Lion v. Capital Cities/ABC, Inc.*. A lawsuit by animal rights, environmental, and whistleblower advocates challenged the statute on 1st Amendment grounds. *People for the Ethical Treatment of Animals v. North Carolina Farm Bureau Federation, Inc.*, 60 F.4th 815 (4th Cir. 2023). In that suit, the court held that the statute is unconstitutional and enjoined its enforcement "insofar as it applies to bar protected newsgathering activities", but "reserve[d] all other applications for future case-by-case adjudication."

2. Recall that in *Dalton v. Camp*, the North Carolina Supreme Court stated that "the federal district court in *Food Lion* incorrectly interpreted our state case law" and held that, absent a fiduciary relationship between an employer and employee, "there is no basis for recognizing an independent tort claim for a breach of duty of loyalty". What implications does this have for claims under §§ 99-A-2(b)(1) & (2), which impose liability on employees who use information collected or recordings made without authorization "to breach the person's duty of loyalty to the employer"?

3. § 99-A-2(e) excludes employee conduct that is protected under certain other state statutes from liability under § 99-A-2. N.C.G.S. chap. 95, art. 21 prohibits retaliation or discrimination against employees for filing claims, providing evidence, or other activity under N.C.G.S. chap. 97 (Workers' Compensation Act), N.C.G.S. chap. 95, art. 2A (Wage and Hour Act), N.C.G.S. chap 95, art. 16 (Occupational Safety and Health Act); N.C.G.S. chap. 74, art. 2A (Mine Safety and Health Act), (National Guard Reemployment Rights Act), N.C.G.S. art. 143, chap. 52 (Pesticide Board); N.C.G.S. chap. 90, art. 5F (Control of Potential Drug Paraphernalia Products); and N.C.G.S. §§ 95-28.1 & 95-28.1A (prohibiting discrimination based on certain medical traits and genetic information or testing). N.C.G.S. chap 126, art. 14 prohibits retaliation or discrimination against state employees for reporting illegal,

fraudulent, or certain other improper activity by state agencies or employees.

However, the statute does not exempt employee conduct that is protected under federal law. The National Labor Relations Act protects concerted activity by employees regarding their terms and conditions of employment. This protection may apply to unauthorized recording of workplace conditions and communications, and to sharing the information recorded with co-workers and the public. Other federal laws also sometimes protect the use of unauthorized recordings to document illegal workplace conditions or activity, for example in connection with a complaint to a federal agency with investigatory or enforcement authority, or as evidence in an employee's lawsuit.

The NLRA generally preempts state law (criminal and civil) regulating or imposing liability for employee or employer conduct that is "arguably subject" to the NLRA.[28] This means that if an employer sues an employee or labor union for conduct that is arguably protected under Section 7, the court (state or federal) must normally dismiss the claim for lack of subject matter jurisdiction.[29] It is an unfair labor practice under § 8(a)(1) for an employer to bring such a preempted suit against an employee or union.[30]

28. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)

29. There is an exception for claims involving matters of special state interest, such as trespassing or "conduct marked by violence and imminent threats to the public order". *Garmon*, 359 U.S. at 247.

30. *Can-Am Plumbing, Inc.*, 321 F. 3d 145 (D.C. Cir. 2003)

2.3 Non-Compete Agreements

TSG Finishing, LLC v. Bollinger (II), 767 S.E.2d 870 (N.C. App. 2014)

ROBERT C. HUNTER, Judge.

TSG Finishing, LLC ("plaintiff" or "TSG") appeals from an order denying its motion for a preliminary injunction aimed at preventing its former employee, Keith Bollinger ("defendant"), from breaching a non-competition and confidentiality agreement ("the non-compete agreement") and misappropriating TSG's trade secrets. On appeal, plaintiff contends that the trial court erred by denying its motion for a preliminary injunction because: (1) it has demonstrated a likelihood of success on the merits of its claims for breach of contract and misappropriation of trade secrets; and (2) it would suffer irreparable harm without issuance of the preliminary injunction.

After careful review, we reverse the trial court's order and remand with instructions to issue the preliminary injunction.

Background

TSG is in the business of fabric finishing. It has three plants in Catawba County, North Carolina. Rather than manufacturing fabrics, TSG applies chemical coatings to achieve whichever result is desired by the customer, such as coloring, stiffening, deodorizing, and abrasion resistance.

Defendant began working in the field of fabric finishing for Geltman Corporation after graduating from high school in 1982. He has no formal education beyond high school. TSG, Incorporated ("TSG, Inc.") acquired Geltman in 1992, and defendant stayed on to work for TSG, Inc. By the late 1990's, defendant was promoted to Quality Control Manager.

Defendant was responsible for assessing a customer's finishing needs and developing a finishing protocol for that customer. Defendant also helped in the creation of a "style data card" for each customer. The style data cards contained information on each step of the finishing process, such as: (1) the chemical finish compound, 70 percent of which was proprietary to TSG; (2) "cup weight" density; (3) needle punch technique; (4) type of machine needed for the needle punch technique; (5) speed of needle punch; (6) types of needles used; (7) needle punch depths; (8) method of compound application; (9) speed of compound application; (10) blade size; (11) fabric tension; and (12) temperature and type of drying required.

Defendant testified during deposition that some of these factors required trial and error to achieve a customer's desired result. For example, on one of the style data cards used to explain defendant's work-related duties during the deposition, defendant had marked a number of changes to the various factors listed and signed his initials to the changes. He testified that he changed the data entered by the customer because subsequent testing revealed different and more efficient methods to achieve the result. He also testified that the results of the trials he conducted and the knowledge he gained regarding how to achieve these results were not known outside of TSG. Michael Goldman, the Director of Operations at TSG, filed an affidavit in which he asserted that some of the customer projects that defendant worked on required over a year's worth of trial and error to achieve a customer's desired result.

TSG expends great effort to keep its customer and finishing information confidential. Specifically, it uses a code system in its communications with customers that allows the customer to identify the type of finish it wants, but does not reveal the chemicals or processes involved in creating that finish. TSG has confidentiality agreements in place with many of its customers. Third parties must sign confidentiality agreements and receive a temporary identification badge when visiting TSG's facilities. TSG's computers are password protected, with additional passwords being required to access the company's production information.

In 2007, TSG, Inc. and defendant entered into a non-disclosure and non-compete agreement. In exchange for an annual increase in compensation of $1,300.00 and a $3,500.00 signing bonus, defendant agreed not to disclose TSG, Inc.'s confidential or proprietary trade secrets and further assented to employment restrictions after his tenure at the company ended.

TSG, Inc. filed for bankruptcy in 2009. By a plan approved by the United States Bankruptcy Court on 1 May 2011, TSG, Inc. transferred its interests to plaintiff, a wholly owned operating subsidy of TSG, Inc., which remained in operation. According to defendant, every aspect of his day-to-day job remained the same after bankruptcy reorganization.

In July 2013, defendant and a direct competitor of TSG, American Custom Finishing, LLC ("ACF"), began negotiations regarding defendant's potential to leave TSG and work for ACF. According to TSG, defendant resigned from his position on 21 November 2013 and announced that he was leaving to become plant manager for ACF at a plant five miles away from TSG. Defendant claims that he gave TSG two weeks' notice on 21 November 2013 but was terminated immediately and escorted off of the premises. Defendant began working for ACF the following Monday, on 25 November 2013. During his deposition, defendant testified that TSG and ACF shared certain customers, and that defendant is responsible for performing similar customer evaluations for ACF as he did at TSG.

TSG filed suit against defendant on 16 January 2014, alleging claims for breach of contract, misappropriation of trade secrets, and unfair and deceptive practices. TSG also moved for a preliminary injunction to prevent defendant from breaching the non-compete and misappropriating TSG's trade secrets. A confidential hearing was held on plaintiff's motion, and by order entered 20 February 2014, the trial court denied the motion for preliminary injunction. Plaintiff filed timely notice of appeal.

We must first address the interlocutory nature of plaintiff's appeal. Orders granting or denying preliminary injunctions are "interlocutory and thus generally not immediately reviewable. An appeal may be proper, however, in cases, including those involving trade secrets and non-compete agreements, where the denial of the injunction deprives the appellant of a substantial right which he would lose absent review prior to final determination."

Accordingly, because both a non-compete and the potential misappropriation of trade secrets are implicated by this case, we conclude that plaintiff has succeeded in demonstrating how a substantial right may be lost without immediate appellate review; thus, we will reach the merits of the appeal.

Discussion

II. Breach of Contract

Plaintiff next argues that the trial court erred by concluding that it failed to present a likelihood of success on the merits of its claim for breach of the non-compete. We agree.

Due to a choice of law provision in the agreement, Pennsylvania law governs enforcement of the non-compete. "Restrictive covenants are not favored in Pennsylvania and have been historically viewed as a trade restraint that prevents a former employee from earning a living." However, "restrictive covenants are enforceable if they are incident to an employment relationship between the parties; the restrictions imposed by the covenant are reasonably necessary for the protection of the employer; and the restrictions imposed are reasonably limited in duration and geographic extent." Thus, in assessing whether to enforce a non-compete agreement, Pennsylvania law requires the court to balance "the employer's protectable business interests against the interest of the employee in earning a living in his or her chosen profession, trade or occupation, and then balancee the result against the interest of the public.

We believe that the restrictions imposed in the non-compete are reasonable. Under Pennsylvania law, the burden is on the employee to show how a non-compete is unreasonable in order to prevent its enforcement. The non-compete provided that upon termination, defendant would be prevented from participating in the field of "textile finishing" for two years in the prohibited territory, which was defined, in part, as all of North America. Specifically, the non-compete prevents defendant from:

> Engaging, as an employee or contractor, in the performance of Textile Finishing, engaging in the manufacture of Textile Finishing machinery or equipment, including but not limited to a jobber, reseller, or dealers of used textile machinery or equipment or engaging in sales, marketing or managerial services for any individual or entity that competes with TSG directly or indirectly within the Prohibited Territory.

In contrast to unenforceable non-competes restricting "any work" competitive to the employer, the non-compete here permissibly restricts defendant from engaging in the specific industrial practices that could harm the legitimate business interests TSG seeks to protect.

Furthermore, defendant has failed to carry his burden of demonstrating that the time and geographic restrictions are unreasonable and render the non-compete unenforceable. Pennsylvania courts have consistently enforced non-compete agreements restricting employment for two or more years. Additionally, Pennsylvania courts have established a correlation between reasonableness of a geographic restriction and the employer's verifiable market. Specifically, Pennsylvania federal courts have upheld covenants restricting competition nationwide or throughout the region of North America, where appropriate. TSG presented evidence that it serves customers throughout at least 38 states, in addition to Canada and Mexico. Defendant claims that TSG failed to explain how the geographic restrictions are reasonable, and also argues that the cases TSG cites in support of the time restriction are inapposite. However, the burden is not on TSG to establish that the restrictions in the non-compete are reasonable; rather, the burden rests with defendant to show that they are unreasonable and that the contract he signed is unenforceable. Defendant has failed to carry that burden here.

Finally, we turn to the trial court's determination that the equities weighed against enforcing the non-compete. "Fundamental to any enforcement determination is the threshold assessment that there is a legitimate interest of the employer to be protected as a condition precedent to the validity of a covenant not to compete." "Generally, interests that can be protected through covenants include trade secrets, confidential information, good will, and unique or extraordinary skills." "The issue of enforceability is one to be determined on a case-by-case basis," wherein the Court is to consider all relevant facts and circumstances.

Among the important factors that Pennsylvania courts consider in assessing the enforceability of a non-compete are: (1) the circumstance under which the employment relationship was terminated; (2) the employee's skills and capacity; (3) the length of time of the previous employment; (4) the type of consideration paid to the employee; (5) the effect of restraint on the employee's life; and (6) circumstantial economic conditions.

> It bears noting that there is a significant factual distinction between the hardship imposed by the enforcement of a restrictive covenant on an employee who voluntarily leaves his employer and that imposed upon an employee who is terminated for failing to do his job. The salesman discharged for poor sales performance cannot reasonably be perceived to pose the same competitive threat to his employer's business interests as the salesman whose performance is not questioned, but who voluntarily resigns to join another business in direct competition with the employer. Only when the novice has developed a certain expertise, which could possibly injure the employer if unleashed competitively, will the employer begin to think in terms of a restrictive covenant.

Based on the record before us, we believe that these notions weigh in favor of enforcement of the non-compete. Defendant worked at TSG for 27 years and became one of its most trusted and skilled managers. Throughout his tenure he developed valuable expertise in the field of textile finishing through trial-and-error and industrial experimentation that was highly guarded by TSG and not known throughout the industry. In exchange for his assent to the non-compete, defendant was offered an annual increase of $1,300.00 to his regular salary and a signing bonus of $3,500.00; defendant considered TSG's offer for at least two weeks before eventually agreeing to the non-compete and accepting this increase in compensation. Rather than being terminated for poor work, defendant was specifically recruited and voluntarily left TSG to work for a direct competitor at a plant five miles away without giving prior notice or asking for a raise from TSG. ACF did not require defendant to provide a resume or interview for the position; defendant was hired after meeting with an ACF representative one time. Given that defendant possessed advanced expertise in the field of textile finishing and abruptly and voluntarily left his position at TSG after 27 years of service to work for a direct competitor, we find that he poses a significant competitive threat to TSG's legitimate business interests should the non-compete be unenforceable.

Despite these factors, defendant argues, and the trial court agreed, that enforcement of the non-compete essentially renders him unemployable for two years because he has "no experience outside of textile finishing, rudimentary computer skills, and no college education." We are unpersuaded. Defendant argued in his brief that ACF hired him for "his management skills in dealing with employees, human resources issues, equipment dealers, customer complaints and suppliers, not for any trade secrets or other confidential information which he might know from his time at TSG." Skill in management and human resources is desirable in many fields, not just textile finishing. Although the non-compete does restrict defendant from working as an employee for any company that competes with TSG "in sales, marketing or managerial services," TSG's competitors only comprise a small subset of companies and industries where such skills are valuable. Defendant admitted that before leaving TSG for ACF, he did not look for other employment. TSG presented evidence of multiple job openings within 25 miles of Hickory, N.C., that were not competitive to TSG and listed experience in plant management and manufacturing as desirable traits. Therefore, we disagree with the trial court's conclusion that enforcement of the non-compete would effectively prevent defendant from attaining employment anywhere in North America.

We also find TSG's policy arguments in this case persuasive. TSG employs around 160 people. According to Rosenstein, the customers that defendant now serves at ACF could account for up to forty percent of TSG's business, and some of the customer relationships that TSG has had for many years are now "strained" due to defendant's transition from TSG to ACF. In weighing the equities, we are permitted to consider the effect that breach of a non-compete may have on an employer's protectable business interests. Among these, we consider the potential harm done to other TSG employees should defendant be permitted to retain employment at ACF in contravention of the non-compete. The significant risk that defendant's actions pose to TSG's competitive advantage indirectly threaten the job security of many others who work for TSG. Thus, in balance, we find that the equities favor enforcement of the non-compete.

In sum, we hold that the non-compete was validly assigned to plaintiff through bankruptcy reorganization, the non-compete itself is reasonable to protect TSG's legitimate business interests, and the equities weigh in favor of enforcement under these facts. Therefore, because it is undisputed that defendant is in breach of the non-compete by working for ACF, a direct competitor of TSG, we hold that TSG has demonstrated a likelihood of success on the merits of its claim for breach of contract.

Edwards v. Arthur Andersen, LLP, 189 P.3d 285 (Cal. 2008)

CHIN, J.

FACTS

In January 1997, Raymond Edwards II (Edwards), a certified public accountant, was hired as a tax manager by the Los Angeles office of the accounting firm Arthur Andersen LLP (Andersen). Andersen's employment offer was made contingent upon Edwards's signing a noncompetition agreement, which prohibited him from working for or soliciting certain Andersen clients for limited periods following his termination. The agreement was required of all managers, and read in relevant part: "If you leave the Firm, for eighteen months after release or resignation, you agree not to perform professional services of the type you provided for any client on which you worked during the eighteen months prior to release or resignation. This does not prohibit you from accepting employment with a client. ¶ For twelve months after you leave the Firm, you agree not to solicit (to perform professional services of the type you provided) any client of the office(s) to which you were assigned during the eighteen months preceding release or resignation. ¶ You agree not to solicit away from the Firm any of its professional personnel for eighteen months after release or resignation." Edwards signed the agreement.

Between 1997 and 2002, Edwards continued to work for Andersen, moving into the firm's private client services practice group, where he handled income, gift, and estate tax planning for individuals and entities with large incomes and net worth. Over this period he was promoted to senior manager and was on track to become a partner. In March 2002, the United States government indicted Andersen in connection with the investigation into Enron Corporation, and in June 2002, Andersen announced that it would cease its accounting practices in the United

States. In April 2002, Andersen began selling off its practice groups to various entities. In May 2002, Andersen internally announced that HSBC USA, Inc. (a New York-based banking corporation), through a new subsidiary, Wealth and Tax Advisory Services (WTAS), would purchase a portion of Andersen's tax practice, including Edwards's group.

In July 2002, HSBC offered Edwards employment. Before hiring any of Andersen's employees, HSBC required them to execute a "Termination of Non-compete Agreement" (TONC) in order to obtain employment with HSBC. Among other things, the TONC required employees to, inter alia, (1) voluntarily resign from Andersen; (2) release Andersen from "any and all" claims, including "claims that in any way arise from or out of, are based upon or relate to Employee's employment by, association with or compensation from" defendant; (3) continue indefinitely to preserve confidential information and trade secrets except as otherwise required by a court or governmental agency; (4) refrain from disparaging Andersen or its related entities or partners; and (5) cooperate with Andersen in connection with any investigation of, or litigation against, Andersen. In exchange, Andersen would agree to accept Edwards's resignation, agree to Edwards's employment by HSBC, and release Edwards from the 1997 noncompetition agreement.

HSBC required that Andersen provide it with a completed TONC signed by every employee on the "Restricted Employees" list before the deal went through. At least one draft of the Restricted Employees list contained Edwards's name. Andersen would not release Edwards, or any other employee, from the noncompetition agreement unless that employee signed the TONC.

Edwards signed the HSBC offer letter, but he did not sign the TONC. In response, Andersen terminated Edwards's employment and withheld severance benefits. HSBC withdrew its offer of employment to Edwards.

Procedural History

On April 30, 2003, Edwards filed a complaint against Andersen, HSBC and WTAS for intentional interference with prospective economic advantage and anticompetitive business practices under California law. Edwards alleged that the Andersen noncompetition agreement violated California Business & Professions Code section 16600, which states "except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

[The trial court held that the noncompetition agreement did not violate Cal. Bus. & Prof. Code § 16600, because it was narrowly tailored and did not deprive Edwards of his right to pursue his profession. The California Court of Appeals reversed on that issue.]

Discussion

A. Section 16600

Under the common law, as is still true in many states today, contractual restraints on the practice of a profession, business, or trade, were considered valid, as long as they were reasonably imposed. This was true even in California. However, in 1872 California settled public policy in favor of open competition, and rejected the common law "rule of reasonableness," when the Legislature enacted the Civil Code. Today in California, covenants not to compete are void, subject to several exceptions discussed briefly below.

Section 16600 states: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The chapter excepts noncompetition agreements in the sale or dissolution of corporations (§ 16601), partnerships, and limited liability corporations. In the years since its original enactment as Civil Code section 1673, our courts have consistently affirmed that section 16600 evinces a settled legislative policy in favor of open competition and employee mobility. The law protects Californians and ensures "that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice." It protects "the important legal right of persons to engage in businesses and occupations of their choosing."

This court has invalidated an otherwise narrowly tailored agreement as an improper restraint under section 16600 because it required a former employee to forfeit his pension rights on commencing work for a competitor. In *Muggill v. Reuben H. Donnelley Corp.*, the court reviewed an adverse judgment against a company's retired employee whose pension plan rights were terminated after the former employee commenced work for a competitor. The retired employee had sued the former employer, seeking declaratory relief on the ground that the provision in the pension plan that terminated the retirement payments because the retiree went to work for a competitor was "against public policy and unenforceable." *Muggill* held that, with exceptions not applicable here, section 16600 invalidates provisions in employment contracts and retirement pension plans that prohibit "an employee from working for a competitor after completion of his employment or imposing a penalty if he does so unless they are necessary to protect the employer's trade secrets." In sum, following the Legislature, this court generally condemns noncompetition agreements.

Under the statute's plain meaning, therefore, an employer cannot by contract restrain a former employee from engaging in his or her profession, trade, or business unless the agreement falls within one of the exceptions to the rule. Andersen, however, asserts that we should interpret the term "restrain" under section 16600 to mean simply to "prohibit," so that only contracts that totally prohibit an employee from engaging in his or her profession, trade, or business are illegal. It would then follow that a mere limitation on an employee's ability to practice his or her vocation would be permissible under section 16600, as long as it was reasonably based.

Andersen contends that some California courts have held that section 16600 is the statutory embodiment of prior common law, and embraces the rule of reasonableness in evaluating competitive restraints. Andersen claims that these cases show that section 16600 "prohibits only broad agreements that prevent a person from engaging entirely in his chosen business, trade or profession. Agreements that do not have this broad effect—but merely regulate some aspect of post-employment conduct, e.g., to prevent raiding employer's personnel—are not within the scope of section 16600."

As Edwards observes, however, the cases Andersen cites to support a relaxation of the statutory rule simply recognize that the statutory exceptions to section 16600 reflect the same exceptions to the rule against noncompetition agreements that were implied in the common law. For example, *South Bay Radiology* acknowledged the general prohibition against restraints on trade while applying the specific partnership dissolution exception of section 16602 to the facts of its case. In that case, the covenant not to compete was set forth in a partnership agreement to which the appellant doctor was a party. When the appellant's partnership with several other doctors dissolved due to his inability to work following an accident, he challenged the noncompete clause. The court found the partnership exception to section 16600 applicable.

Vacco involved the sale of shares in a business, an exception to section 16600 found in section 16601. The Court of Appeal upheld an agreement not to compete made by a terminated employee who had sold all of his stock in the business for $500,000 prior to his termination. In applying the exception to section 16600, the court held that section 16601 "permits agreements not to compete made by a party selling the goodwill of a business or *all* of the shares of stock in a corporation." As the present Court of Appeal recognized, "Fairly read, the foregoing authorities suggest section 16600 embodies the original, strict common law antipathy toward restraints of trade, while the section 16601 and 16602 exceptions incorporated the later common law 'rule of reasonableness' in instances where those exceptions apply."

We conclude that Andersen's noncompetition agreement was invalid. As the Court of Appeal observed, "The first challenged clause prohibited Edwards, for an 18-month period, from performing professional services of the type he had provided while at Andersen, for any client on whose account he had worked during 18 months prior to his termination. The second challenged clause prohibited Edwards, for a year after termination, from 'soliciting,' defined by the agreement as providing professional services to any client of Andersen's Los Angeles office." The agreement restricted Edwards from performing work for Andersen's Los Angeles clients and therefore restricted his ability to practice his accounting profession. The noncompetition agreement that Edwards was required to sign before commencing employment with Andersen was therefore invalid because it restrained his ability to practice his profession.

Disposition

We hold that the noncompetition agreement here is invalid under section 16600, and we reject the narrow-restraint exception urged by Andersen. Noncompetition agreements are invalid under section 16600 in California, even if narrowly drawn, unless they fall within the applicable statutory exceptions of section 16601, 16602, or 16602.5.

FTC, Non-Compete Clause Rule, 88 FR 3482 (Jan. 19, 2023)

I. Overview of the Proposed Rule

A non-compete clause is a contractual term between an employer and a worker that typically blocks the worker from working for a competing employer, or starting a competing business, within a certain geographic area and period of time after the worker's employment ends. Non-compete clauses limit competition by their express terms. As a result, non-compete clauses have always been considered proper subjects for scrutiny under the nation's antitrust laws. In addition, non-compete clauses between employers and workers are traditionally subject to more exacting review under state common law than other contractual terms, due, in part, to concerns about unequal bargaining power between employers and workers and the fact that non-compete clauses limit a worker's ability to practice their trade.

In recent decades, important research has shed light on how the use of non-compete clauses by employers affects competition. Changes in state laws governing non-compete clauses have provided several natural experiments that have allowed researchers to study the impact of non-compete clauses on competition. This research has shown the use of non-compete clauses by employers has negatively affected competition in labor markets, resulting in reduced wages for workers across the labor force—including workers not bound by non-compete clauses. This research has also shown that, by suppressing labor mobility, non-compete clauses have negatively affected competition in product and service markets in several ways.

In this rulemaking, the Commission seeks to ensure competition policy is aligned with the current economic evidence about the consequences of non-compete clauses. In the Commission's view, the existing legal frameworks governing non-compete clauses—formed decades ago, without the benefit of this evidence—allow serious anticompetitive harm to labor, product, and service markets to go unchecked.

Section 5 of the Federal Trade Commission Act ("FTC Act") declares "unfair methods of competition" to be unlawful. Section 5 further directs the Commission "to prevent persons, partnerships, or corporations from using unfair methods of competition in or affecting commerce." Section 6(g) of the FTC Act authorizes the Commission to "make rules and regulations for the purpose of carrying out the provisions of" the FTC Act, including the Act's prohibition of unfair methods of competition.

Pursuant to Sections 5 and 6(g) of the FTC Act, the Commission proposes the Non-Compete Clause Rule. The proposed rule would provide it is an unfair method of competition—and therefore a violation of Section 5—for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or, under certain circumstances, represent to a worker that the worker is subject to a non-compete clause.

The proposed rule would define the term "non-compete clause" as a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer. The proposed rule would also clarify that whether a contractual provision is a non-compete clause would depend not on what the provision is called, but how the provision functions. As the Commission explains below, the definition of non-compete clause would generally not include other types of restrictive employment covenants—such as non-disclosure agreements ("NDAs") and client or customer non-solicitation agreements—because these covenants generally do not prevent a worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer. However, under the proposed definition of "non-compete clause," such covenants would be considered non-compete clauses where they are so unusually broad in scope that they function as such.

The proposed rule would define "employer" as a person that hires or contracts with a worker to work for the person. The proposed rule would define "worker" as a natural person who works, whether paid or unpaid, for an employer. The proposed rule would clarify that the term "worker" includes an employee, individual classified as an independent contractor, extern, intern, volunteer, apprentice, or sole proprietor who provides a service to a client or customer.

In addition to prohibiting employers from entering into non-compete clauses with workers starting on the rule's compliance date, the proposed rule would require employers to rescind existing non-compete clauses no later than the rule's compliance date. The proposed rule would also require an employer rescinding a non-compete clause to provide notice to the worker that the worker's non-compete clause is no longer in effect. To facilitate compliance, the proposed rule would (1) include model language that would satisfy this notice requirement and (2) establish a safe harbor whereby an employer would satisfy the rule's requirement to rescind existing non-compete clauses where it provides the worker with a notice that complies with this notice requirement.

The proposed rule would include a limited exception for non-compete clauses between the seller and buyer of a business. This exception would only be available where the party restricted by the non-compete clause is an owner, member, or partner holding at least a 25% ownership interest in a business entity. The proposed regulatory text would clarify that non-compete clauses covered by this exception would remain subject to federal antitrust law as well as all other applicable law.

II. Factual Background

A. What are non-compete clauses?

A non-compete clause is a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer. A typical non-compete clause blocks the worker from working for a competing employer, or starting a competing business, within a certain geographic area and period of time after their employment ends. A non-compete clause may be part of the worker's employment contract or may be contained in a standalone contract. Employers and workers may enter into non-compete clauses at the start of, during, or at the end of a worker's employment.

If a worker violates a non-compete clause, the employer may sue the worker for breach of contract. An employer may be able to obtain a preliminary injunction ordering the worker, for the duration of the lawsuit, to stop the conduct that allegedly violates the non-compete clause. If the employer wins the lawsuit, the employer may be able to obtain a permanent injunction ordering the worker to stop the conduct that violates the non-compete clause; a payment of monetary damages from the worker; or both. Where workers are subject to arbitration clauses, the employer may seek to enforce the non-compete clause through arbitration.

The below examples of non-compete clauses from recent news reports, legal settlements, and court opinions are illustrative.

> A contractual term between a security guard firm and its security guards requiring that, for two years following the conclusion of the security guards' employment with the firm, the security guard may not "a-ccept employment with or be employed by" a competing business "within a one hundred (100) mile radius" of the security guard's primary jobsite with the firm and stating that the security guards may not "a-ssist, aid or in any manner whatsoever help any firm, corporation, partnership or other business to compete with" the firm. The non-compete clause also contains a "liquidated damages" clause requiring the security guard to pay the firm $100,000 as a penalty for any conduct that contravenes the agreement.
>
> A contractual term between a glass container manufacturing company and its workers typically requiring that, for two years following the conclusion of the worker's employment with the company, the worker may not directly or indirectly "perform or provide the same or substantially similar services" to those the worker performed for the company to any business in the U.S., Canada, or Mexico that is "involved with or that supports the sale, design, development, manufacture, or production of glass containers" in competition with the company.

A contractual term between a sandwich shop chain and its workers stating that, for two years after the worker leaves their job, the worker may not perform services for "any business which derives more than ten percent (10%) of its revenue from selling submarine, hero-type, deli-style, pita and/or wrapped or rolled sandwiches" located within three miles of any of the chain's more than 2,000 locations in the United States.

A contractual term between a steelmaker and one of its executives prohibiting the executive from working for "any business engaged directly or indirectly in competition with" the steelmaker anywhere in the world for one year following the termination of the executive's employment.

A contractual term between an office supply company and one of its sales representatives stating that, for two years after the sales representative's last day of employment, the sales representative is prohibited from "engaging- directly or indirectly, either personally or as an employee, associate, partner, or otherwise, or by means of any corporation or other legal entity, or otherwise, in any business in competition with Employer," within a 100-mile radius of the sales representative's employment location.

A contractual term between a nationwide payday lender and its workers stating that, for one year after the worker leaves their job, they are prohibited from performing any "consumer lending services or money transmission services" for any entity that provides such services, or to "sell products or services that are competitive with or similar to the products or services of the Company," within a 15-mile radius of any of the payday lender's 1,000 locations in the United States.

A contractual term between an online retailer and its warehouse workers prohibiting the workers, for 18 months after leaving their job, from "directly or indirectly engaging- or supporting- the development, manufacture, marketing, or sale of any product or service that competes or is intended to compete with any product or service sold, offered, or otherwise provided by" the retailer—or that is "intended to be sold, offered, or otherwise provided by the retailer- in the future"—that the worker "worked on or supported" or about which the worker obtained or received confidential information.

> A contractual term between a medical services firm and an ophthalmologist stating that, for two years after the termination of the ophthalmologist's employment with the firm, the ophthalmologist shall not engage in the practice of medicine in two Idaho counties unless the ophthalmologist pays the firm a "practice fee" of either $250,000 or $500,000, depending on when the ophthalmologist's employment ends.

In addition to non-compete clauses, other types of contractual provisions restrict what a worker may do after they leave their job. These other types of provisions include, among others:

> Non-disclosure agreements (NDAs)—also known as "confidentiality agreements"—which prohibit the worker from disclosing or using certain information;
>
> Client or customer non-solicitation agreements, which prohibit the worker from soliciting former clients or customers of the employer (referred to in this NPRM as "non-solicitation agreements");
>
> No-business agreements, which prohibit the worker from doing business with former clients or customers of the employer, whether or not solicited by the worker;
>
> No-recruit agreements, which prohibit the worker from recruiting or hiring the employer's workers;
>
> Liquidated damages provisions, which require the worker to pay the employer a sum of money if the worker engages in certain conduct; and
>
> Training-repayment agreements (TRAs), a type of liquidated damages provision in which the worker agrees to pay the employer for the employer's training expenses if the worker leaves their job before a certain date.

These other types of restrictive employment covenants can sometimes be so broad in scope that they serve as *de facto* non-compete clauses.

In addition to restricting what workers may do after they leave their jobs, employers have also entered into agreements with other employers in which they agree not to compete for one another's workers. These include no-poach agreements, in which employers agree not to solicit or hire one another's workers, and wage-fixing agreements, in which employers agree to limit wages or salaries (or other terms of compensation).

B. Evidence Relating to the Effects of Non-Compete Clauses on Competition

Non-compete clauses have presented challenging legal issues for centuries. But only in the last two decades has empirical evidence emerged to help regulators and the general public understand how non-compete clauses affect competition in labor markets and product and service markets.

In the early 2000s, researchers began to shed new light on the impacts of non-compete clauses on innovation and productivity. As this new body of research was evolving, news reports revealed non-compete clauses were being imposed even on low-wage workers. Researchers responded by applying the tools of economic research to better understand how employers were using non-compete clauses and how they were affecting competition.

1. Labor Markets

The empirical research on how non-compete clauses affect competition shows that the use of non-compete clauses in the aggregate is interfering with competitive conditions in labor markets.

Labor markets function by matching workers and employers. Workers offer their skills and time to employers. In return, employers offer pay, benefits, and job satisfaction. In a well-functioning labor market, a worker who is seeking a better job—more pay, better hours, better working conditions, more enjoyable work, or whatever the worker may be seeking—can enter the labor market by looking for work. Employers who have positions available compete for the worker's services. The worker's current employer may also compete with these prospective employers by seeking to retain the worker—for example, by offering to raise the worker's pay or promote the worker. Ultimately, the worker chooses the job that best meets their objectives. In general, the more jobs available—*i.e.,* the more options the worker has—the stronger the match the worker will find.

Just as employers compete for workers in a well-functioning labor market, workers compete for jobs. An employer who needs a worker will make it known that the employer has a position available. Workers who learn of the opening will apply for the job. From among the workers who apply, the employer will choose the worker that best meets the employer's needs—in general, the worker most likely to be the most productive. In general, the more workers who are available— *i.e.,* the more options the employer has—the stronger the match the employer will find.

Through these processes—employers competing for workers, workers competing for jobs, and employers and workers matching with one another—competition in the labor market leads to higher earnings for workers, greater productivity for employers, and better economic conditions.

In a perfectly competitive labor market, if a job that a worker would prefer more—for example, because it has higher pay or is in a better location—were to become available, the worker could switch to it quickly and easily. Due to this ease of switching, in a perfectly competitive labor market, workers would easily match to the optimal job for them. If a worker were to find themselves in a job where the combination of their happiness and productivity is less than in some other job, they would simply switch jobs, making themselves better off.

However, this perfectly competitive labor market exists only in theory. In practice, labor markets deviate substantially from perfect competition. Non-compete clauses, in particular, impair competition in labor markets by restricting a worker's ability to change jobs. If a worker is bound by a non-compete clause, and the worker wants a better job, the non-compete clause will prevent the worker from accepting a new job that is within the scope of the non-compete clause. These are often the most natural alternative employment options for a worker: jobs in the same geographic area and in the worker's field of expertise. For example, a non-compete clause might prevent a nurse in Cleveland from working in the health care field in Northeast Ohio, or a software engineer in Orlando from working for another technology company in Central Florida. The result is less competition among employers for the worker's services and less competition among workers for available jobs. Since the worker is prevented from taking these jobs, the worker may decide not to enter the labor market at all. Or the worker may enter the labor market but take a job in which they are less productive, such as a job outside their field.

Non-compete clauses affect competition in labor markets through their use in the aggregate. The effect of an individual worker's non-compete clause on competition in a particular labor market may be marginal or may be impossible to discern statistically. However, the use of a large number of non-compete clauses across a labor market markedly affects the opportunities of all workers in that market, not just those with non-compete clauses. By making it more difficult for many workers in a labor market to switch to new jobs, non-compete clauses inhibit optimal matches from being made between employers and workers across the labor force. As a result, where non-compete clauses are prevalent in a market, workers are more likely to remain in jobs that are less optimal with respect to the worker's ability to maximize their productive capacity. This materially reduces wages for workers—not only for workers who are subject to non-compete clauses, but for other workers in a labor market as well, since jobs that would otherwise be better matches for an unconstrained worker are filled by workers subject to non-compete clauses.

a. Estimates of Non-Compete Clause Use

Based on the available evidence, the Commission estimates that approximately one in five American workers—or approximately 30 million workers—is bound by a non-compete clause.

While many workers are bound by non-compete clauses, many workers do not know whether their non-compete clause is legally enforceable or not. As part of their 2014 survey, Starr et al. asked surveyed individuals "Are noncompetes enforceable in your state?" Of the respondents, 37% indicated that they did not know whether or not their non-compete clause was enforceable.

Starr et al. also find that only 10.1% of workers with non-compete clauses report bargaining over it.

b. Earnings—Effects on Workers Across the Labor Force

By inhibiting optimal matches from being made between employers and workers across the labor force, non-compete clauses reduce the earnings of workers. Several studies have found that increased enforceability of non-compete clauses reduces workers' earnings across the labor market generally and for specific types of workers.

c. Earnings—Effects on Workers Not Covered by Non-Compete Clauses

As described above, non-compete clauses negatively affect competition in labor markets, thereby inhibiting optimal matches from being made between employers and workers across the labor force. As a result, non-compete clauses reduce earnings not only for workers who are subject to non-compete clauses, but also for workers who are not subject to non-compete clauses.

d. Earnings—Distributional Effects

There is evidence that non-compete clauses increase racial and gender wage gaps by disproportionately reducing the wages of women and non-white workers. This may be, for example, because firms use the monopsony power which results from use of non-compete clauses as a means by which to wage discriminate. The study by Johnson, Lavetti, and Lipsitz finds that while earnings of white men would increase by about 3.2% if a state's enforceability moved from the fifth-strictest to the fifth most lax, the comparable earnings increase for workers in other demographic groups would be 3.7-7.7%, depending on the characteristics of the group (though it is not clear from the study whether or not the differences are statistically significant).

e. Job Creation

While non-compete clauses may theoretically incentivize firms to create jobs by increasing the value associated with any given worker covered by a non-compete clause, the evidence is inconclusive.

IV. The Commission's Preliminary Determination That Non-Compete Clauses Are an Unfair Method of Competition

The Commission preliminarily determines it is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe the worker is subject to an enforceable non-compete clause.

A. Non-Compete Clauses Are an Unfair Method of Competition Under Section 5

1. Non-Compete Clauses Are Unfair

b. Non-Compete Clauses Are Exploitative and Coercive at the Time of Contracting

The Commission preliminarily finds non-compete clauses for workers other than senior executives are exploitative and coercive because they take advantage of unequal bargaining power between employers and workers at the time the employer and worker enter into the non-compete clause.

As noted above, courts have held conduct that is exploitative and coercive can violate Section 5 where it burdens a not insignificant volume of commerce. As another court stated, more recently:

The average, individual employee has little but his labor to sell or to use to make a living. He is often in urgent need of selling it and in no position to object to boiler plate restrictive covenants placed before him to sign. To him, the right to work and support his family is the most important right he possesses. His individual bargaining power is seldom equal to that of his employer. Under pressure of need and with little opportunity for choice, he is more likely than the seller to make a rash, improvident promise that, for the sake of present gain, may tend to impair his power to earn a living, impoverish him, render him a public charge or deprive the community of his skill and training.

Indeed, courts have cited the imbalance of bargaining power between workers and employers as a central reason for imposing stricter scrutiny on non-compete clauses between employers and workers than on non-compete clauses between businesses or between the seller and buyer of a business.

The imbalance of bargaining power between employers and workers results from several factors. Many of these factors relate to the nature of the employer-worker relationship in the United States generally. Most workers depend on income from their jobs to get by—to pay their rent or mortgage, pay their bills, and keep food on the table. For these workers, particularly the many workers who live paycheck to paycheck, loss of a job or a job opportunity can severely damage their finances.

Several additional factors contribute to the imbalance of bargaining power between employers and workers generally. These include the decline in union membership, which forces more workers to negotiate with their employers individually;

While the employer-worker relationship is defined by an imbalance of bargaining power generally, the imbalance of bargaining power is particularly acute in the context of negotiating employment terms such as non-compete clauses, for several reasons. First, as courts have long recognized, employers are repeat players who are likely to have greater experience and skill at bargaining, in the context of negotiating employment terms, than individual workers. while employers are more likely to seek the assistance of counsel in drafting them.

Third, research indicates consumers exhibit cognitive biases in the way they consider contractual terms, Workers likely display similar cognitive biases in the way they consider employment terms. These reasons explain why the imbalance of bargaining power between workers and employers is particularly high in the context of negotiating employment terms such as non-compete clauses.

There is considerable evidence employers are exploiting this imbalance of bargaining power through the use of non-compete clauses. Non-compete clauses are typically standard-form contracts, Because there is a considerable imbalance of bargaining power between workers and employers in the context of negotiating employment terms, and because employers take advantage of this imbalance of bargaining power through the use of non-compete clauses, the Commission preliminarily finds non-compete clauses are exploitative and coercive at the time of contracting.

As noted above, for coercive conduct to constitute unfair method of competition, it must also burden a not insignificant volume of commerce. The Commission preliminarily finds non-compete clauses burden a not insignificant volume of commerce due to their negative effects on competitive conditions in labor markets and product and service markets, which are described above.

This preliminary finding does not apply to workers who are senior executives. Non-compete clauses for senior executives are unlikely to be exploitative or coercive at the time of contracting, because senior executives are likely to negotiate the terms of their employment and may often do so with the assistance of counsel.

c. Non-Compete Clauses Are Exploitative and Coercive at the Time of the Worker's Potential Departure From the Employer

The Commission preliminarily finds non-compete clauses for workers other than senior executives are exploitative and coercive at the time of the worker's potential departure from the employer, because they force a worker to either stay in a job they want to leave or choose an alternative that likely impacts their livelihood.

For most workers who want to leave their jobs, the most natural employment options will be work in the same field and in the same geographic area. However, where a worker is bound by a non-compete clause, the worker's employment options are significantly limited. A worker who is subject to a non-compete clause, and who wants to leave their job, faces an undesirable choice that will likely affect their livelihood: either move out of the area; leave the workforce for a period of time; leave their field for period of time; pay the employer a sum of money to waive the non-compete clause; or violate the non-compete clause and risk a lawsuit from the employer. By forcing a worker who wants to leave their job to either stay in their job or take an action that will likely negatively affect their livelihood, non-compete clauses coerce workers into remaining in their current jobs. Courts have long expressed concern about this coercive effect of non-compete clauses—that non-compete clauses may threaten a worker's livelihood if they leave their job.

Workers have an inalienable right to quit their jobs. Non-compete clauses burden the ability to quit by forcing workers to either remain in their current job or, as described above, take an action—such as leaving the labor force for a period of time or taking a job in a different field—that would likely affect their livelihood. For this reason, the Commission finds non-compete clauses are exploitative and coercive at the time of the worker's potential departure.

As noted above, for coercive conduct to constitute unfair method of competition, it must also burden a not insignificant volume of commerce. The Commission preliminarily finds non-compete clauses burden a not insignificant volume of commerce due to their negative effects on competitive conditions in labor markets and product and service markets, which are described above.

This preliminary finding does not apply to workers who are senior executives. Non-compete clauses for senior executives are unlikely to be exploitative or coercive at the time of the executive's departure. Because many senior executives negotiate their non-compete clauses with the assistance of expert counsel, they are likely to have bargained for a higher wage or more generous severance package in exchange for agreeing to the non-compete clause.

B. The Justifications for Non-Compete Clauses Do Not Alter the Commission's Preliminary Determination

1. Commonly Cited Justifications for Non-Compete Clauses

The most cited justifications for non-compete clauses are that they increase employers' incentive to make productive investments, including in worker training, client attraction, or in creating or sharing trade secrets with workers. According to these justifications, without non-compete clauses, employment relationships are subject to an investment hold-up problem. Investment hold-up occurs where an employer—faced with the possibility a worker may depart after receiving some sort of valuable investment—opts not to make that investment in the first place, thereby decreasing the firm's productivity and overall social welfare. For example, according to these justifications, an employer may be more reticent to invest in trade secrets or other confidential information; to share this information with its workers; or to train its workers if it knows the worker may depart for or may establish a competing firm. Courts have cited these justifications when upholding non-compete clauses under state common law or antitrust law.

There is evidence non-compete clauses increase worker training and capital investment (*e.g.,* investment in physical assets, such as machines). Non-compete clauses may increase an employer's incentive to train their workers or invest in capital equipment because workers bound by non-compete clauses are less likely to leave their jobs for competitors. The author of the study assessing effects on capital investment finds there are likely two mechanisms driving these effects. First, firms may be more likely to invest in capital when they train their workers because worker training and capital expenditure are complementary (*i.e.,* the return on investment in capital equipment is greater when workers are more highly trained). Second, non-compete clauses reduce competition, and firms' returns to capital expenditure are greater when competition is lower, incentivizing firms to invest more in capital.

2. Employers Have Alternatives to Non-Compete Clauses for Protecting Valuable Investments

There are two reasons why the business justifications for non-compete clauses do not alter the Commission's preliminary determination non-compete clauses are an unfair method of competition. The first is employers have alternatives to non-compete clauses for protecting valuable investments. These alternatives may not be as protective as employers would like, but they reasonably accomplish the same purposes as non-compete clauses while burdening competition to a less significant degree.

As noted above, the most commonly cited justifications for non-compete clauses are that they increase an employer's incentive to make productive investments—such as investing in trade secrets or other confidential information, sharing this information with its workers, or training its workers—because employers may be more likely to make such investments if they know workers are not going to depart for or establish a competing firm. However, non-compete clauses restrict considerably more activity than necessary to achieve these benefits. Rather than restraining a broad scope of beneficial competitive activity—by barring workers altogether from leaving work with the employer for a competitor and starting a business that would compete with the employer—employers have alternatives for protecting valuable investments that are much more narrowly tailored to limit impacts on competitive conditions. These alternatives restrict a considerably smaller scope of beneficial competitive activity than non-compete clauses because—while they may restrict an employee's ability to use or disclose certain information—they generally do not prevent workers from working for a competitor or starting their own business altogether.

The FTC discusses alternatives including trade secret law, non-disclosure agreements, fixed duration employment contracts, pay increases, and improvements in working conditions.

Chapter 6: Wages & Hours

1. Legislative Regulation of Wages and Hours

Lochner v. New York, 198 U.S. 45 (1905)

MR. JUSTICE PECKHAM, after making the foregoing statement of the facts, delivered the opinion of the court.

The indictment, it will be seen, charges that the plaintiff in error violated the one hundred and tenth section of article 8, chapter 415, of the Laws of 1897, known as the labor law of the State of New York, in that he wrongfully and unlawfully required and permitted an employe working for him to work more than sixty hours in one week. There is nothing in any of the opinions delivered in this case, either in the Supreme Court or the Court of Appeals of the State, which construes the section, in using the word "required," as referring to any physical force being used to obtain the labor of an employe. It is assumed that the word means nothing more than the requirement arising from voluntary contract for such labor in excess of the number of hours specified in the statute. There is no pretense in any of the opinions that the statute was intended to meet a case of involuntary labor in any form. All the opinions assume that there is no real distinction, so far as this question is concerned, between the words "required" and "permitted." The mandate of the statute that "no employe shall be required or permitted to work," is the substantial equivalent of an enactment that "no employe shall contract or agree to work," more than ten hours per day, and as there is no provision for special emergencies the statute is mandatory in all cases. It is not an act merely fixing the number of hours which shall constitute a legal day's work, but an absolute prohibition upon the employer, permitting, under any circumstances, more than ten hours work to be done in his establishment. The employe may desire to earn the extra money, which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employe to earn it.

The statute necessarily interferes with the right of contract between the employer and employes, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere.

The State, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment. Contracts in violation of a statute, either of the Federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution, as coming under the liberty of person or of free contract. Therefore, when the State, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are *sui juris* (both employer and employe), it becomes of great importance to determine which shall prevail — the right of the individual to labor for such time as he may choose, or the right of the State to prevent the individual from laboring or from entering into any contract to labor, beyond a certain time prescribed by the State.

This court has recognized the existence and upheld the exercise of the police powers of the States in many cases which might fairly be considered as border ones, and it has, in the course of its determination of questions regarding the asserted invalidity of such statutes, on the ground of their violation of the rights secured by the Federal Constitution, been guided by rules of a very liberal nature, the application of which has resulted, in numerous instances, in upholding the validity of state statutes thus assailed. Among the later cases where the state law has been upheld by this court is that of *Holden v. Hardy*. A provision in the act of the legislature of Utah was there under consideration, the act limiting the employment of workmen in all underground mines or workings, to eight hours per day, "except in cases of emergency, where life or property is in imminent danger." It also limited the hours of labor in smelting and other institutions for the reduction or refining of ores or metals to eight hours per day, except in like cases of emergency. The act was held to be a valid exercise of the police powers of the State. A review of many of the cases on the subject, decided by this and other courts, is given in the opinion. It was held that the kind of employment, mining, smelting, etc., and the character of the employes in such kinds of labor, were such as to make it reasonable and proper for the State to interfere to prevent the employes from being constrained by the rules laid down by the proprietors in regard to labor.

It will be observed that, even with regard to that class of labor, the Utah statute provided for cases of emergency wherein the provisions of the statute would not apply. The statute now before this court has no emergency clause in it, and, if the statute is valid, there are no circumstances and no emergencies under which the slightest violation of the provisions of the act would be innocent.

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext — become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? and that question must be answered by the court.

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.

It is a question of which of two powers or rights shall prevail — the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris,* as employer or employe, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go.

We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employe. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the Government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family. In our large cities there are many buildings into which the sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the business of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by many clerks, messengers, and other employes. Upon the assumption of the validity of this act under review, it is not possible to say that an act, prohibiting lawyers' or bank clerks, or others, from contracting to labor for their employers more than eight hours a day, would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real estate clerk, or the broker's clerk in such offices is therefore unhealthy, and the legislature in its paternal wisdom must, therefore, have the right to legislate on the subject of and to limit the hours for such labor, and if it exercises that power and its validity be questioned, it is sufficient to say, it has reference to the public health; it has reference to the health of the employes condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts.

It is also urged, pursuing the same line of argument, that it is to the interest of the State that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employes, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the State be impaired. We mention these extreme cases because the contention is extreme. We do not believe in the soundness of the views which uphold this law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employes named, is not within that power, and is invalid. The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employes, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employes, if the hours of labor are not curtailed. If this be not clearly the case the individuals, whose rights are thus made the subject of legislative interference, are under the protection of the Federal Constitution regarding their liberty of contract as well as of person; and the legislature of the State has no power to limit their right as proposed in this statute. All that it could properly do has been done by it with regard to the conduct of bakeries, as provided for in the other sections of the act, above set forth. These several sections provide for the inspection of the premises where the bakery is carried on, with regard to furnishing proper wash-rooms and water-closets, apart from the bakeroom, also with regard to providing proper drainage, plumbing and painting; the sections, in addition, provide for the height of the ceiling, the cementing or tiling of floors, where necessary in the opinion of the factory inspector, and for other things of that nature; alterations are also provided for and are to be made where necessary in the opinion of the inspector, in order to comply with the provisions of the statute. These various sections may be wise and valid regulations, and they certainly go to the full extent of providing for the cleanliness and the healthiness, so far as possible, of the quarters in which bakeries are to be conducted. Adding to all these requirements, a prohibition to enter into any contract of labor in a bakery for more than a certain number of hours a week, is, in our judgment, so wholly beside the matter of a proper, reasonable and fair provision, as to run counter to that liberty of person and of free contract provided for in the Federal Constitution.

It was further urged on the argument that restricting the hours of labor in the case of bakers was valid because it tended to cleanliness on the part of the workers, as a man was more apt to be cleanly when not overworked, and if cleanly then his "output" was also more likely to be so. What has already been said applies with equal force to this contention. We do not admit the reasoning to be sufficient to justify the claimed right of such interference. The State in that case would assume the position of a supervisor, or *pater familias,* over every act of the individual, and its right of governmental interference with his hours of labor, his hours of exercise, the character thereof, and the extent to which it shall be carried would be recognized and upheld. In our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman. The connection, if any exists, is too shadowy and thin to build any argument for the interference of the legislature. If the man works ten hours a day it is all right, but if ten and a half or eleven his health is in danger and his bread may be unhealthful, and, therefore, he shall not be permitted to do it. This, we think, is unreasonable and entirely arbitrary. When assertions such as we have adverted to become necessary in order to give, if possible, a plausible foundation for the contention that the law is a "health law," it gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare.

This interference on the part of the legislatures of the several States with the ordinary trades and occupations of the people seems to be on the increase.

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose.

It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to and no such substantial effect upon the health of the employe, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employes (all being men, *sui juris*), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employes. Under such circumstances the freedom of master and employe to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.

MR. JUSTICE HOLMES dissenting.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. Two years ago we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California. The decision sustaining an eight hour law for miners is still recent. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire.* It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.

West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

This case presents the question of the constitutional validity of the minimum wage law of the State of Washington.

The Act, entitled "Minimum Wages for Women," authorizes the fixing of minimum wages for women and minors. It provides:

> SECTION 1. The welfare of the State of Washington demands that women and minors be protected from conditions of labor which have a pernicious effect on their health and morals. The State of Washington, therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect.
>
> SEC. 2. It shall be unlawful to employ women or minors in any industry or occupation within the State of Washington under conditions of labor detrimental to their health or morals; and it shall be unlawful to employ women workers in any industry within the State of Washington at wages which are not adequate for their maintenance.
>
> SEC. 3. There is hereby created a commission to be known as the 'Industrial Welfare Commission' for the State of Washington, to establish such standards of wages and conditions of labor for women and minors employed within the State of Washington, as shall be held hereunder to be reasonable and not detrimental to health and morals, and which shall be sufficient for the decent maintenance of women.

Further provisions required the Commission to ascertain the wages and conditions of labor of women and minors within the State. Public hearings were to be held. If after investigation the Commission found that in any occupation, trade or industry the wages paid to women were "inadequate to supply them necessary cost of living and to maintain the workers in health," the Commission was empowered to call a conference of representatives of employers and employees together with disinterested persons representing the public. The conference was to recommend to the Commission, on its request, an estimate of a minimum wage adequate for the purpose above stated, and on the approval of such a recommendation it became the duty of the Commission to issue an obligatory order fixing minimum wages. Any such order might be reopened and the question reconsidered with the aid of the former conference or a new one. Special licenses were authorized for the employment of women who were "physically defective or crippled by age or otherwise," and also for apprentices, at less than the prescribed minimum wage.

The appellant conducts a hotel. The appellee Elsie Parrish was employed as a chambermaid and (with her husband) brought this suit to recover the difference between the wages paid her and the minimum wage fixed pursuant to the state law. The minimum wage was $14.50 per week of 48 hours. The appellant challenged the act as repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States. The Supreme Court of the State, reversing the trial court, sustained the statute and directed judgment for the plaintiffs. The case is here on appeal.

The appellant relies upon the decision of this Court in *Adkins v. Children's Hospital,* which held invalid the District of Columbia Minimum Wage Act, which was attacked under the due process clause of the Fifth Amendment. On the argument at bar, counsel for the appellees attempted to distinguish the *Adkins* case upon the ground that the appellee was employed in a hotel and that the business of an innkeeper was affected with a public interest. That effort at distinction is obviously futile, as it appears that in one of the cases ruled by the *Adkins* opinion the employee was a woman employed as an elevator operator in a hotel.

The recent case of *Morehead v. New York ex rel. Tipaldo,* came here on certiorari to the New York court, which had held the New York minimum wage act for women to be invalid. A minority of this Court thought that the New York statute was distinguishable in a material feature from that involved in the *Adkins* case, and that for that and other reasons the New York statute should be sustained. But the Court of Appeals of New York had said that it found no material difference between the two statutes, and this Court held that the "meaning of the statute" as fixed by the decision of the state court "must be accepted here as if the meaning had been specifically expressed in the enactment." That view led to the affirmance by this Court of the judgment in the *Morehead* case, as the Court considered that the only question before it was whether the *Adkins* case was distinguishable and that reconsideration of that decision had not been sought.

We think that the question which was not deemed to be open in the *Morehead* case is open and is necessarily presented here. The Supreme Court of Washington has upheld the minimum wage statute of that State. It has decided that the statute is a reasonable exercise of the police power of the State. In reaching that conclusion the state court has invoked principles long established by this Court in the application of the Fourteenth Amendment. The state court has refused to regard the decision in the *Adkins* case as determinative and has pointed to our decisions both before and since that case as justifying its position. We are of the opinion that this ruling of the state court demands on our part a reexamination of the *Adkins* case. The importance of the question, in which many States having similar laws are concerned, the close division by which the decision in the *Adkins* case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the State must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration.

The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the States, as the due process clause invoked in the *Adkins* case governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

This essential limitation of liberty in general governs freedom of contract in particular. More than twenty-five years ago we set forth the applicable principle in these words, after referring to the cases where the liberty guaranteed by the Fourteenth Amendment had been broadly described:

> But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.

This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day; in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages; in forbidding the payment of seamen's wages in advance; in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine; in prohibiting contracts limiting liability for injuries to employees; in limiting hours of work of employees in manufacturing establishments; and in maintaining workmen's compensation laws. In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression.

The point that has been strongly stressed that adult employees should be deemed competent to make their own contracts was decisively met nearly forty years ago in *Holden v.Hardy*, where we pointed out the inequality in the footing of the parties. We said:

> The legislature has also recognized the fact, which the experience of legislators in many States has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employes,

> while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority.

And we added that the fact "that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself." "The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer."

It is manifest that this established principle is peculiarly applicable in relation to the employment of women in whose protection the State has a special interest. That phase of the subject received elaborate consideration in *Muller v. Oregon* (1908), where the constitutional authority of the State to limit the working hours of women was sustained. We emphasized the consideration that "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence" and that her physical well being "becomes an object of public interest and care in order to preserve the strength and vigor of the race." We emphasized the need of protecting women against oppression despite her possession of contractual rights. We said that "though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right." Hence she was "properly placed in a class by herself, and legislation designed for her protection may be sustained even when like legislation is not necessary for men and could not be sustained." We concluded that the limitations which the statute there in question "placed upon her contractual powers, upon her right to agree with her employer as to the time she shall labor" were "not imposed solely for her benefit, but also largely for the benefit of all." Again, in *Quong Wing v. Kirkendall,* in referring to a differentiation with respect to the employment of women, we said that the Fourteenth Amendment did not interfere with state power by creating a "fictitious equality." We referred to recognized classifications on the basis of sex with regard to hours of work and in other matters, and we observed that the particular points at which that difference shall be enforced by legislation were largely in the power of the State. In later rulings this Court sustained the regulation of hours of work of women employees in *Riley v. Massachusetts,* (factories), *Miller v. Wilson,* (hotels), and *Bosley v. McLaughlin,* (hospitals).

This array of precedents and the principles they applied were thought by the dissenting Justices in the *Adkins* case to demand that the minimum wage statute be sustained. The validity of the distinction made by the Court between a minimum wage and a maximum of hours in limiting liberty of contract was especially challenged. That challenge persists and is without any satisfactory answer. As Chief Justice Taft observed: "In absolute freedom of contract the one term is as important as the other, for both enter equally into the consideration given and received, a restriction as to the one is not greater in essence than the other and is of the same kind. One is the multiplier and the other the multiplicand." And Mr. Justice Holmes, while recognizing that "the distinctions of the law are distinctions of degree," could "perceive no difference in the kind or degree of interference with liberty, the only matter with which we have any concern, between the one case and the other. The bargain is equally affected whichever half you regulate."

The minimum wage to be paid under the Washington statute is fixed after full consideration by representatives of employers, employees and the public. It may be assumed that the minimum wage is fixed in consideration of the service that are performed in the particular occupations under normal conditions. Provision is made for special licenses at less wages in the case of women who are incapable of full service. The statement of Mr. Justice Holmes in the *Adkins* case is pertinent: "This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden. In short the law in its character and operation is like hundreds of so-called police laws that have been upheld." And Chief Justice Taft forcibly pointed out the consideration which is basic in a statute of this character: "Legislatures which adopt a requirement of maximum hours or minimum wages may be presumed to believe that when sweating employers are prevented from paying unduly low wages by positive law they will continue their business, abating that part of their profits, which were wrung from the necessities of their employees, and will concede the better terms required by the law; and that while in individual cases hardship may result, the restriction will enure to the benefit of the general class of employees in whose interest the law is passed and so to that of the community at large."

What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The legislature was entitled to adopt measures to reduce the evils of the "sweating system," the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deep-seated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.

There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. While in the instant case no factual brief has been presented, there is no reason to doubt that the State of Washington has encountered the same social problem that is present elsewhere. The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest. The argument that the legislation in question constitutes an arbitrary discrimination, because it does not extend to men, is unavailing. This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature "is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be dearest." If "the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." There is no "doctrine requirement" that the legislation should be couched in all embracing terms. This familiar principle has repeatedly been applied to legislation which singles out women, and particular classes of women, in the exercise of the State's protective power. Their relative need in the presence of the evil, no less than the existence of the evil itself, is a matter for the legislative judgment.

Our conclusion is that the case of *Adkins v. Children's Hospital* should be, and it is, overruled.

2. The Fair Labor Standards Act and State Wage & Hour Laws

The Fair Labor Standards Act, enacted in 1938, establishes minimum wage and overtime pay requirements for covered employees. Many states (and some local governments) have laws setting a higher minimum wage or requiring overtime payment on both a daily and weekly basis. State laws also commonly require timely payment of wages at regular intervals, regulate withholding of and deductions from wages, and authorize courts

The FLSA also regulates child labor. Those provisions are not covered here.

See U.S. Department of Labor Wage & Hour Division, State Minimum Wage Laws to award liquidated damages and attorney's fees as additional remedies in suits to recover unpaid wages.

Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq.

See also, Wage & Hour Division Regulations and Statements of General Policy or Interpretation, 29 CFR chap. V.

§ 202. Congressional finding and declaration of policy

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

§ 203. Definitions

As used in this chapter—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(d) “Employer” includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(1) Except as provided in paragraphs (2), (3), and (4), the term “employee” means any individual employed by an employer.

(g) “Employ” includes to suffer or permit to work.

(m)(1) “Wage” paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees: *Provided*, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: *Provided further*, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee.

> (2)(a) In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee’s employer shall be an amount equal to—
>
>> (i) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996; and
>>
>> (ii) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in clause (i) and the wage in effect under section 206(a)(1) of this title.

The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

(b) An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips, regardless of whether or not the employer takes a tip credit.

(o) Hours Worked.—In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

§ 206. Minimum wage

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than—

(a) $5.85 an hour, beginning on the 60th day after May 25, 2007;

(b) $6.55 an hour, beginning 12 months after that 60th day; and

(c) $7.25 an hour, beginning 24 months after that 60th day;

(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

§ 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall

employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(e) "Regular rate" defined

As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—
[…]

(f) Employment necessitating irregular hours of work

No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(g) Employment at piece rates

No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection—

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided*, That the rate so established shall be authorized by regulation by the Administrator as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

(r) Reasonable break time for nursing mothers

(1) An employer shall provide—

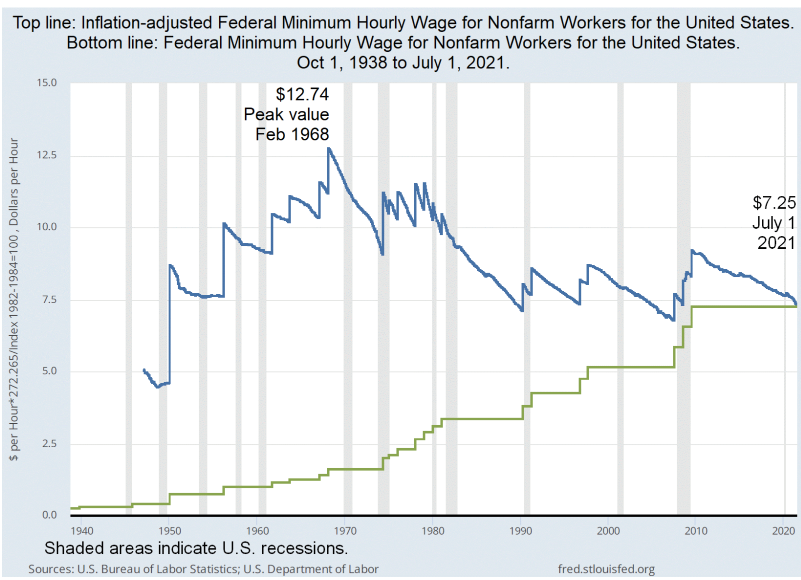
(a) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and

(b) 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.

(2) An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.

(3) An employer that employs less than 50 employees shall not be subject to the requirements of this subsection, 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.

(4) Nothing in this subsection shall preempt a State law that provides greater protections to employees than the protections provided for under this subsection.



Federal Minimum Wage, 1938-2021

North Carolina Wage & Hour Act

§ 95-25.6. Wage payment.

Every employer shall pay every employee all wages and tips accruing to the employee on the regular payday. Pay periods may be daily, weekly, bi-weekly, semi-monthly, or monthly. Wages based upon bonuses, commissions, or other forms of calculation may be paid as infrequently as annually if prescribed in advance.

§ 95-25.7. Payment to separated employees.

Employees whose employment is discontinued for any reason shall be paid all wages due on or before the next regular payday either through the regular pay channels or by trackable mail if requested by the employee in writing. Wages based on bonuses, commissions or other forms of calculation shall be paid on the first regular payday after the amount becomes calculable when a separation occurs. Such wages may not be forfeited unless the employee has been notified in accordance with G.S. 95-25.13 of the employer's policy or practice which results in forfeiture. Employees not so notified are not subject to such loss or forfeiture.

§ 95-25.7A. Wages in dispute.

(a) If the amount of wages is in dispute, the employer shall pay the wages, or that part of the wages, which the employer concedes to be due without condition, within the time set by this Article. The employee retains all remedies that the employee might otherwise be entitled to regarding any balance of wages claimed by the employee, including those remedies provided under this Article.

(b) Acceptance of a partial payment of wages under this section by an employee does not constitute a release of the balance of the claim. Further, any release of the claim required by an employer as a condition of partial payment is void.

§ 95-25.8. Withholding of wages.

(a) An employer may withhold or divert any portion of an employee's wages when:

(1) The employer is required or empowered to do so by State or federal law;

(2) When the amount or rate of the proposed deduction is known and agreed upon in advance, the employer must have written authorization from the employee which (i) is signed on or before the payday(s) for the pay period(s) from which the deduction is to be

made; (ii) indicates the reason for the deduction; and (iii) states the actual dollar amount or percentage of wages which shall be deducted from one or more paychecks. Provided, that if the deduction is for the convenience of the employee, the employee shall be given a reasonable opportunity to withdraw the authorization; or

(3) When the amount of the proposed deduction is not known and agreed upon in advance, the employer must have written authorization from the employee which (i) is signed on or before the payday(s) for the pay period(s) from which the deduction is to be made; and (ii) indicates the reason for the deduction. Prior to any deductions being made under this section, the employee must (i) receive advance written notice of the actual amount to be deducted; (ii) receive written notice of their right to withdraw the authorization; and (iii) be given a reasonable opportunity to withdraw the authorization in writing.

(b) The withholding or diversion of wages owed for the employer's benefit must comply with the following requirements:

(1) In nonovertime workweeks, an employer may reduce wages to the minimum wage level.

(2) In overtime workweeks, employers may reduce wages to the minimum wage level for nonovertime hours.

(3) No reductions may be made to overtime wages owed.

(c) In addition to complying with the requirements in subsections (a) and (b) of this section, an employer may withhold or divert a portion of an employee's wages for cash shortages, inventory shortages, or loss or damage to an employer's property after giving the employee written notice of the amount to be deducted seven days prior to the payday on which the deduction is to be made, except that when a separation occurs the seven-day notice is not required.

(d) Notwithstanding subsections (a) and (b), above, an overpayment of wages to an employee as a result of a miscalculation or other bona fide error, advances of wages to an employee or to a third party at the employee's request, and the principal amount of loans made by an employer to an employee are considered prepayment of wages and may be withheld or deducted from an employee's wages. Deductions for interest and other charges related to loans by an employer to an employee shall require written authorization in accordance with subsection (a), above.

(e) Notwithstanding subsections (a) and (c), above, if criminal process has issued against an employee, an employee has been indicted, or an employee has been arrested pursuant to Articles 17, 20, and 32 of Chapter 15A of the General Statutes for a charge incident to a cash shortage, inventory shortage, or damage to an employer's property, an employer may withhold or divert a portion of the employee's wages in order to recoup the amount of the cash shortage, inventory shortage, or damage to the employer's property, without the written authorization required by this section, but the amount of such withholdings shall comply with the provisions of subsection (b) of this section. If the employee is not found guilty, then the amount deducted shall be reimbursed to the employee by the employer.

(f) For purposes of this section, a written authorization or written notice may be in the form of an electronic record in compliance with Article 40 of Chapter 66 (the Uniform Electronic Transactions Act).

(g) Nothing in this Article shall preclude an employer from bringing a civil action in the General Court of Justice to collect any amounts due the employer from the employee.

§ 95-25.22. Recovery of unpaid wages.

(a) Any employer who violates the provisions of G.S. 95-25.3 (Minimum Wage), G.S. 95-25.4 (Overtime), or G.S. 95-25.6 through 95-25.12 (Wage Payment) shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, their unpaid overtime compensation, or their unpaid amounts due under G.S. 95-25.6 through 95-25.12, as the case may be, plus interest at the legal rate set forth in G.S. 24-1, from the date each amount first came due.

(a1) In addition to the amounts awarded pursuant to subsection (a) of this section, the court shall award liquidated damages in an amount equal to the amount found to be due as provided in subsection (a) of this section, provided that if the employer shows to the satisfaction of the court that the act or omission constituting the violation was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this Article, the court may, in its discretion, award no liquidated damages or may award any amount of liquidated damages not exceeding the amount found due as provided in subsection (a) of this section.

(b) Action to recover such liability may be maintained in the General Court of Justice by any one or more employees.

(c) Action to recover such liability may also be maintained in the General Court of Justice by the Commissioner at the request of the employees affected. Any sums thus recovered by the Commissioner on behalf of an employee shall be held in a special deposit account and shall be paid directly to the employee or employees affected.

(d) The court, in any action brought under this Article may, in addition to any judgment awarded plaintiff, order costs and fees of the action and reasonable attorneys' fees to be paid by the defendant. In an action brought by the Commissioner in which a default judgment is entered, the clerk shall order attorneys' fees of three hundred dollars ($300.00) to be paid by the defendant.

The court may order costs and fees of the action and reasonable attorneys' fees to be paid by the plaintiff if the court determines that the action was frivolous.

(e) The Commissioner is authorized to determine and supervise the payment of the amounts due under this section, including interest at the legal rate set forth in G.S. 24-1, from the date each amount first came due, and the agreement to accept such amounts by the employee shall constitute a waiver of the employee's right to bring an action under subsection (b) of this section.

(f) Actions under this section must be brought within two years pursuant to G.S. 1-53.

(g) Prior to initiating any action under this section, the Commissioner shall exhaust all administrative remedies, including giving the employer the opportunity to be heard on the matters at issue and giving the employer notice of the pending action.

2.1 Minimum Wage

Glaxiola v. Williams Seafood of Arapahoe, Inc., 776 F.Supp.2d 117 (E.D.N.C. 2011)

MALCOLM J. HOWARD, Senior District Judge.

BACKGROUND

This is an action alleging claims under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA") and the North Carolina Wage and Hour Act, N.C. Gen. Stat. §§ 95-25.1 *et seq.* ("NCWHA"). Gaxiola is a former employee of defendants who was recruited in Mexico to work as a crab picker at defendants' seafood processing facility in Arapahoe, North Carolina. Gaxiola alleges that she and other individuals employed by defendants on H-2B guestworker visas from 2005 through 2008 were not paid minimum wage for all hours worked in violation of the FLSA. Specifically, Gaxiola alleges: (1) that she and other employees were paid on a piece-rate basis (by weight of crab picked) even when the weekly pay earned through a piece rate was less than the minimum wage mandated by federal law; and (2) that defendants reduced her wages and the wages of her coworkers below minimum wage by deducting from their paychecks costs incurred for the benefit of defendants, such as visa, transportation and border crossing expenses. Additionally, Gaxiola brings a claim pursuant to NCWHA alleging defendants failed to pay plaintiff and members of the proposed NCWHA class at least he promised wage each week in which they performed work for defendants. Gaxiola alleges that defendants also violated NCWHA by making unauthorized deductions from her pay and the pay of the proposed plaintiff class members for transportation, visa and border crossing expenses.

The court's discussion of the FLSA wage deduction claim and the NCWHA wage payment claim appears in § 5: Wage Payment, Deductions, & Reimbursements.

STATEMENT OF THE FACTS

Plaintiff class members were employed by defendants pursuant to the H-2B visa program, which allows the temporary employment of foreign workers. The terms of the H-2B visa program are controlled by statute, as well as by United States Department of Labor ("USDOL") regulations applicable to the temporary labor certification process. On December 19, 2008, USDOL published new regulations governing the H-2B program. Both the previous and the new H-2B regulations require the Secretary of Labor to make two overarching determinations before allowing an employer to employ H-2B workers:

i. Whether U.S. workers are available to perform temporary employment in the United States, for which an employer desires to employ nonimmigrant foreign workers, and

ii. whether the employment of aliens for such temporary work will adversely affect the wages or working conditions of similarly employed U.S. workers.

Employers must pay H-2B workers the highest of the following rates: the prevailing wage as determined by the USDOL, federal minimum wage, the applicable state minimum wage, or the applicable local minimum wage. The prevailing wage is the wage necessary to protect against adversely affecting U.S. workers.

In 2005, 2006 and 2007 defendants sought permission to import foreign labor to work as crab pickers in their seafood processing plant by filing temporary labor certification applications ("Clearance Orders") with USDOL. The Clearance Orders were prepared, signed and submitted by defendant Midyette. On each Clearance Order, defendants indicated the number of workers needed, the period of employment, the type of work, and the terms and conditions of work being offered by defendants. The Clearance Orders indicated that the H-2B workers would work 35 hours per week plus varying overtime; that the regular work schedule would be 7:00 am until 4:00 pm; that job duties would include hand picking meat from the bodies and claws of crabs and placing the meat in a cup; and that the basic rate of pay based on the prevailing wage would be $5.17 per hour in 2005 and 2006, and $6.17 per hour in 2007. USDOL approved the terms of the work in the Clearance Orders and certified defendants to employ foreign workers through the H-2B visa program.

Once an employer receives temporary labor certification from USDOL, the employer may then petition United States Customs and Immigration Services for the actual visas. Each individual who is going to work pursuant to the certification must go to the United States Consulate in his home country to apply for and receive his visa. H-2B visas issued to workers are valid only for the specific job described in the employer's Clearance Order. Upon completion of the work period described in the Clearance Order or upon separation from work, the worker is required to return to his home country.

During the time period relevant to the instant matter, defendants relied on returning workers and word of mouth to fill job openings each year. Two of defendants' H-2B employees, Alba Gloria Acosta and Amado Segura, along with their daughter, acted on behalf of defendants while in Mexico by communicating with new and returning workers and making arrangements for those workers. Defendant Midyette made visa interview appointments for the workers and then notified them of their appointments. Acosta and Segura made arrangements for the workers to travel together to their visa interviews as well as from their homes in Mexico to Arizona.

COURT'S DISCUSSION

I. Summary Judgment

B. Parties' Contentions

Plaintiffs seek an order granting summary judgment as to liability, contending that:

1. Defendants willfully violated the minimum wage provisions of FLSA by failing to pay Gaxiola and the FLSA class members the minimum wage established in 29 U.S.C. § 206(a)(1) when compensation on a piece-rate basis resulted in pay less than the minimum wage.

II. FLSA Claims

A. Coverage by the FLSA

The FLSA is a remedial statute designed to "eliminate substandard labor conditions" in the United States. It was enacted to protect workers who lack sufficient bargaining power to secure a subsistence wage. Under the FLSA, an employer is required to pay each employee wages at or above the minimum wage rate for the hours worked during each workweek. The FLSA applies to all employees for whom there is not a specific exemption. H-2B workers are not specifically exempt; therefore, they are protected by the provisions of the FLSA.

B. Failure to Pay Minimum Wage when Piece-Rate Compensation was Less than Minimum Wage

Employers must pay minimum wage for all hours worked. Thus, workers paid on a piece-rate basis are entitled to the minimum wage rate when the piece-rate compensation does not reach the minimum wage.

Plaintiffs seek summary judgment as to defendants' liability on their claim that workers paid on a piece-rate basis did not receive minimum wage for all hours worked as required by the FLSA. The court agrees that summary judgment is appropriate because there are no contested issues of fact with regard to defendants' liability for failing to pay their employees compensated on a piece-rate basis at least minimum wage during some periods.

Defendants had a production standard in place during the 2005, 2006 and 2007 seasons in which crab pickers were required to pick 3.5 pounds of crab per hour. No one was ever fired for failing to meet the production standard. Yet the evidence shows there were times that defendants paid employees by the pound, even if that pay did not rise to the level of minimum wage. For example, Gaxiola's pay stub from July 11, 2007, shows that she worked 34.4 hours and received gross pay of $164.35. There is a handwritten notation of 86 ½ on the pay stub, which purportedly is the number of pounds of crab picked by Gaxiola that week. Multiplying that number by the agreed-upon piece-rate of $1.90 per pound equals the

$164.35 gross pay received by Gaxiola that week. However, $164.35 for 34.4 hours of work is only $4.78 per hour.

When questioned about defendants' practices, Ms. Midyette admitted that defendants did not always comply with the FLSA's minimum wage requirement. Ms. Midyette stated: "If you're-if you're trying to get me to say that once in awhile they weren't paid their full thing, yes." "If you're-If I-are there incidents where they may not have made production, and got paid by production instead of hours."

Based on the pay stubs presented to the court as well as Midyette's own deposition testimony, the court finds that defendants violated the FLSA at times by failing to pay workers minimum wage when their piece-rate compensation was less than minimum wage. The court therefore grants plaintiffs' motion for summary judgment as to defendants' liability on this issue. The court makes no findings as to plaintiffs' damages at this time.

D. Willfulness

Defendants move for summary judgment as to plaintiffs' FLSA claims arising prior to August 1, 2006. Defendants contend there is no genuine issue of material fact that any alleged violations were not willful and these claims are therefore barred by the statute of limitations.

The statute of limitations for claims under the FLSA is two years, unless plaintiffs can prove that defendants acted willfully. If willfulness is shown, then the statute of limitations is increased to three years. Plaintiffs bear the burden of proving that defendants' acts or omissions were "willful" within the meaning of the FLSA. An employer's violation of the FLSA is willful if the employer either "knew or showed reckless disregard for the matter of whether its conduct was prohibited by" the FLSA. Unreasonable or negligent conduct is not enough to constitute "willful" conduct.

1. Piece-rate violations

Defendants knew about their obligation to pay the minimum wage to all of their employees. Defendants additionally knew that when they paid their employees on a piece-rate basis they would be required to pay them additional wages if their piece-rate compensation was not at least equal to minimum wage. Plaintiff argues that despite knowledge of their obligations under the FLSA, defendants knowingly and intentionally failed to pay plaintiff and members of the FLSA class who were compensated on a piece-rate basis at least minimum wage on several occasions. This court agrees. In her deposition, defendant Midyette admits that she understood that she was required to pay at least minimum wage for the hours worked, even if she was in the practice of paying on a piece-rate. She also admits that she did not always follow what she knew to be the law. Therefore, as to plaintiffs' claim that defendants violated the FLSA by paying a straight piece-rate wage, this court finds those violations to be willful under the FLSA.

E. Good Faith Defense

The Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251 *et seq.,* includes three employer defenses that may apply even if the employer is found to be in violation of the FLSA: Section 9, which provides a defense based on employer acts or omissions that occurred before the effective date of the Portal-to-Portal Act; Section 10, which provides a bar to liability if the employer can prove good faith as defined therein; and, Section 11, which allows the court, in its discretion, to refuse to award liquidated damages to a prevailing plaintiff under certain circumstances.

Section 10 of the Portal-to-Portal Act, the good-faith defense to the FLSA, provides, in pertinent part, as follows:

> a. In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the USDOL, or any administrative practice or enforcement policy of USDOL with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or

> rescinded or is determined by judicial authority to be invalid or of no legal effect.

To avail itself of this defense, an employer must prove that it actually relied upon an administrative regulation, order, ruling, approval, interpretation, enforcement policy or practice. In deciding whether defendants have proven good faith, the court must look at (1) the particular "agency action" upon which the defendants relied; (2) whether defendants can show actual reliance; and, (3) whether defendants acted in good faith, both objectively and subjectively.

Defendants attempt to make an argument, albeit a weak one, that they should be entitled to the good faith defense, relying on basically the same evidence used to argue that their actions were not willful. Merely participating in the H-2B program for several years and assuming you were in compliance because the government never told you otherwise is not sufficient to meet the heavy burden required to take advantage of the good faith defense. Therefore, defendants' motion for summary judgment as to the good faith defense is DENIED.

2.2 Compensible Hours

Walsh v. East Penn Manufacturing, Inc., 555 F.Supp.3d 89 (E.D. Pa. 2021)

PRATTER, United States District Judge.

The Secretary of Labor initiated this action against East Penn Manufacturing Co., Inc., a battery manufacturer, alleging that East Penn has failed to compensate its employees for time spent changing into and out of uniforms and personal protective equipment and showering at the end of a work shift. East Penn does not dispute that the time spent donning, doffing, and showering is compensable under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 203 *et seq.* The crux of the dispute is whether East Penn's pay policies, which compensate employees based on what it deems a "reasonable" time for these tasks, are sound as a matter of law and sufficient as a matter of fact. Contrary to the Secretary's contentions, East Penn disputes that it is legally required to compensate for the actual time expended by any given employee. But to the extent that such compensation as it pays is deficient, East Penn then maintains that the difference between what is "reasonable" and what would be "actual" is de minimis. Like the Energizer Bunny, the parties have pounded their steady drumbeats, with each side steadfast in its belief that it poses the correct standard of measurement.

BACKGROUND

East Penn manufactures and recycles lead acid batteries at its Lyon Station, Pennsylvania campus. The Lyon Station facility consists of roughly 30 separate divisions and plants, including automotive, industrial, metals, and manufacturing support services. East Penn employees are not union represented and have not entered into a collective bargaining agreement with their employer.

Most of East Penn's plants operate 24 hours a day, divided into three consecutive eight-hour shifts. The exception is East Penn's "continuous operations" departments which—as its name suggests—operate with partially overlapping eight-and-a-half hour shifts. The overlapping scheduling ensures that the machines in those plants are never taken offline.

East Penn requires that all employees at the Lyon Station campus wear personal protective equipment, regardless of their risk of exposure to lead, chemicals, or other hazards. Because of the chemicals with which they work, certain East Penn employees are required to change out of their street clothes and into a uniform prior to entering the production floor at the beginning of their shifts. This uniform is supplied each day and the employee is required to be fully dressed in the uniform prior to entering the production floor. Depending on the hazards associated with the job, East Penn also requires certain employees to wear additional PPE, including safety shoes, respirators, and hard hats.

At the end of their shifts, uniformed employees remove their uniforms and change back into their street clothes prior to leaving the facility. Some of them also shower as part of their end-of-shift activities. The parties dispute whether all uniformed employees are required to shower as part of the end of shift activities. East Penn maintains that only uniformed employees who work in defined lead exposure areas must shower. But it is undisputed that employees face disciplinary action for failing to wear their uniforms and for failing to shower, if showering is required.

A. Tracking East Penn Employees' Time

East Penn maintains two sets of time records for each of their employees. The first is what East Penn deems "actual" time (or "Actl" as appears on some time sheets). Per East Penn policy, all employees are required to swipe in and out using a card-scanning system located in the plant to which they are assigned. Employees are required to swipe in no more than 14 minutes before the start of their shift and 14 minutes after the end of their paid shift. The time clock system records these swipe times to the minute, which are then preserved in East Penn's "mainframe."

The second set of time records is for "adjusted" time. Adjusted time corresponds to the employees' scheduled shift times and does not show the 1-14 minutes before and after shifts. Both the actual and adjusted time entries appear on an employee's Payroll Transaction Edit List.East Penn does not pay for "actual" time—that is, the recorded between the swipes. Instead, East Penn pays employees based on "adjusted" time—the length of their scheduled production shift—which is paid out in 15-minute increments. Some employees swipe in when their shift time officially starts so there is no discrepancy between "actual" and "adjusted" time.

The parties dispute the import of time clocks and East Penn's requirement that employees clock in and out no more than 14 minutes from the start and end of their shifts. East Penn maintains that the time clock policy is used only as an attendance tool to ensure that employees are in the plant for their full shift, not to mark the official beginning or ending of the continuous workday as a means to calculate pay. The Secretary contends that the "14-minute rule" is probative of East Penn's knowledge that its employees required more than the time East Penn has allotted to complete pre- and post-shift activities.

B. East Penn's Pay Policies for Donning and Doffing

There are two pertinent East Penn policies governing beginning and end-of-day activities. East Penn's Time Clock and Pay Procedures, effective as of 1998, require that each employee be at her or his workstation at shift starting time. In 2003, East Penn formalized a five-minute "grace period" for compensable start-of-shift clothes changing (the 2003 Company Uniform Policy). Under this policy, "for pay purposes," employees have five minutes after the start of their shift to report to their workstation.

In 2016, in response to an employee complaint, East Penn increased its paid shower and end-of-shift clothes changing time in all plants to ten minutes (the 2016 Personal Protective Equipment/Uniform/Shower Policy). Since then, if an employee works in an area that requires a uniform, the following policy applies:

1. Employees are expected to be at their designated workstations wearing their uniform and other PPE (Personal Protection Equipment) at the start of their shift. For pay purposes, *employees will be granted a five-minute grace period* after the start of the shift to report to their workstation for the purpose of donning uniforms. Employees may be granted longer clean up time in departments or under certain circumstances when approved by Plant Management of Supervisor.

2. Employees will be granted a *10-minute shower time* which includes walking distance to the locker room, doffing the uniform and showering.

C. Time Spent by Uniformed Employees on Pre and Post Shift Activities

The time that East Penn employees spend donning, doffing, and showering is compensable. The parties dispute whether the employees performed this compensable work outside of their eight-hour shift times.

During discovery, East Penn stated that its pertinent personnel are aware that some employees don their uniforms prior to the start of their shift and that some employees arrive at their workstations prior to the start of their shift. In support of its motion for summary judgment, East Penn submitted some 650 employee declarations. Employees attest to the time they arrive at work and their pre- and post-shift routine, including estimating the amount of time for each. Of those, roughly 200 employees acknowledged that the grace period exists, and of that subset, some of them stated that they make use of the grace period some portion of the time. Other employees declare that they acquire and don their uniform prior to the shift start.

To support its claim that employees were expected or made to work off the clock, the Secretary submitted the results of a time study conducted by his expert, Dr. Robert G. Radwin. Dr. Radwin conducted what is known as a "did-take" study that measures the actual time employees spent to perform given tasks. Of the 29 plants within the Lyon Station complex, he selected a subset of eight plants to study. Within those eight plants, he and his research team ultimately observed the pre-shift activities of 370 randomly selected employees who were required to wear uniforms and PPE and post-shift activities of 131 employees who were likewise required to wear uniforms and shower. Doc. No. 174 at 9.

To determine when uniformed employees begin their pre-shift activities, Dr. Radwin measured the time between their "first touch"—i.e., when they acquired their uniform or PPE item—and compared that time to their shift start time. Dr. Radwin concluded that, for those uniformed employees, the 370 uniformed employees performed their "first touch" approximately 15.6 minutes before their shift time started. As for measuring the time to complete end-of-shift activities, Dr. Radwin recorded the time that uniformed employees left the production floor and the time of their last touch. Dr. Radwin did not compare the results of his study to the amount of time East Penn's pay policies operate to compensate an employee.

East Penn admits that Dr. Radwin's "own subjects acquired and donned their uniform either entirely or *partially on paid time,* i.e., during East Penn's grace period."

DISCUSSION

I. Applicable FLSA Law

The Court begins its evaluation of the three cross-motions for summary judgment and three motions to strike by providing an overview of the FLSA, the Portal-to-Portal Act, and case law bearing on the compensability of the activities at issue in this case and an employer's statutory obligations.

Though perhaps surprising, the FLSA does not define "work." The Supreme Court has described work, for purposes of the Act, as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." Over 50 years ago, the Supreme Court held that the time spent walking to workstations after punching a timecard was compensable. *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680 (1946). But the Court also introduced a limiting principle to the idea that any time spent on such work is necessarily compensable. "Insubstantial and insignificant periods of time spent in preliminary activities need not be included in the statutory workweek." The "de minimis" doctrine thus allows for "only a few seconds or minutes of work beyond the scheduled working hours to be disregarded" to avoid "split-second absurdities." The doctrine, which accounts for the realities of the industrial world, is not an unfamiliar principle of practicality.

Concerned about the potential overbreadth of the result in *Mt. Clemens,* Congress enacted the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251 *et seq.,* which amended provisions of the FLSA and carved out activities that might otherwise be considered compensable. Relevant to this case, the Portal-to-Portal Act precluded compensation for "preliminary or postliminary" activities to the principal work. 29 U.S.C. § 254(a)(2). "Principal activities" are those that the employee is "employed to perform" or activities that are integral and indispensable to the principal activity. 29 C.F.R. § 790.8. The Portal-to-Portal Act did not, however, alter or amend the Court's definition of "work," nor did it disturb the de minimis doctrine. 29 C.F.R. § 785.7.

The Supreme Court subsequently held that activities before or after the workday that are an "integral and indispensable part of the principal activities" are compensable under the FLSA. *Steiner v. Mitchell,* 350 U.S. 247 (1956). *Steiner* held that donning and doffing personal protective gear and post-work showering were integral and indispensable for certain workers in a battery plant who regularly handled hazardous materials. The Court confirmed that it "would be difficult to conjure up an instance where changing clothes and showering are more clearly an integral and indispensable part of the principal activity of the employment than in the case of these employees." Because the time spent changing clothes and showering constituted "work" under the FLSA, the battery plant employees were entitled to compensation during or for those activities.

Most recently in *IBP, Inc. v. Alvarez*, the Court sought to clarify the definition of "compensable time" under the FLSA in light of both the Portal-to-Portal Act and Steiner. Finding that doffing gear that is integral and indispensable to work is a principal activity, the Court went on to hold that time spent waiting to doff is covered by the FLSA and is not affected by the Portal-to-Portal Act. Conversely, it held that time spent waiting to don the first piece of gear—to mark the start of the continuous, and compensable, workday—is not covered by the FLSA.

In some respects, the *Alvarez* decision announced some clear markers. The Department of Labor interpreted *Alvarez* to "clearly stand for the proposition that where the aggregate time spent donning, walking, waiting and doffing exceeds the de minimis standard, it is compensable." The Court, however, did not resolve all ambiguities that have percolated since *Steiner*—notably what the parties contend is a burgeoning circuit split over how to calculate compensable time.

II. The Secretary's Motion for Partial Summary Judgment

The Secretary requests that the Court rule in his favor on 11 separate issues that go both to East Penn's liability and available damages. The Secretary seeks summary judgment in his favor as to the substantive FLSA claims as to liability and to foreclose East Penn from contesting damages, including by presenting a de minimis defense. The Court, having carefully reviewed the disputes of fact that prevent resolution of certain issues on summary judgment, grants the Secretary's motion in part and denies it in part.

A. Uncontested Issues

Of the 11 grounds raised by the Secretary, East Penn does not dispute two of them: it admits (1) that it is a covered enterprise engaged in commerce or in the production of goods for commerce under the FLSA, and (2) that the donning and doffing activities at issue are considered "integral and indispensable" within the meaning of *Steiner v. Mitchell*. Accordingly, the Court grants summary judgment in the Secretary's favor as to these two undisputed issues.

B. Correct Measurement of Compensable Time

The Secretary moves for summary judgment as to the activities that start and stop the "continuous workday." The "continuous workday rule" defines the "workday" as "the period between the commencement and completion on the same workday of an employee's principal activity or activities." The Supreme Court held that "principal activity or activities embraces all activities which are an integral and indispensable part of the principal activities." Although East Penn admits that donning, doffing, and showering are integral and indispensable activities, it does not agree that it is obligated to pay for all time between the start and stop of the continuous workday (excluding meal breaks or off-duty breaks).

As has been previewed in prior memoranda throughout this litigation, the parties vigorously dispute the correct measure of the continuous workday. The Secretary asks the Court to find, as a matter of law, that East Penn must record and pay their uniformed employees for the *actual* time it takes to don and doff a uniform and shower. East Penn asserts that it must compensate its employees only for time reasonably spent donning, doffing, and showering. East Penn admits that it does not record and has not recorded and does not pay for the actual time spent on the indisputably compensable activities. But it contends that the 15 minutes of compensable time it applies to its employees (i.e., the five-minute grace period at the start, and the ten minutes at the end of the day) is reasonable and sufficient.

As a matter of legal principle, the Court cannot adopt East Penn's position. The Court reaches this conclusion having reviewed relevant case law, as well as the Department of Labor's rulings, opinions, and interpretations. Collectively, these sources support the Secretary's interpretation as a matter of precedent, pragmatism, and, of no small moment, achieving the purpose of the FLSA.

Although the Supreme Court in *Alvarez* did not reach the issue of the correct method of measurement, it unequivocally held that the continuous workday rule requires that employees be compensated for all time spent during the continuous workday. Nothing in the Court's opinion suggests that "all" is interchangeable or otherwise synonymous with "reasonable."

At first glance, the circuit courts of appeals that have addressed the correct measure appear to be split between an actual and reasonable time standard. Absent binding precedent from the Third Circuit Court of Appeals on this issue, this Court may look to other circuits for helpful guidance. The Ninth and Tenth Circuit Court of Appeals appear to adopt a reasonable time standard, while the Second and Sixth Circuits have endorsed an actual time requirement. But partitioning in this way is overly reductive. That is because no circuit court has endorsed the reasonable time standard after *Alvarez* was issued.

Moreover, when those courts that have endorsed a reasonable time standard, it was in the context of fashioning a damages award when there were no records of actual compensable time worked. The circuit "split" disappears when one considers the difference between liability and damages. In *Alvarez v. IBP*, the Ninth Circuit affirmed the district court's decision to calculate compensable time on the "basis of a reasonable time" as "within the district court's discretion." Although the Tenth Circuit in *Reich v. IBP, Inc* discussed a reasonable time measure for calculating back pay damages, the resulting permanent injunction obligated the defendant to "implement recordkeeping practices sufficient to record the time spent by each employee in performing pre-shift and post-shift activities found to be compensable under the Act." So put, the Tenth Circuit was not endorsing an employer's own "reasonable" calculation of work in perpetuity.

Within this Circuit, East Penn interprets *Lugo v. Farmer's Pride Inc* to "embrace" a reasonable time standard. It is true that *Lugo* permitted the defendant's expert to present evidence "to assist the jury in determining the reasonable amount of time that Defendant's employees spend on certain activities at the poultry production plant, including donning, doffing, sanitizing, washing, and walking." But finding that the expert's methodology is admissible for consideration is not a ruling on the proper standard for measuring time worked.

In each of these cases, the courts relied on reasonable estimations as a proxy to reconstruct the amount of time the employees spent because there were no time records. It does not absolve an employer of its obligations under the FLSA to record and compensate for actual time. 29 U.S.C. § 211(c).

Indeed, recent donning and doffing cases have held actual time is the appropriate standard because it more faithfully adheres to precedent and the statutory purposes of the FLSA.

East Penn seizes on certain language in *Mt. Clemens* that comments on the unfairness and impracticality of compensating employees who take "roundabout journeys to their workstation for purely personal reasons." East Penn's argument is pragmatic and, for that reason, tempting. But it is not legally sound. Theoretically, a worker could arrive well in advance of his shift, don his uniform—thereby initiating the continuous workday—then lounge about for some extended amount of time, and claim compensation for that leisure time. The Court is certainly mindful of this possibility. To the extent East Penn is fearful of excess idling, it can implement policies to manage the work performed during the continuous workday. But speculation that an intrepid, self-indulgent employee might take advantage of the legal standard cannot support prophylactically chiseling wages.

Beyond persuasive jurisprudence, the Court can also consider the Secretary of Labor's and the Wage and Hour Division's rulings, opinions, and interpretations as they "constitute a body of experienced and informed judgment."

Support for the actual time standard appears in Department of Labor regulations, including one that East Penn relies on. Although 29 C.F.R. § 785.48(a) does not obligate an employer to use time clocks, for those that do—like East Penn— the regulation discourages discrepancies between clock records and "actual hours worked." That is because gaps in those time values "raise a doubt as to the accuracy of the records of the hours actually worked."

In what has pre-occupied much of the parties' post-summary judgment briefing here, the parties have submitted dueling notices of supplemental authority from prior DOL interpretations and guidance. Each side claims they are providing the clean, unambiguous answer. The Court cannot agree. The stacks of briefing on competing interpretations alone suggest the answer is not so obvious. So, the Court gives minimal probative value to these "authorities."

The Secretary cites to a 2001 Opinion Letter from the Wage and Hour Division, which it argues establishes the DOL's endorsement of actual time. In response to whether an employer could permissibly pay all employees based on an average amount of time that all employees work, the DOL responded that "company must record and pay for each employee's actual hours of work, including compensable time spent putting on, taking off and cleaning his or her protective equipment, clothing or gear."

East Penn relies on the DOL's Wage and Hour Division Field Operations Handbook for what it contends supports a reasonable time standard. Courts have found that the Handbook lacks the force of law and is not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). However, the Handbook may be considered to the extent it offers persuasive guidance. *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944).

The Handbook authorizes employers to "set up a formula by which employees are allowed given amounts of time to perform clothes changing and washup activities, provided the time set is reasonable in relation to the actual time required to perform such activities." To the extent the Court considers the Handbook, it is at most of little relevance. That is because the cited provision applies where a collective bargaining agreement governs but is silent whether clothes changing and wash-up time should be included in hours worked. CBAs are a means of ordering a labor relationship between employer and employees through the private law. Here, there is no CBA for East Penn employees.

But even if a CBA were in place, East Penn relies on version of the FOH from 1996. The later-in-time 2001 Opinion Letter from the DOL states that a company must record and pay for actual hours of work.

Finally, the Supreme Court has consistently held that the FLSA should be liberally construed in favor of employees. The actual time standard effectuates this employee-centric policy goal, incentivizing employers to comply with the FLSA's record-keeping requirements while guaranteeing that employees are appropriately compensated.

Accordingly, the Court grants summary judgment in the Secretary's favor on this point. It is improper as a matter of law for East Penn to pay an estimated amount of time for compensable pre- and post-shift activities, as they are properly part of the continuous workday. To the extent that the concept of "reasonableness" permeates this case, it is limited to the calculation of damages once liability is established.

D. Whether East Penn Violated the FLSA Overtime Requirements

The Secretary also moves for a finding that East Penn violated the FLSA's overtime provision by failing to compensate its uniformed employees for the actual time spent donning, doffing, and showering. In other words, the Court must find that no reasonable jury could find that East Penn did not fully compensate its uniformed employees for the actual time spent on these activities.

Even though the Court found that East Penn's records are inadequate, the Secretary has the burden of proving that the employees have actually performed work for which they were improperly compensated.

East Penn does not dispute that it does not compensate for actual time spent on these activities. That is because East Penn maintains that it pays for what it deems a "reasonable" amount of time as part of the shift time. East Penn's undisputed pay policy for uniformed (non-continuous operations) employees provides for five minutes of donning time, should the employee use the "grace period," and ten minutes of doffing and showering time— independent of whether it takes employees more or less than this allotted amount of time. But, in opposing summary judgment as to its liability, East Penn argues that the Secretary has failed to show that the employees' claims exceed the time already compensated.

In support of its motion, the Secretary relies on (1) East Penn's admissions, (2) employee declarations that East Penn gathered and submitted, (3) time study data from Dr. Radwin, and (4) East Penn's time clock records showing the swipe in and out time.

First, the Secretary relies on East Penn's own admissions that its pay practices violate the FLSA's overtime provision. In its responses to requests for admission and deposition testimony from managers, East Penn admits that it is aware that "some employees chose to don required PPE before their scheduled shift starting time, that"some employees chose to shower after their schedule shift time," and that management observed employees arriving at their workstation prior to their shift time. It is undisputed that East Penn employees are paid for their scheduled eight-hour shift time. So, if an employee dons his uniform prior to the start of his shift—an activity that East Penn does not dispute is compensable work—East Penn admittedly does not compensate for that time.

East Penn responds that not all employees don uniforms and PPE prior to the start of their shift, opting instead to use the grace period, nor are they required to. But it undisputed that East Penn's Time Clock and Pay Procedures require that each employee be at his workstation at shift starting time. East Penn does not square this seeming inconsistency. Rather, it relies on employee declarations that acknowledge the existence of the grace period and their use of it. Because the correct legal standard is payment for "actual" work, the existence of the five-minute grace period—whether illusory as the Secretary contends or fully in effect as East Penn urges—does not change the analysis. If an employee acquires and dons his uniform prior to the start of his shift, that employee has "suffered" work and is legally entitled to compensation.

Second, the Secretary points to the roughly 650 declarations from East Penn employees that the company gathered and submitted as evidence that its employees routinely used more than five minutes for donning activities. East Penn does not dispute the authenticity or contents of the hundreds of these declarations.

The Secretary maintains that overtime violations appear on the face of the declarations that East Penn produced. Certain employee declarants attest to the grace period but take more than the allotted five minutes.

East Penn responds that the declarants also state that they "believe that they have been properly and fully compensated for all straight time and overtime hours associated with their regular production work as well as their donning/doffing activities before and after their regularly scheduled shift time." So, East Penn maintains, the employees themselves undermine the Secretary's case. The Court is not so convinced for two reasons. First, to the extent East Penn questions the reliability of the time estimates, such a challenge does not raise a genuine dispute of material fact. That is because East Penn does not dispute the fact the employees have stated that they don their uniforms and PPE *prior* to the start of their shift. It is this admission of work performed out-side of the compensable eight-hour shift that the Secretary relies on to establish liability.

Second, at summary judgment, the Court avoids credibility determinations as to the declarants' beliefs. To the extent the declarations contain evidence that is unfavorable to East Penn's case, that evidence can nevertheless be construed against East Penn. That is because East Penn is the party proponent of the evidence and because it is clear that the formats of the declarations, which each follow the same format, were prepared by counsel.

On the basis of East Penn's admissions and its own declarations—the contents of which East Penn does not dispute—the Court finds that the Secretary has established that East Penn's pay practices violate the FLSA's overtime provisions as to its uniformed non-continuous operations employees. Although the Court finds East Penn has admitted liability as to this subgroup of employees, that is not the end of the inquiry. Rather, this ruling is separate and distinct from determining whether East Penn can assert a de minimis defense that may reduce or eliminate any damages.

The Secretary also offers Dr. Radwin's time study as representative evidence to establish that employees donned, doffed, and showered outside of their paid shift times. As for end-of-shift activities, Dr. Radwin calculated that, for the 125 uniformed employees he studied, 11 minutes passed between leaving the production floor and completing their last activity. East Penn does not dispute that he reported an 11-minute average, to the extent he documented his observations. But it notes that this figure does not account for the ten minutes of paid time (and 20 minutes for continuous operations employees) that its employees are allotted at the end of a shift. Indeed, Dr. Radwin testified that he did not calculate a measure of uncompensated time and acknowledged that some number of his subjects were compensated—in whole or in part—for those activities measured.

As to pre-shift activities, of the 370 uniformed employees he chose to study, Dr. Radwin estimated that, on average, they began their workday roughly 16 minutes before shift started. East Penn does not dispute that this is the figure Dr. Radwin reported. But it again criticizes the reliability of this assertion, including whether the employees' activity actually is "integral and indispensable" —hence, compensable—so as to start the continuous workday.

East Penn has launched numerous challenges to Dr. Radwin's methodology and calculations, including his admitted extrapolating the estimated one-plant average to all plants and employees, the reliability of his methodology. The Court has already found that these attacks go to the weight of his testimony—"vulnerable as it may very well be"—and not to its admissibility.

The Court already found that the task of evaluating Dr. Radwin's methodology and the import of his findings should go to the jury. Indeed, a reasonable jury could very well discredit or give little weight to this expert's sampling testimony, including whether it is "representative," and whether it measured compensable activities. The Court declines to step into the jury's shoes and conduct the weighting itself as a matter of law on the papers. Moreover, the Court finds that Dr. Radwin's estimations arguably go to any damages determination at trial.

E. East Penn's Time Clock Records as Minimum Amount of Uncompensated Time

The Secretary also moves for summary judgment on a finding that East Penn's swipe in and out time clock records constitute the "indisputable" minimum measure of overtime hours worked. According to the Secretary, the amount of time between punch time and shift time is time that East Penn knowingly "shaved off." So doing, the Secretary seeks to use these records as a proxy for uncompensated time.

The parties dispute whether the punch records are probative of anything that would establish liability. East Penn contends that its "14-minute rule" serves only as an attendance policy and is common throughout the manufacturing industry, including being used by the employer in *Mt. Clemens*. The Supreme Court found there that "the time clocks do not necessarily record the actual time worked by employees." Nor are time clocks controlling when "the employee is required to be on the premises or on duty at a different time or where the payroll or other facts indicate that work starts at an earlier or later period.

The Secretary argues that the time clock data is the best evidence of the minimum amount of uncompensated time that East Penn owes its uniformed employees. He bases this claim on certain of East Penn's own employees' declarations that describe performing their donning and doffing activities contemporaneous with clocking in and out, as well as Dr. Radwin's observations that, on average, employees in his time study swiped in after their first donning activity.

The fundamental problem with the Secretary's hopscotch to damages, as East Penn notes, is that the Secretary has not carried his burden yet to establish liability as to the 10,000-some employees he purports to represent. Although the Court finds that the Secretary has established that he succeeds on liability as to non-continuous operations uniformed employees, he seeks overtime damages for many other categories of employees for which he has certainly not adduced representative evidence.

Moreover, the Secretary's argument presupposes that employees contemporaneously clock-in with performing their first and last principal activity. East Penn does not admit this fact. Although the Secretary cites to certain employee declarations attesting to this fact, other declarants state that they clock in, attend to non-compensable work, then retrieve and don their uniform. East Penn has raised at least a factual issue to show that it does not have to compensate for all "recorded" time between the punches because employees began their compensable workday after clocking in.

The Secretary's claim is also complicated by the findings of its own time study expert. Dr. Radwin estimated that, on average, the employees he studied swiped their timecard 1.2 minutes *after* they had completed their last clothes-changing activity. Even accepting the Secretary's premise that the time swipes are any sort of proxy, it is undisputed that the time swipe records on average overestimate the amount of compensable work for post-shift activities. Accordingly, the Court cannot find that the record "indisputably" establishes that the actual clock swipe records are the minimum amount of time worked for purposes of establishing damages.

To be sure, the Court's decision on this point does not preclude, nor should it be taken as precluding or otherwise limiting, the Secretary from submitting the actual clock records at trial to try to establish his claim for damages.

F. East Penn's de minimis Defense

Preliminary and postliminary activities that are deemed integral and indispensable are theoretically compensable although they may not be automatically so. The de minimis doctrine provides a "limiting principle to compensation for trivial calculable quantities of work." The Secretary moves for summary judgment to foreclose East Penn from presenting a de minimis defense at trial. According to the Secretary, East Penn has failed to establish that it satisfies the requirements of 29 C.F.R. § 785.47. At summary judgment, the Secretary must show that no reasonable jury could find that the amount of compensation is not de minimis.

In evaluating a de minimis defense, the Third Circuit Court of Appeals has held the following factors be considered: "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." The line between compensable and de minimis time is fact-specific and the defense necessarily applies on a case-by-case basis. Indeed, the Court is not aware of any court within this Circuit that has granted summary judgment to an FLSA plaintiff to prevent a defendant from asserting a de minimis defense at trial. (The Secretary, to his advocate-nature credit, located two out-of-circuit decisions.)

As a threshold matter, there is no genuine dispute of fact that East Penn's employees regularly don, doff, and shower as part of their work. East Penn required all employees to wear PPE and required its uniformed employees to be fully dressed in their uniform and boots prior to entering the production floor. East Penn points out that its employees may perform their donning and doffing activities differently each day. But the order in which an employee opts to don his uniform and PPE on a particular day does not rebut a finding that the activities are performed on a regular basis.

The Secretary submits that whatever practical administrative challenges inherent in measuring the time worked are minimized by the fact that East Penn already uses time clocks and requires employees to swipe in and out. The mere existence of the time clocks, according to the Secretary, establishes that East Penn could—but chooses not to—promulgate a policy that pays based on actual swipe times.

According to East Penn, the Secretary's proposal that East Penn simply install more time clocks and implement new policies governing clocking in and out cannot be considered at summary judgment because it derives from the Secretary's descriptions of other battery manufacturing plants. Although these third-party practices are not in evidence in this case, the Court rejects that East Penn's claim that it cannot consider whether East Penn can theoretically add more clocks to its production floors. East Penn controls how and where it places time clocks as well as the policies governing swiping in and out. Moreover, East Penn's timekeeping system permits it to accurately record increments of time to the minute. So, the system that East Penn already has in place rebuts the notion of administrative difficulties it may face in accurately tracking the actual amount of time spent on pre- and post-shift compensable work.

But East Penn's more compelling argument is that the focus of this factor is not on the employer's theoretical technological capability. Rather, the proper inquiry is whether there is wide variation in the amount of time spent on pre- and post-shift activities among East Penn's uniformed and PPE-wearing employees. The fact of variation is corroborated by Dr. Radwin's measurements. For example, he reported a range of zero minutes to greater than 51 minutes reflecting the time between the employees starting their pre-shift activities and their shift. Neither party expressly addresses how much of this pre-shift time was spent on actual compensable work. And despite the breath-taking volumes of briefing and exhibits, "the court is not obliged to scour the record to find evidence that will support a party's claims."

That said, the Court has reviewed the contents of employee declarations that include estimates of the amount of time to don a uniform and walk to their workstations. Without weighing the credibility of these declarants, the Court notes a pattern among employees who attest to spending between three and nine minutes on these activities. So, within Dr. Radwin's own limited study, there are swaths of time spent on non-compensable activities (i.e., time spent in the break room, cafeteria, or "smoke shack"). At a minimum, East Penn has raised a genuine issue of fact as to the practical feasibility of precisely recording time for purposes of payroll that separates out compensable from social and non-compensable activities.

As for the aggregate amount of compensable time involved, the Court finds that genuine disputes preclude granting summary judgment to the Secretary. As a threshold matter, the amount of time that employees don, doff, and shower each day is a disputed issue. The parties' time-study experts employed different methodologies to calculate the amount of time employees spent performing their pre and post-shift activities. And the Court has permitted each party to introduce evidence of both methodologies and findings. Even crediting the results of Dr. Radwin's study, East Penn submits that the results support a finding that any left-over uncompensated time for post-shift work is de minimis.

In particular, Dr. Radwin estimated an average of 11 minutes and a median 10.8 minutes for end-of-shift clothes changing and showering. It is undisputed that East Penn's policy (since 2016) provides for ten minutes of paid time for these activities. Accepting the validity of Dr. Radwin's calculations —which East Penn does not—a rational trier of fact could find that the remainder of uncompensated time according to Dr. Radwin at the end of the shift is on average a single minute. Although the Secretary may dispute whether employees are actually afforded the full ten minutes (i.e., if they are not timely released from their workstations), that dispute also supports the Court's finding that summary judgment is inappropriate. As for the 15.6 minutes that Dr. Radwin estimated for pre-shift activities, East Penn contests the validity of this finding. And because the Court has already determined that East Penn can make its arguments challenging the time study, it is inappropriate to treat these figures as established, particularly when it is the Secretary's burden here on summary judgment.

Notwithstanding the Court's finding that regularity of the work has been established, factual issues prevent the Court from granting summary judgment as to this claim. The Court finds a genuine issue of material fact remains as to the size of the aggregate claim as well as whether East Penn can practically record the time spent, given the variation of time needed in the record. The Court finds that East Penn may present a de minimis defense at trial, which will be a critical factual issue for the jury to resolve.

Clayton v. Delmarva Community Services, Inc., 447 F.Supp.3d 404 (D. Md. 2020)

Richard D. Bennet, United States District Judge.

Plaintiffs Sharon Clayton, Vivian Thomas, Linda Carr, Consowillo Travers, and Jamez Justice (collectively, "Plaintiffs") have brought this action against Defendants Delmarva Community Services, Inc. and Santo Grande (collectively, "Defendants"), alleging violations of the Fair Labor Standards Act, 29 U.S.C. § 203, *et seq.* ("FLSA"). Presently pending are the parties' cross-motions for summary judgment.

BACKGROUND

Defendant Delmarva Community Services, Inc. ("Delmarva") is a non-profit organization that provides services to people with developmental disabilities and other diagnoses, people in poverty, and senior citizens in the States of Maryland and Delaware. Defendant Santo Grande ("Grande") has served as the President and Chief Executive Officer of Delmarva for approximately the last ten years. Delmarva's services include, but are not limited to, providing day services, community transportation, vocational services, poverty programs, and residential services.

One of the residential services Delmarva provides is the Developmental Disabilities Program, which serves elderly people and people with disabilities in residential homes. Delmarva began this program in or about 1979 or 1980 in coordination with the Maryland Developmental Disabilities Administration, a state agency that provided Delmarva with funding. One of the components of this program was the creation of Community Living Assistant positions with a sleep staff shift. Based on the guidance and funding provided by the State of Maryland, sleep staff were not compensated during the time they spent sleeping overnight in

Delmarva's residential homes. This was in compliance with the program established by the Maryland Developmental Disabilities Administration.

Plaintiffs Sharon Clayton ("Clayton"), Vivian Thomas ("Thomas"), Linda Carr ("Carr"), Consowillo Travers ("Travers"), and Jamez Justice ("Justice") were all previously employed as Community Living Assistants in Delmarva's Developmental Disabilities Program.

As Community Living Assistants, Plaintiffs helped residents live an independent lifestyle in Delmarva's residential homes, assisting with individual care, supervision, daily living activities, and general safety of the residents. Plaintiffs also served as "sleep staff," staying overnight with Delmarva residents one week on and one week off, every other Thursday to Thursday in varying residential homes. Typically, Plaintiffs' work schedules were as follows:

Plaintiffs all had some amount of down time while on the clock, during which time they did not have to complete any tasks and were able to watch television, use social media, make personal telephone calls, play games, read, or just relax. For example, Plaintiff Clayton spent much of her shift watching television, sending text messages, or using social media. Plaintiff Thomas engaged in personal activities during her working hours, such as making telephone calls, watching television, and using social media. Plaintiff Carr watched television, read, and played games on her phone. Plaintiff Travers also read during her down time. Plaintiff Justice watched television, relaxed, or read magazines and books in his down time. The time the Plaintiffs clocked out at the end of each workday until they clocked back in the next morning was time designated for sleep or other personal pursuits.

Plaintiffs' "workweek" began on Monday and ended on Sunday. Plaintiffs clocked in and out of each work shift using Delmarva's "e-time system," whereby they would use the Delmarva residence's telephone to dial a given number and punch in their personal code. When Plaintiffs were unable to clock in or out, or if they forgot to do so, they would contact their supervisor, Angela Major-Hill, who would ensure that Plaintiffs were properly compensated for time that was not recorded by the e-time system.

When Plaintiffs "clocked out" at night, they slept at the Delmarva residence and were not permitted to leave. During this "sleep time," Plaintiffs either slept, watched television, read, or engaged in other personal activities. If they were awakened by a resident during this time, they were instructed to clock back in while attending to the situation in order to be paid for the time spent working.Plaintiffs were occasionally awakened to assist residents during the night.

The Delmarva residences where Plaintiffs worked were typically single-family homes. Plaintiffs slept alone in rooms that were used by other sleep staff members during their off-duty weeks. Plaintiffs were not permitted to leave their belongings at the residences during their off-duty weeks.

While Plaintiffs had varying sleeping arrangements at the Delmarva residences, they all had their own rooms. All of the Plaintiffs' sleeping arrangements included a bed and a lamp or lighting, and some included a television, closet, chair, and additional furniture. All of the homes had at least one bathroom, a kitchen, and a living space. Plaintiffs were not permitted to have guests for periods longer than ten minutes.

At some of the residences, Plaintiffs were not provided with dressers or closets to keep their belongings. At one of Plaintiff Thomas's assigned residences, she slept in a room off the kitchen with a transparent sliding door, through which the residents had to travel to reach their bedrooms. At another residence, Plaintiff Thomas slept in an open room without a door separating it from the kitchen.

Defendants affixed the required Fair Labor Standards Act and Maryland Wage and Hour Law postings at their headquarters in Cambridge, Maryland, but not in any of the residences to which Plaintiffs were assigned. Plaintiffs all acknowledged that they saw the postings at Defendants' headquarters, just beyond the front desk in the lobby of the headquarters. When Plaintiffs accepted their positions with Delmarva, they were informed of the job's requirements, the schedule, their non-exempt employee status, the pay structure, *and the fact that they would not be paid for their sleep time.*

It is undisputed that Plaintiffs were not compensated for the time they spent sleeping overnight in Delmarva's residences. It is also undisputed that the parties did not execute a written agreement excluding the time Plaintiffs were required to remain in Delmarva's residences overnight from Plaintiffs' compensable time. Delmarva's employee handbook also does not contain any written statement about their sleep time policy, but it does explain that some schedules and shifts include "7 Days On/7 Days Off (with a sleep shift)."

ANALYSIS

Plaintiffs seek compensation for the "sleep time" they spent at the Delmarva residences in between their on-duty work hours. Defendants assert that Plaintiffs' time spent sleeping is not compensable under the FLSA. The undisputed record before this Court reveals that summary judgment is warranted on all of Plaintiffs' claims in favor of the Defendants because Plaintiffs' "sleep time" was not compensable work as a matter of law.

II. Plaintiffs' FLSA Claim Fails as a Matter of Law.

Under the FLSA, employers must compensate employees for all of their hours worked, at a rate that is not less than the federal minimum wage rate. 29 U.S.C. § 206. In addition, the FLSA provides that employers must compensate employees "at a rate not less than one and one-half times" the employee's regular hourly rate for any time the employee is required to work in excess of a 40-hour workweek. 29 U.S.C. § 207.

The parties agree that Plaintiffs were not compensated for their time spent sleeping. The parties also agree that Plaintiffs accepted their jobs with the knowledge that they would not be paid for sleep time, despite the absence of a formal written agreement to this effect. There are no genuine issues of disputed facts in this matter. There is simply the legal question before this Court: whether the Plaintiffs are entitled to compensation for their sleep time.

To determine whether this time is considered working time under the FLSA, the United States Supreme Court has explained that employees must be compensated if they are "engaged to wait," but an employer is not required to pay an employee who is merely "waiting to be engaged." *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The United States Department of Labor ("DOL") has implemented regulations to determine whether time spent by employees is compensable as working time. *See* 29 C.F.R. § 785. Specifically, the DOL implemented separate regulations regarding "waiting time" under 29 C.F.R. §§ 785.14-785.17 and "sleeping time and certain other activities" under 29 C.F.R. §§ 785.20-785.23.

Under 29 C.F.R. § 785.14, "waiting time" is compensable if it is time spent "engaged to wait." This determination "depends upon particular circumstances," such as the "scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances." 29 C.F.R. § 785.14.

Under 29 C.F.R. § 785.23, "an employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises." Accordingly, an employer need not compensate an employee for time when an employee "may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own." 29 C.F.R. § 785.23. When an employee resides on the employer's premises, there is a presumption that he or she is not working the entire time on the premises. Further, "any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted." 29 C.F.R. § 785.23. "Ultimately, an agreement reached pursuant to section 785.23 is binding if it is reasonable in light of 'all of the pertinent facts' of the employment relationship."

A court's analysis of time under *Skidmore* and 29 C.F.R. § 785.14 is a separate and distinct inquiry of sleep time under 29 C.F.R. § 785.23.

Defendants urge the Court to find that Plaintiffs' sleep time was not compensable under both the "waiting time" analysis of 29 C.F.R. § 785.14 and the "sleeping time" analysis of 29 C.F.R. § 785.23. This Court is persuaded that Plaintiffs' time spent sleeping was not compensable under

29 C.F.R. § 785.14 and the *Skidmore* test. However, Defendants' arguments under 29 C.F.R. § 785.23 raise more complicated questions of law that need not be resolved here because summary judgment is appropriate in Defendants' favor for the separate and distinct basis that Plaintiffs' sleep time was time spent "waiting to be engaged" pursuant to 29 C.F.R. § 785.14 and *Skidmore.*

A. Plaintiffs' sleep time is not compensable because it was time spent waiting to be engaged.

To determine if on-call time is compensable under the FLSA, the critical question is whether "the time is spent predominantly for the employer's benefit or the employee's." Employees must be compensated if they are "engaged to wait," but an employer is not required to pay an employee who is merely "waiting to be engaged."

To make this determination, courts examine several factors, including: the agreement of the parties, the nature and frequency of the services provided in relation to the time spent waiting, where the plaintiff is waiting, whether the employee may carry a beeper or leave home, the employee's ability to switch on-call shifts, and whether the employee actually engaged in personal activities during on-call time. *See* 29 C.F.R. § 785.14. "The test is not whether the employee has substantially the same flexibility or freedom she would have if not on call." Rather, the relevant inquiry is "whether employees may actually engage in personal activities during on call shifts." This issue may be answered as a matter of law, or if the facts are unclear, may be answered at trial.

This Court is satisfied that this issue may be resolved as a matter of law because Plaintiffs' time sleeping was clearly time spent "waiting to be engaged." The undisputed record in this case shows that when Plaintiffs clocked out at night, they remained at the Delmarva residences and either slept, watched television, read, or engaged in other personal activities. If they were awakened by a resident during this time, they were instructed to clock back in while attending to the situation in order to be paid for the time spent working.

Plaintiffs assert that they were engaged to wait because they did not have complete freedom to leave and would be terminated if they did leave. However, as explained above, the relevant inquiry is not whether Plaintiffs had the freedom to leave, but whether they had the freedom to engage in personal activities during this time. Indeed, the Fourth Circuit has concluded that eating, sleeping, and watching television at night are just the types of personal activities that constitute "uninterrupted personal pursuits." In *Myers,* the Fourth Circuit found that "Caretakers" who were required to live at a park 24 hours per day to respond to infrequent emergencies were not entitled to compensation for such "uninterrupted personal pursuits." The Court further noted that there was "no indication that interruptions of private pursuits were frequent enough to render such time work time, that is, time spent predominantly for the benefit of the employer."

In this case, all five Plaintiffs likewise testified that they were only infrequently awakened to assist residents during the night. Plaintiff Thomas testified that "it didn't happen often." Plaintiff Carr also testified that she did not always clock in when she was awakened because she "didn't see the use to clock in for 10 minutes." Such infrequent disruption does not create a genuine dispute of fact as to whether Plaintiffs should be compensated for this time. This Court has previously granted summary judgment in favor of the employer when the employee had to reside and remain on an island but "was not so restricted that she could not use her on-call time for personal activities."

In addition, while the Plaintiffs assert that their sleeping arrangements were less than satisfactory, it is undisputed that Plaintiffs all had their own private rooms at the Delmarva residences, with a bed, lighting, and sometimes a television, closet, chair, and additional furniture. In addition, all of the homes had at least one bathroom, a kitchen, and a living space.

The fact that, at some of the homes, Plaintiffs did not have dressers or closets to store their belongings or that Plaintiff Justice slept on a sofa instead of a bed for a 6-month period does not raise a genuine dispute of material fact as to whether this time was spent waiting to be engaged. In fact, 29 C.F.R. § 785.14 makes no mention of "adequate" sleeping facilities. Rather, this language comes from 29 C.F.R. § 785.22, which Plaintiffs do not assert in this case.

Moreover, all of the Plaintiffs testified that, even during their working hours, they often had down time to watch television, use social media, make personal telephone calls, play games, read, or just relax. In addition, Plaintiffs Thomas and Carr both testified that the homes contained all of the furnishings and amenities one would find in a private house. Considering all of the circumstances and nature of the employment agreement, which Plaintiffs acknowledged did not compensate them for their time spent sleeping, the Court finds that, as a matter of law, Plaintiffs' overnight time was time during which they were waiting to be engaged, time that was not compensable under the FLSA. Accordingly, summary judgment on Plaintiffs' FLSA claim is appropriate in favor of the Defendants.

B. The Court need not apply 29 C.F.R. § 785.23.

As the party seeking the benefit of Section 785.23, Defendants bear the burden of establishing its application and that the employment agreement with Plaintiffs was reasonable. Plaintiffs argue that Defendants have failed to meet all of the requirements of 29 C.F.R. § 785.23 because Plaintiffs did not reside in Delmarva's residences for an extended period of time. Plaintiffs specifically contend that Defendants failed to provide them with adequate sleeping quarters and did not provide them with periods of complete freedom. However, the record shows that the Plaintiffs and Defendants had a reasonable employment agreement under which Plaintiffs resided at Delmarva residences for one week at a time, Plaintiffs were provided adequate sleeping accommodations and periods of complete freedom, and Plaintiffs and Defendants agreed that sleep time would not be compensated.

Plaintiffs contend that they did not reside at Delmarva's residences for an extended period of time because "they did not remain on Delmarva's premises for five consecutive nights in a single workweek." While the United States Court of Appeals for the Fourth Circuit has not specifically addressed what constitutes "extended periods of time" under 29 C.F.R. § 785.23, there is a split of authority among other circuits.

In *Beaston,* the employees worked at a residential school for seven-day shifts that began at 3:00 p.m. on a Friday and ended at 8:30 a.m. the following Friday. The Third Circuit affirmed the District Court's finding that because the employees "spend seven consecutive days and nights on campus, they reside there for an extended period of time." Under this interpretation, Plaintiffs in this case would meet the "extended period of time" requirement because they also spent seven consecutive nights in Delmarva's residences.

In *Giguere,* the plaintiffs similarly worked seven days on, seven days off from Thursday through Thursday, while their employer's workweek was Sunday through Sunday. However, the First Circuit affirmed the District Court's finding that the employer had *not* met the "extended periods of time" requirement under 29 C.F.R. § 785.23 based on a 1988 Department of Labor Enforcement Policy ("1988 DOL Policy"). The 1988 DOL Policy "stated that an employee meets the extended-periods-of-time standard when he 'resides on the premises for a period of at least 120 hours in a workweek,'" and "defined workweek' as 'seven consecutive 24-hour periods,' citing 29 C.F.R. § 778.105 which provides that once the employer has established when the workweek begins, the workweek's span 'remains fixed regardless of the schedule of hours worked by the employee.'" The Court explained that because the employer had established a workweek of Sunday to Sunday, and the employees worked Thursday to Thursday, then the employees could not be found to have resided on the employers' premises for "extended periods of time," as contemplated by 29 C.F.R. § 785.23.

Under the First Circuit's interpretation of the regulation, Plaintiffs in this case would not have resided on the Defendants' premises for an extended period of time, or at least 120 hours in the employer's workweek, because the Defendants' workweek was defined as Monday through Sunday, and Plaintiffs' sleep shifts were Thursday through Thursday.

This Court is not persuaded that the First Circuit's understanding of "extended periods of time" based on the employer's workweek is the correct interpretation. While the First Circuit noted that the 1988 DOL Policy has not been superseded and is still used by the DOL, there is additional guidance by the DOL that suggests that "extended periods of time" is not defined by the employer's workweek under 29 C.F.R. § 778.105. For example, in a 2014 Opinion Letter, the DOL defined "extended periods of time" as "to work and sleep there for five days a week (120 hours or more) or five consecutive days or nights (regardless of the total number of hours)," without reference to the employer's workweek or 29 C.F.R. § 778.105. Similarly, in a 2016 DOL Field Assistance Bulletin, "extended periods of time" was defined as "working and sleeping there for five days a week (120 hours or more) or five consecutive days or nights (regardless of the total number of hours)," without reference to an employer's workweek or 29 C.F.R. § 778.105. This varying guidance shows that the DOL has not clearly established what constitutes the requisite period of time to determine whether employees reside on their employer's premises for "extended periods of time." Consequently, this Court is not inclined to adopt the First Circuit's understanding without more definitive guidance from the DOL or the Fourth Circuit.

In any event, the circuit split on this issue is not dispositive here in light of the separate and independent basis for this Court's decision. Accordingly, because this Court found that Plaintiffs' time spent sleeping is not compensable on a separate basis, this Court need not resolve whether Plaintiffs resided on Defendants' premises for "extended periods of time" as required by 29 C.F.R. § 785.23.

Modise v. CareOne Health Services, LLC, 638 F.Supp.3d 159 (D. Conn. Nov. 1, 2022)

Sarala V. Nagala, United States District Judge.

Individual Plaintiffs Motlalepula Modise, Morwesi Mmolawa, and Tirelo Mmolawa were formerly employed by CareOne Health Services, LLC ("CareOne"), as personal care assistants ("PCAs") providing live-in care for elderly clients. They brought this collective action against CareOne and Abel Osagie ("Defendant"), the sole owner of the company. Plaintiffs claim that Defendant violated the Fair Labor Standards Act ("FLSA") and the Connecticut Minimum Wage Act ("CMWA") by failing to properly compensate them for overtime hours worked, including time their sleep was interrupted by the clients' needs.

Defendant has now moved for summary judgment with respect to Plaintiffs' FLSA and CMWA claims.

I. FACTUAL BACKGROUND

Pursuant to a statutory mandate, the Connecticut Department of Social Services ("DSS") implements programs designed to regulate home healthcare and companion service agencies. The agencies must comply with the regulations and procedures and, in turn, DSS reimburses the agencies for certain services provided to eligible clients.

One such agency is CareOne, a limited liability company owned and operated by Defendant. It is licensed by the State of Connecticut to provide home healthcare, homemaker, and companion services. To do so, CareOne employs PCAs2 and assigns them to particular elderly clients based on their needs. Consistent with the DSS regulations, CareOne offers two relevant types of services: one live-in PCA pursuant to DSS Procedure Code 1023z, who provides daytime assistance with the client's daily living needs; or three PCAs who work eight-hour shifts to provide full-time assistance with the client's heightened needs. Procedure Code 1023z requires an employer of a PCA providing services pursuant to that code to employ the PCA for no more than thirteen hours per day, so that the PCA can receive at least eight hours of sleep, at least five of which need to be uninterrupted, and three hours of meal break time per day. As part of the reimbursement for PCA services, DSS provides a questionnaire inquiring whether the client required care consistent with Procedure Code 1023z or a higher level of care, although it is unclear whether the client, the agency, or the PCA completes this form.

In the context of live-in PCA services pursuant to Procedure Code 1023z, both the agency and the client "share the supervisory responsibility" with respect to the PCA. Relevant here, CareOne hired Plaintiffs to provide live-in PCA services pursuant to Procedure Code 1023z, although it never executed a formal employment agreement with them. Employees were provided with an employee handbook at the beginning of their employment that outlined certain expectations. In the CareOne office, posters on the wall explained employees' rights under the FLSA. It is undisputed that CareOne did not enter into a written agreement with any of the three named Plaintiffs to exclude their sleep time from their compensable hours.

Plaintiff Precious Modise ("Modise") was employed by CareOne as a PCA from April 30, 2017, to September 27, 2019. During that time, she lived with her client, Ann, who provided food and housing for her. Modise took approximately three breaks for personal time throughout each day, amounting to three hours total. It is undisputed that Modise observed that Ann "had a sleeping problem" since beginning to work with her. Modise attests that Ann typically went to sleep at 8:00 p.m.; then woke up around 11:00 p.m. and returned to sleep around midnight; then woke up around 2:00 a.m. for about thirty minutes; then woke up again around 5:00 a.m. It is further undisputed that Modise never documented the sleep interruptions in either of the two activity documentation systems provided by CareOne. Modise contends that she orally informed Defendant about Ann's sleeping problems and that Defendant disregarded her concern, but Defendant contends that Modise never informed him about Ann's sleeping problems.

Plaintiff Tirelo Mmolawa ("T. Mmolawa") was employed by CareOne as a PCA from March 2, 2017, to September 14, 2019. Prior to his employment with CareOne, T. Mmolawa had been providing live-in PCA services to his client, Haddad, through a different agency. When Haddad sought PCA services from CareOne in March of 2017, T. Mmolawa was hired by CareOne, and thereafter he continued living with and providing services for Haddad. T. Mmolawa took breaks throughout the day for meals, smoking, and other personal time. T. Mmolawa attests that Haddad typically woke up four or five times each night, but, as with Modise, the parties dispute whether T. Mmolawa orally informed Defendant about Haddad's sleeping problems. It is undisputed that T. Mmolawa did not document Haddad's sleeping problems in either of the two activity documentation systems provided by CareOne. In March of 2019, Defendant reassigned T. Mmolawa to provide services to a different client, who did not experience sleeping problems.

Plaintiff Morwesi Mmolawa ("M. Mmolawa") was employed by CareOne as a PCA from March 20, 2017, to September 15, 2019. During that time, she lived with her client, Geraldine, who provided food and housing for her. M. Mmolawa took breaks throughout the day for meals, personal hygiene, and phone calls. It is undisputed that Geraldine did not have routine sleeping problems. M. Mmolawa attests, however, that she had to care for Geraldine overnight in the emergency room twice per month and that she informed Defendant of these visits.

Turning to the facts surrounding Plaintiffs' wages, it is undisputed that they were paid $1960.00 for every two weeks of work. The calculation of that wage, however, is hotly disputed. Plaintiffs attest that they were paid a daily flat rate of $140.00. Mathematically, this is consistent with the undisputed fact that they were paid $1960.00 for every fourteen days of work, given that $1960.00 divided by fourteen equals a daily wage of $140.00. Plaintiffs further represent that, during the course of their employment, they never received a paystub or other itemized breakdown of their overtime wages or food and housing deductions.

Defendant represents that Plaintiffs were not paid a daily flat rate, and that his calculation of Plaintiffs' wages proceeded in the following manner. First, Defendant would determine the amount of a food and housing credit. To do so, Defendant would obtain the relevant expenses from the clients, such as their mortgage payment, utility bills, property insurance, and grocery bills. If the clients did not provide him with the actual bills, which appears to have frequently been the case, he would review "certain publications" to determine "what rates are in the area." After ascertaining the clients' food and housing expenses, either actual or approximate, he would calculate a weekly amount and credit that amount to Plaintiffs' wages. For example, Defendant's records indicate that $469.66 were credited to Modise's weekly wage to account for the food and housing provided by her client Ann. Defendant did not apply the credit on a weekly basis, however; rather, he divided the weekly food and housing credit into an hourly credit. The food credit was applied hourly throughout the entire week, but the housing credit applied only to hours above fifty-one hours per week, in other words, each hour of days five through seven of the workweek. Id. Defendant contends that, as the days progressed in the workweek, the hourly food and housing credit grew commensurately until the final take-home wage for a seven-day workweek, including the overtime wages, equaled $980.00. When multiplied by two, this weekly wage resulted in the undisputed wage of $1960.00 for every two weeks of work. In essence, Defendant contends that Plaintiffs' wages, accounting for a credit in the amount of the food and housing provided by the client, ended up being $1960.00 every two weeks, but not because they earned a flat amount of $140.00 per day.

Part of the dispute in how Plaintiffs' wages were calculated stems from the fact that Defendant did not provide paystubs to Plaintiffs, either in the course of their employment or in discovery. Defendant represents that, during the relevant time period, Plaintiffs were undocumented immigrants and did not have Social Security numbers, and the payroll vendor hired by CareOne "refused to process anybody that did not have a valid Social Security number." Therefore, Defendant did not generate pay stubs for Plaintiffs. In support of the present motion, Defendant submitted records that he kept regarding Plaintiffs' weekly wages. In the course of Plaintiffs' employment, however, he did not furnish them with these records, or any further information regarding how he calculated the food and housing credit.

IV. PLAINTIFFS' FLSA CLAIM

A. Legal Standard

"The FLSA was designed to protect workers and ensure that they are not subjected to working conditions 'detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being.'" Specifically, the FLSA sets a minimum hourly wage, a maximum number of weekly work hours, and overtime wage requirements. "Under the FLSA, a plaintiff may bring a 'collective action' for his or her FLSA claims," which allows employees "to sue on behalf of themselves and other employees who are 'similarly situated.'"

An employee who brings a claim for unpaid minimum or overtime wages "has the burden of proving that he performed work for which he was not properly compensated. The remedial nature of the FLSA and the great public policy which it embodies, however, militate against making that burden an impossible hurdle for the employee." When the employer "has kept proper records of wages, hours and other conditions and practices of employment," as required by the FLSA, the employee can obtain these records in discovery and utilize such records to satisfy his or her burden of proof.

When the employer fails to keep or produce such records, however, an employee will satisfy his initial burden "if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." "An employee's burden to produce sufficient evidence is low and can be met by that employee's recollection alone." If the employee satisfies this initial burden, "the burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." "If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate."

Generally, because the FLSA contains a two-year statute of limitations, a plaintiff may recover lost wages from two years before the filing of the suit. 29 U.S.C. § 255(a). If the employer's violation of the FLSA is willful, however, a plaintiff can recover damages dating back to three years before the filing of the suit. An employer who violates the FLSA is generally liable for the unpaid minimum or overtime wages and "an additional equal amount as liquidated damages."

B. The Parties' Arguments

Before examining the merits of the parties' dispute as to the FLSA claim, the Court briefly summarizes their main arguments on this claim. At base, Plaintiffs' complaint alleges that Defendant did not pay overtime as required under the law. Specifically, Plaintiffs contend that they worked at least ninety-one hours per week, and thus should have been paid their regular rate of pay for the first forty hours, and one-and-a-half times their regular rate of pay for the remaining fifty-one hours. Plaintiffs also allege that their sleep breaks were frequently interrupted by their clients' needs, and that this time worked was not compensated. Because Plaintiffs were unable to have at least five hours of uninterrupted sleep per night, and because there was no agreement between Plaintiffs and CareOne to exclude interrupted sleep time, they claim that they should have been paid for the entire eight-hour rest period. Additionally, although the complaint does not allege that Defendant improperly deducted excessive amounts for food and lodging provided to Plaintiffs, that has become a central focus of the parties' summary judgment briefing. Based on these allegations, Plaintiffs claim that Defendant has committed a willful violation of the FLSA.

Defendant moves for summary judgment on Plaintiffs' FLSA claim. In short, Defendant contends that he accurately calculated and paid Plaintiffs' wages and overtime such that he did not violate the FLSA at all, much less willfully. Specifically, he argues that he appropriately credited against Plaintiffs' wages the value of food and housing provided to Plaintiffs; that Plaintiffs did not tell him that their sleep was being interrupted, so he could not act on those issues; and, accordingly, that he properly calculated Plaintiffs' pay. Defendant thus contends that there are no genuine issues of material fact, and that he is entitled to judgment as a matter of law.

C. Wage & Overtime Calculation

The Court begins with Defendant's contention that he properly calculated Plaintiffs' overtime pay, and finds genuine disputes of material fact that preclude summary judgment in Defendant's favor. "To establish liability under the FLSA on a claim for unpaid overtime, a plaintiff must prove that he performed work for which he was not properly compensated, and that the employer had actual or constructive knowledge of that work." Thus, Plaintiffs' FLSA claim presents two issues for the Court to consider at the summary judgment stage: first, whether Plaintiffs were properly compensated for overtime hours it is undisputed that they worked; and second, whether Plaintiffs are entitled to compensation for overtime hours it is disputed that they worked. For the reasons that follow, the Court finds genuine disputes of material fact as to both issues.

1. Pay for Undisputed Hours

First, it is undisputed that Plaintiffs worked more than forty hours per week and were entitled to overtime compensation. Specifically, the undisputed facts are that Plaintiffs typically worked at least thirteen hours per day for seven days per week, for a total of at least ninety-one hours per week. Plaintiffs contend that their daily wage of $140.00 did not reflect proper overtime compensation, whereas Defendant contends that Plaintiffs' biweekly wage of $1960.00 reflected proper overtime compensation. Relevant here, the minimum wage for any occupation in Connecticut, which the parties do not dispute applies here, was $10.10

per hour in 2017 and 2018, then increased to $11.00 per hour in 2019. In addition, both the FLSA and CMWA require employers to pay a rate of “one and one-half times the regular rate at which the employee] is employed” for each hour in excess of forty hours during a workweek. 29 U.S.C. § 207(a)(1). Although an employer need not compensate employees on an hourly basis, overtime compensation “must be computed on the basis of the hourly rate derived” from whatever basis on which the employees are compensated. 29 C.F.R. § 778.109.

Thus, in order to calculate how much overtime wages were owed to Plaintiffs and whether Defendant properly compensated them, the Court must “first determine the ‘regular rate’ received by plaintiffs.” “Although the FLSA does not expressly define ‘regular rate’ of pay, the Supreme Court has determined that it is ‘the hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed.’” If the employer pays the employee on an hourly basis, then the regular rate is simply the hourly rate. On the other hand, if the employer pays the employee on some other basis, such as a daily or weekly rate, then the regular rate “is the hourly rate as calculated by dividing the total sum received in a workweek by the total number of hours actually worked that week.”

Plaintiffs contend that Defendant calculated their wages as a flat per-day fee and did not pay them overtime. Defendant counters that Plaintiffs were not paid a flat fee but, rather, wages that accurately took into account overtime and credits for food and lodging. As explained below, genuine issues of material fact remain as to whether Defendant properly calculated Plaintiffs’ regular rate of pay as well as the overtime they were due for the hours that it is undisputed they worked. Thus, Defendant’s summary judgment motion cannot succeed.

a. Flat Rate

Beginning with Plaintiffs’ argument regarding their regular rate of pay, Plaintiffs each submitted affidavits stating that they were paid a “flat rate of pay of $140 per day.” M. Mmolawa admitted at a deposition, however, that she did not understand the meaning of the word “flat” as it was used in her affidavit, and T. Mmolawa testified that Defendant had never used the word “flat” in describing the pay system to him. While a plaintiff’s statements alone are generally not sufficient to create a disputed fact to survive summary judgment, here, Plaintiffs contend that basic mathematics supports their argument that they were paid $140.00 as a flat rate per day, given that pay of $980.00 per week divided by seven days equals $140.00 as a flat rate per day. Plaintiffs further point to documents entitled “Staff Pay Record” submitted by Defendant, which appear to be the closest thing to paystubs Defendant created for Plaintiffs. Plaintiffs claim that these records evince that Defendant did not separate out “straight” time from overtime and, thus, that Defendant did not in fact pay the required overtime. Indeed, the Staff Pay Record documents consist simply of two columns, “paydates” and “amount” for the corresponding paydate; the documents do not further break down what portion of the “amount” paid on a particular payday was regular time or overtime, suggesting that Defendant did not in fact separate out these categories of pay and, therefore, did not appropriately pay overtime. Plaintiffs have also submitted a more traditional paystub Defendant provided to another former employee of CareOne who is not a party to this action, as circumstantial evidence that Defendant did not properly pay Plaintiffs overtime. The traditional paystub, Plaintiffs argue, contains fields for rate, hours, and amount, unlike the Staff Pay Record Defendant created for Plaintiffs here; Plaintiffs thus argue that Defendant was capable of producing detailed paystubs that separate out straight time and overtime, and his failure to do so for Plaintiffs demonstrates he did not properly pay them for overtime. Defendant claims he was unable to produce these more traditional paystubs for Plaintiffs because they were undocumented workers without Social Security numbers, and his payroll company thus would not process payroll for these individuals.

In order to fully consider Plaintiffs’ argument, the Court must first address Defendant’s response. Defendant argues that, even in the absence of paystubs or more detailed payroll records, he properly calculated and paid overtime to Plaintiffs. In particular, he claims he appropriately calculated credit for housing and food provided to Plaintiffs, which, in turn, renders his wage calculations compliant with the FLSA’s overtime requirement. The Court therefore considers this argument next.

b. Food and Housing Credit

The FLSA permits an employer to take a wage credit for a live-in employee’s food and housing, subject to certain conditions. 29 U.S.C. § 203(m)(1). Specifically, the statute defines “wage” to include “the reasonable cost to the employer of furnishing such employee with board, lodging, or other facilities, if customarily furnished by such employer to his employees." Consistent with its statutory mandate, the DOL has promulgated regulations permitting an employer to credit "the actual cost or fair value of furnishing lodging, whichever is less," if such cost or value is different from the prescribed maximum credit, provided that the employer "keeps, maintains, and preserves the records on which they rely to justify such different cost figures." 29 C.F.R. §§ 516.27(a), 552.100(b), 552.100(d). The records must "include itemized accounts showing the nature and amount of any expenditures entering into the computation of the reasonable cost." 29 C.F.R. § 516.27(a)(1).

The DOL regulations provide that, if an employer of a live-in domestic service employee fails to maintain these itemized records, the maximum § 203(m) credit the employer may claim is "seven and one-half times the statutory minimum hourly wage for each week" housing is furnished. 29 C.F.R. § 552.100(d). For purposes of this regulation, the federal minimum hourly wage applies. Because the statutory federal minimum wage has been $7.25 per hour during the relevant time, 29 U.S.C. § 206(a)(1)(C), the maximum housing credit an employer who fails to maintain adequate records may claim is seven and one-half times that amount per week, which equals $54.38 per week for lodging. In addition, an employer may credit a certain amount for meals provided to the employee, which Plaintiffs compute at a maximum of $76.16 per week if the employer does not keep records justifying different meal costs. See 29 C.F.R. § 552.100(c). In total, then, in the absence of records justifying different costs, an employer may credit a maximum of $130.54 per week for both housing and food.

As noted above, here Defendant's records indicate that he credited Plaintiffs' wages with weekly food and housing expenses that ranged between $300 and $470 per week. Defendant's documents supporting the present motion do not place beyond genuine dispute that he properly recorded the actual cost or fair market value of the food and housing credited to Plaintiffs' wages. Indeed, Defendant's own argument raises disputes as to how he calculated the food and housing credit. With respect to his client Ann, he represented that he examined her bills when calculating the food and housing credit, but he later argued that he did not have a way of obtaining the clients' bills directly to calculate the actual costs because the clients contracted for the services through DSS rather than CareOne. Moreover, to the extent that Defendant calculated this weekly food and housing credit by relying on the actual cost or fair market value of those expenses, he did not submit evidence of that actual cost or fair market value in support of his motion to substantiate his calculations. Nor did he submit evidence indicating that he confirmed which calculation, the actual cost or the fair market value, was less, as required by the DOL regulations. 29 C.F.R. §§ 552.100(c), 552.100(d) (permitting the employer to credit "the actual cost or fair market value" of furnishing food and lodging, "whichever is less").

The regulations and case law make clear that the burden to demonstrate proper calculation of the § 203(m) credit is on the employer, not the employee. Here, a reasonable jury could find that Defendant failed to maintain the records required by the DOL regulations to justify use of an amount beyond the otherwise maximum credit allowed by 29 C.F.R. § 552.100(d). Although there are few cases in the Second Circuit addressing this issue, courts in other circuits have held that an employer is not entitled to a § 203(m) credit greater than the regulatory maximum if they fail to meet the recordkeeping requirements to justify the greater credit.

Defendant has not proved as a matter of law that he kept sufficient records, such that he was entitled to claim more than the otherwise applicable regulatory maximum. If a jury were to find that Defendant failed to maintain adequate records to substantiate his § 203(m) credit, he would not be entitled to such credit. Thus, this genuine dispute is material to Defendant's liability under the FLSA, and the Court denies his motion for summary judgment regarding the food and housing credit.

Returning to Plaintiffs' argument, particularly in light of the absence of itemized paystubs and records concerning the calculation of the food and housing credit, the Court cannot resolve the factual dispute regarding the calculation of Plaintiffs' wages with respect to the overtime they undisputedly worked. Indeed, despite significant searching in the record, the Court is unable to discern exactly what hourly amounts Defendant claims Plaintiffs earned as their regular and overtime rates of pay. Because a reasonable jury viewing this record could find either Plaintiffs' or Defendant's view of the facts to be accurate, the Court is not in a position to determine what Plaintiffs' regular rate was. Consequently, the Court cannot ascertain if Plaintiffs' overtime wages were properly calculated with respect to the overtime hours Plaintiffs undisputedly worked, and summary judgment on that issue is not warranted.

2. Pay for Disputed Hours

In addition, the parties disagree about whether Plaintiffs were entitled to overtime compensation for sleep time that was interrupted by their clients' overnight needs. The Court characterizes these hours as disputed because the parties do not agree that they were hours worked by Plaintiffs.

The legal framework for compensation of sleep time is as follows. In general, the FLSA requires compensation for "work," which includes "time spent performing activities predominantly for the benefit of the employer." "While the FLSA itself is silent as to whether sleep time is compensable time, the DOL has promulgated interpretive rules addressing that exact issue." "When an employee is on duty for a shift of less than twenty-four hours, but is allowed to sleep during his shift, 29 C.F.R. § 785.21 regards him as 'working even though he is permitted to sleep when not busy.'" "So long as he is 'required to be on duty,' 'the time is worktime.'" When the employee's shift is twenty-four hours or more, he and his employer "may agree to exclude a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked," but only if "adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep." 29 C.F.R. § 785.22(a). If the employee "cannot get at least 5 hours' sleep during the scheduled period the entire time is working time." 29 C.F.R. § 785.22(b).

The parties dispute various aspects of the sleep time issue, including whether Plaintiffs had sleep interruptions and whether Defendant knew about these alleged interruptions. All three named Plaintiffs claim to have experienced interruptions to their sleep time because of their clients' needs. Modise's client, Ann, routinely woke up several times during the night and required assistance. T. Mmolawa's client, Haddad, woke up four or five times per night. M. Mmolawa's client, Geraldine, did not experience routine sleep difficulties, but M. Mmolawa attests that Geraldine traveled to the emergency room overnight approximately twice per month and required M. Mmolawa's assistance during those nights. Plaintiffs further claim that because there was no appropriate place to record these interruptions in Defendant's timekeeping system, they did not record them in writing, but they told Defendant about them.

Defendant contends, by contrast, that Plaintiffs did not tell him about sleep interruptions. Defendant further argues that it was inherent in the nature of Plaintiffs' job, which was coded under DSS Procedure Code 1023z, and from CareOne's employee handbook and conversations

Plaintiffs had with Defendant, that they could work only thirteen hours per day, a schedule that would accommodate eight hours for sleep and three hours for meal and rest breaks. From the parties' conflicting recitations of facts alone, it is clear that there are genuine disputes concerning, at least, whether Plaintiffs experienced sleep interruptions and whether Defendant knew about these interruptions. These issues are material to Defendant's alleged liability, as explained further below.

The factual dispute over whether Defendant knew that Plaintiffs were working overtime due to interruptions to their sleep, and were not compensated for such work, must go to the jury. Critically, the Second Circuit has held that "an employer's duty under the FLSA to maintain accurate records of its employees' hours is non-delegable." To that end, "once an employer knows or has reason to know that an employee is working overtime, it cannot deny compensation even where the employee fails to claim overtime hours." As another court in this circuit has explained, if the employer "does not wish that such overtime work be performed, it is the employer who 'has a duty to make every effort to prevent its performance.' The key issue is therefore whether there is evidence in the record showing the defendant had actual or constructive knowledge that the plaintiff engaged in uncompensated overtime work, regardless of whether the plaintiff followed the employer's policy about recording overtime." Whether an employer had actual or constructive knowledge of uncompensated overtime work "is an issue of fact."

Here, there is evidence from which a reasonable jury could infer that Defendant knew Plaintiffs were working uncompensated overtime hours, notwithstanding Plaintiffs' failure to record the hours. Essentially, the parties' dispute over whether Plaintiffs informed Defendant of the interruptions to their sleep turns on a credibility assessment, which is not properly conducted by the Court at summary judgment. Plaintiffs' assertions as to what Defendant knew are sufficient for their claims of uncompensated interruptions to sleep time to survive the summary judgment stage.

Further, genuine issues of material fact exist as to whether Defendant entered into any agreement(s) with Plaintiffs to exclude sleep time from their pay. Defendant concedes that Plaintiffs did not sign an express written agreement with CareOne to exclude sleep time from their compensable hours. He contends, however, that he and Plaintiffs entered into an oral agreement to exclude sleep time by virtue of their employment with CareOne. Specifically, he contends that the employee handbook, informed Plaintiffs that they were "to work no more than 13 hours" per day. Defendant explained that he told Plaintiffs that, by continuing their employment with CareOne, they were "agreeing" to "work no more than 13 hours" per day. In effect, Defendant appears to contend that he had an "implied agreement" to exclude sleep time from Plaintiffs' compensable hours. See 29 C.F.R. § 785.22(a). There are, however, numerous questions of fact material to the compensability of Plaintiffs' sleep time.

For example, at least one court in this district has denied summary judgment because it found disputed questions of fact as to "exactly what documents and interactions even comprised the parties' agreement, whether it was express or implied." Similarly, the Court cannot grant summary judgment here given that it is far from clear if the parties had any kind of agreement to exclude sleep time and, if so, what the terms of that agreement were.

In addition, the DOL regulations permit an agreement to exclude sleep time only if the employee "can usually enjoy an uninterrupted night's sleep," and only if they can get "at least 5 hours' sleep during the scheduled period." 29 C.F.R. §§ 785.22(a), (b). Modise's and T. Mmolawa's recitations of their clients' typical sleep schedules raise genuine disputes as to whether they were usually able to enjoy a period of five hours of uninterrupted sleep. Similarly, although M. Mmolawa's interruptions to her sleep appear to have been less frequent, they constituted entire nights she spent attending to her client in the emergency room without sleeping at all. Thus, there are genuine disputes as to whether the sleep periods were bona fide and regularly scheduled as required under the DOL regulations.

In sum, the Court finds genuine disputes of material fact regarding Plaintiffs' overtime compensation, with respect to both the overtime work they indisputably performed and the alleged work they performed during sleep periods, and thus summary judgment is improper at this stage. The Court thus denies Defendant's motion for summary judgment with respect to Plaintiffs' overtime compensation claim under the FLSA.

2.3 Exemptions

The FLSA exempts certain employees from coverage under the minimum wage and overtime provisions. Some state and local minimum wage and overtime laws cover employees who are exempt under the FLSA.

Some of the FLSA exemptions, notably those for agricultural and domestic service employees, were included in the statute when it was originally enacted in 1938; others have been added over the years. Most recently, the “Save America’s Pastime Act” (2018) amended the FLSA to add an exemption for professional baseball players. § 213(a)(19). As you read this section of the statute, consider what the rationale might have been for exempting these particular categories of employees.

Fair Labor Standards Act, § 213

Exemptions

(a) Minimum wage and maximum hour requirements

The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to—

> (1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman […]; or
>
> (3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (a) it does not operate for more than seven months in any calendar year, or (b) during the preceding calendar year, its average receipts for any six months of such year were not more than 331/3 per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this

paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture; or

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (a) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (b) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (c) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (d) if such employee (other than an employee described in clause (c) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (e) if such employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 214 of this title; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary); or

(16) a criminal investigator who is paid availability pay under section 5545a of title 5;

(17) any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is—

> (a) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
>
> (b) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
>
> (c) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(d) a combination of duties described in subparagraphs (a), (b), and (c) the performance of which requires the same level of skills, and

who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than $27.63 an hour; or

(18) any employee who is a border patrol agent […]; or

(19) any employee employed to play baseball who is compensated pursuant to a contract that provides for a weekly salary for services performed during the league's championship season (but not spring training or the off season) at a rate that is not less than a weekly salary equal to the minimum wage under section 206(a) of this title for a workweek of 40 hours, irrespective of the number of hours the employee devotes to baseball related activities.

(b) Maximum hour requirements

The provisions of section 207 of this title shall not apply with respect to—

(1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service […]; or

(2) any employee of an employer engaged in the operation of a rail carrier […]; or

(3) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act […]; or

(5) any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state; or

(6) any employee employed as a seaman; or

(9) any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located (a) in a city or town of one hundred thousand population or less, according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Office of Management and Budget, which has a total

population in excess of one hundred thousand, or (b) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area; or

(10)(a) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a non-manufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

(b) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a non-manufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or

(11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 207(a) of this title; or

(12) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year; or

(13) any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (a) is primarily employed during his workweek in agriculture by such farmer, and (b) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 206(a)(1) of this title; or

(14) any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations; or

(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup; or

(16) any employee engaged (a) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (b) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables; or

(17) any driver employed by an employer engaged in the business of operating taxicabs; or

(20) any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be; or

(21) any employee who is employed in domestic service in a household and who resides in such household; or

(24) any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children—

> (a) who are orphans or one of whose natural parents is deceased, or
>
> (b) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than $10,000; or

(27) any employee employed by an establishment which is a motion picture theater; or

(28) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight;

(29) any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee (a) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and (b) receives compensation for employment in excess of fifty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or

(30) a criminal investigator who is paid availability pay under section 5545a of title 5.

(d) Delivery of newspapers and wreathmaking

The provisions of sections 206, 207, and 212 of this title shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer or to any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths).

(f) Employment in foreign countries and certain United States territories

The provisions of sections 206, 207, 211, and 212 of this title shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act; American Samoa; Guam; Wake Island; Eniwetok Atoll; Kwajalein Atoll; and Johnston Island.

Greene v. Tyler Technologies, Inc., 526 F.Supp.3d 1325 (N.D. Ga. 2021)

AMY TOTENBERG, United States District Judge.

Plaintiff Suzanne Greene brings this suit against her former employer, Defendant Tyler Technologies, Inc. ("Tyler"), alleging that Tyler misclassified her as an exempt employee and failed to pay her legally required overtime pay under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 207 and 215(a)(2). Both Parties move for summary judgment as to whether Ms. Greene, an "implementation consultant," was subject to the FLSA's administrative exemption.

I. Background

Defendant Tyler's ExecuTime Software:

Defendant Tyler is the largest company in the United States providing software and technology services to public sector agencies like local and state governments. In June 2016, Tyler acquired the software company ExecuTime. Tyler has described ExecuTime as follows:

> ExecuTime™ is a leading time and attendance solution that empowers employees via self-service functionalities and allows supervisors to closely manage overtime, job costing, and labor data through reduced expenses. ExecuTime time assists organizations with the most complex time and seamlessly integrates with payroll software solutions.

The ExecuTime software that government customers purchase generally consists of "time and attendance" and/or "advanced scheduling" modules. The more basic time and attendance software is focused on clocking in, clocking out, requesting time off, or checking a time card. Advance scheduling affords clients "more robust scheduling capabilities" such as a "wheel offering" that allows supervisors to post open shifts on a wheel that employees can sign up for or a "trade board" that allows employees to swap shifts themselves.

Process for Purchasing and Implementing ExecuTime:

Typically, after a government customer decides to purchase ExecuTime software, it consults with a Tyler sales representative, who creates a contract, which is later reviewed by Tyler's legal department. During this process, the client determines what type of contract to purchase—daily, hourly, milestone, or paid in full, for example. The customer also consults with the Tyler sales representative to determine what additional features to include in the contract, such as whether it wants the "advance scheduling" module, and how many physical timeclocks will be included. Another purchase decision the customer may make in conjunction with the sales representative is whether to purchase a "mobile module" which allows user access though a general web browser on a desktop or mobile phone. At this contracting stage, the customer and sales representative may also discuss "funded development" which occurs when a customer wants to add something to the software that does not yet exist, and the contract provides for the customer to fund it.

After these decisions have been made and a contract has been signed, the sales representative sends the contract to a team at ExecuTime that includes the director of ExecuTime, a "manager of implementation," and a different "manager of implementation and support." After this team of individuals reviews the contract at issue, it assigns resources to the project, specifically a project team consisting of a project manager and an implementation consultant. The project manager is the supervisor of the implementation consultant. When a project manager is assigned to a project, she first reviews the contract to understand whether the contract is daily or hourly, what hardware will be provided (such as how many physical timeclocks), where the hardware will be installed, and other details provided by the contract. The project manager then sends a welcome packet and schedules a date with for the installation of the software done by a “deployment team.”

In addition, the project manager drafts a “project plan” for the implementation, which includes project objectives, as well as a checklist and deadlines for user training and integration. This project plan and timeline also lays out dates and details for trainings, including whether training will be inperson or remote and when the eventual “go live” date will be. “Going live” occurs after all of the user training is completed and the customer has successfully completed “parallel testing,” which involves using both ExecuTime and any previous time-tracking method at the same time to ensure that the ExecuTime software was accurately reflecting time and attendance. After the “go live” date, the customer uses only ExecuTime for clocking in, clocking out, requesting time off, and other functions.

In addition to this project plan, the project manager also works with the customer to complete a questionnaire and a solution design. These two documents include information concerning the customer’s existing time and attendance policies, such as whether the locality/agency uses comp time. These documents also indicate whether a customer will have weekly or biweekly check-in calls with the implementation consultant.

After the project manager has completed these initial aspects of the implementation process, there is a “handoff” to the implementation consultant. This handoff typically takes the form of a phone call where the project manager introduces the customer to the implementation consultant and they all discuss next steps. After the “handoff,” the project manager supervises the implementation consultant in her duties.

Ms. Greene’s Role as an Implementation Consultant:

Plaintiff Suzanne Greene was employed by ExecuTime beginning in February 2016 but became employed by Tyler when Tyler acquired ExecuTime in June 2016. During Ms. Greene’s first six months with ExecuTime, before the acquisition, she was employed as a “project manager,” working with the advanced scheduling software primarily used in local police and fire departments. In this capacity, Ms. Greene’s duties involved “building schedules,” which did not involve programming the software but instead meant, in part, setting configurations so that the correct schedules would populate in the software for the local departments.

Shortly after ExecuTime was acquired by Tyler, Ms. Greene's title was changed to "implementation consultant." Around this time, Ms. Greene stopped working on the advance scheduling software and switched over to work on the time and attendance side. Tyler's job description for the implementation consultant role states in relevant part:

> The Implementation Consultant is responsible for delivering high quality knowledge training to clients allowing them to use Tyler software products efficiently and effectively to achieve daily operations. The incumbent consults and partners with clients to gain a comprehensive understanding of workflow, business/technical requirements and needs to ensure that the knowledge transfer addresses clients' needs. The Consultant ensures that the transition to Tyler software is completed according to predetermined timelines and establishes a positive baseline for the new relationship between the client site and Tyler Technologies.

Broadly speaking, as an implementation consultant, Ms. Greene's job duties consisted of preparing for and training the employees of Tyler's government customers on how to use its ExecuTime time and pay software. In this capacity, she reported to a supervisor that had the title of project manager. Ms. Greene typically communicated with her project manager daily by phone or email, and often several times a day. Ms. Greene explained that, during her employment, the number of implementation consultants working with ExecuTime software at any given time fluctuated but that there were never more than ten and at one point there were fewer than four. As of October 2019, Tyler employed eight implementation consultants working with ExecuTime software.

As described above, any contract with a government customer would go through the sales team, the legal team, the ExecuTime director team, and then a project manager before the "handoff" to the implementation consultant, Ms. Greene. Once Ms. Greene received the "handoff," she would review the questionnaire and solution design that the project manager put together with the client in order to do a "generic setup" of the ExecuTime application. Reviewing these documents allowed Ms. Greene to determine which preferences she should turn on in the application: for example, if a customer used comp time, she could go into the preferences and check a box to allow them to actually use comp time. After reviewing these materials and completing the generic setup, Ms. Greene would conduct the trainings, beginning with a "power user training." Power user trainings are the trainings with the "higher-ups" like the local government's project manager, or the head of their payroll, possibly the HR manager. This training was sometimes done on-site and sometimes remotely, depending on what the client and project manager discussed.

For most of Ms. Greene's employment, when power training was done on-site, it lasted for three full days from 8:00 a.m. to 5:00 p.m. In contrast, the remote power training was only a single day for 3 to 3.5 hours; however, near the end of Ms. Greene's employment, it was spread out into 3 separate trainings of 3 hours each, for a total of 9 hours. During these power user trainings, Ms. Greene would walk through the different aspects of the software and its functionalities and the power users were essentially watching Ms. Greene show them where everything is located. An example of Ms. Greene conducting a remote power user training is attached to Plaintiff's Motion for Partial Summary Judgment. The video shows Plaintiff sharing her screen with the power users, and showing them where certain functions are located in the software related to system administrator settings and also walking through the process for a fictional employee, "Joe Hourly," clocking in and out, and requesting time off for vacation or sick leave.

During this training, the power users asked questions to clarify the software's offerings and capabilities and where they could find certain functions.

After the power user training was completed, Ms. Greene would conduct training with "super users" which were supervisors in the local government and "end users" which were the everyday local employees. Ms. Greene did not ask questions of the super users or end users during training. Sometimes, a city or department would split the in-person and remote training and do some training (say, for power users) in person but then conduct super user and end user training remotely. After the end user and super user trainings, the "parallel testing" occurs, which, as described above, involves the end and super users utilizing both the previous time-tracking method and ExecuTime software at the same time to ensure that the ExecuTime software is accurate. After this testing is successfully completed, the customer "goes live." After that point, Ms. Greene no longer has involvement, as the customer is passed to Tyler's technical support team.

Throughout the implementation process —after the handoff to Ms. Greene and before the customer is passed to the support team — Ms. Greene would ensure that the customer followed the checklist deadlines in the project plan that was created by the Tyler project manager. Ms. Greene did not set any deadlines but she had to be aware of them. Also throughout, Ms. Greene would have weekly or bi-weekly calls with the client to go over progress. Sometimes during these calls, or at other times, Ms. Greene would engage in "troubleshooting" when the software was not functioning properly: for example, if overtime was not properly populating. For something like overtime failing to populate, Ms. Greene could fix the problem by adjusting the preferences "on the back end", however, if the problem was technical, Ms. Greene would escalate the problem to her project manager and then it would go to the support team. Ms. Greene declares that she was reprimanded on the single occasion when she attempted to send a ticket to the support group directly without going through her project manager first.

Typically, Ms. Greene dealt with multiple implementation projects at once, and managed her workload to ensure that the deadlines in multiple concurrent project plans were met. She handled between 5 and 20 projects at a time. She spent approximately 30-40 percent of her work time conducting ExecuTime training sessions with customers and 30-40 percent of her time preparing for ExecuTime training sessions. She spent about 20 percent of her time on weekly or bi-weekly check-in calls with customers, and helped with troubleshooting throughout. Ms. Greene performed her implementation consultant duties from either her home or at a client site.

During her employment, Ms. Greene received a salary of between $45,000 and $48,500 per year. She was paid bi-weekly. At no point in her employment did she supervise anyone or have the authority to hire or fire any other employee. Tyler classified Ms. Greene as exempt under the FLSA in part based on advice of outside legal counsel. Tyler was sued in a putative collective action in 2008 for alleged misclassification and overtime violations with respect to implementation consultants. That case settled after full briefing on summary judgment but before the court ruled. Plaintiff ultimately resigned her employment with Tyler after taking leave in spring 2019. A source of some contention, Ms. Greene's post-Tyler resume reads:

> Employer: Tyler Technologies
>
> chapter-title: Implementation Consultant
>
> Duration: February 2016 — Present Job Duties
>
> • Manage multiple client implementations simultaneously, while meeting all project plan deadlines.
>
> • Build, lead and direct project teams to meet project objectives
>
> • Strong leadership and delegation skills
>
> • Set clear expectations and goals for project teams. Track progress against timeline, milestones and budget, revise as needed
>
> • Hold regularly scheduled meetings with the client to ensure that milestones are met
>
> • Provide software application training using a variety of delivery methods including web-based and on-site training
>
> • Coordinate new customer implementations, providing effective training to maximize use the software
>
> • Excellent communication (written and oral) and interpersonal skills
>
> • Effective at engaging with people from all backgrounds and work industries

Plaintiff Greene filed this action on March 26, 2019 asserting a single claim for failure to pay overtime pursuant to 29 U.S.C. §§ 207 and 215(a)(2), alleging that Tyler's failure to pay her time-and-a-half for overtime hours worked was not done in good faith within the meaning of 29 U.S.C. § 260.

III. Discussion

The FLSA, which was enacted to protect the health, efficiency and welfare of workers in the United States, requires employers to pay overtime (time and a half) to employees who work more than forty hours per week. 29 U.S.C. § 207(a)(1). However, Section 213(a)(1) exempts from this requirement "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). Keeping in mind the comprehensive remedial purposes of the FLSA, the Court interprets its provisions neither liberally nor narrowly, but instead gives its provisions a "fair interpretation." The employer bears the burden of proving its entitlement to an exemption. For Defendant Tyler to prevail, it must prove the applicability of the exemption by "clear and affirmative evidence."

A. The FLSA's Administrative Exemption

The Parties vigorously dispute whether Ms. Greene was an administrative employee exempt from the FLSA based on her position as an implementation consultant, tasked with training Tyler's government customers on how to use the ExecuTime software.

In order for the FLSA's administrative exemption to apply, Tyler must prove that: (1) Ms. Greene was compensated on a salary basis at a rate of not less than $455 per week;[31] (2) Ms. Greene's primary duty consisted of the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and (3) Ms. Greene's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. 29 C.F.R. § 541.200(a). Whether an employee falls under the administrative exemption is a highly fact-intensive inquiry that depends on the particular circumstances of each case. *See* 29 C.F.R. § 541.700 (a) (providing that the "determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole"); 29 C.F.R. § 541.202(b) (providing that "the phrase 'discretion and independent judgment' must be applied in the light of all the facts involved in the particular employment situation in which the question arises"). As a job title is of little use for exemption purposes, courts look to the tests articulated by the Department of Labor's ("DOL") regulations under the FLSA in assessing the applicability of the FLSA's statutory exemptions.

31. (n.10 in opinion) Since Ms. Greene's employment with Tyler, the DOL has increased the salary basis threshold to $684 per week (which works out to be $35,568 per year). Plaintiff does not dispute that she was paid a salary of $45,000 to $48,500 per year and therefore meets the first criteria of the administrative exemption.

The regulations define the term "primary duty" as "the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a). Factors to consider when determining the primary duty of an employee include (1) the relative importance of the exempt duties as compared with other types of duties; (2) the amount of time spent performing exempt work; (3) the employee's relative freedom from direct supervision; and (4) the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee. While the amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee, it is not dispositive of the primary duty issue. *See* 29 C.F.R. § 541.700(b) (noting that "employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement" and that "employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion").

It is undisputed that Ms. Greene meets the salary requirement of the administrative exemption. However, the Parties dispute (1) whether Ms. Greene's primary duties involved work directly related to the management or general business operations of Tyler or its customers, and (2) whether her primary duties involved the exercise of discretion and independent judgment with respect to matters of significance. Tyler must prove both by clear and affirmative evidence for the exemption to apply.

i. Primary duty consisting of the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers

Tyler argues that, as an implementation consultant, Ms. Greene performed work directly related to both the "servicing of Tyler's business: delivering software to the public sector" and "to the servicing of the business of Tyler's clients." Ms. Greene argues that she did not perform work *directly* related to the management or general business operations of Tyler or its customers, as her work with respect to Tyler was *production* work, and as her work with Tyler's government customers consisted of "presenting canned software presentations that she did not herself create" and thus "simply acting as a conduit for information about how ExecuTime software works does not constitute work directly related to the general business operations of Tyler's local government clients."

Per DOL regulations, to meet the requirement that an employee perform work "directly related to the management or general business operations," an employee "must perform work directly related to assisting with the *running or servicing* of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." 29 C.F.R. § 541.201(a) (emphasis added). The regulations provide examples of work that is "directly related to management or general business operations," as follows:

> b. Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.

The exemption "relates to employees whose work involves servicing the business itself—employees who can be described as staff rather than line employees." U.S. DOL, Wage & Hour Div., Opinion Letter, 2010 WL 1822423, at *2 (Mar. 24, 2010).

Courts addressing the issue of whether an employee engages in work "directly related to management or general business operations" often find the "production versus administrative" dichotomy helpful. This concept is intended to "distinguish between work related to the goods and services which constitute the business' marketplace offerings and work which contributes to running the business itself." And while the administrative-production distinction may be an "imperfect analytical tool" in a service-oriented employment context, employees "can be considered 'production' employees in those instances where their job is to generate (i.e., 'produce') the very product or service that the employer's business offers to the public."

Keeping this framework in mind, the Court first addresses Tyler's passing argument that Ms. Greene performed work directly related to *Tyler's* business operations. In support, Tyler argues that Ms. Greene serviced Tyler's business by "taking the software developed and licensed by other Tyler resources and deploying it for the clients assigned to her."

Plaintiff first asks the Court to disregard this argument, as Defendant never "put Plaintiff on notice of the argument in discovery." During discovery, Plaintiff asked Tyler to "identify each exemption that you contend were applicable to Plaintiff and Describe in detail the factual basis for such contentions" In response, Tyler stated that Plaintiff was subject to the administrative exemption because "her primary duty involved the performance of office or non-manual work directly related to the general business operations of *Tyler's customers*" Accordingly, Ms. Greene argues that Tyler should not now be permitted to argue that Ms. Greene's work was directly related to *Tyler's* general business operations since it did not disclose that theory previously. In addition, Ms. Greene argues that Tyler cannot show that her work was directly related to its management or general operations because, under the "administrative-production dichotomy," her work was clearly *production* work not subject to the exemption.

Tyler does not respond to Plaintiff's argument in justification of its interrogatory response or to substantively argue that Plaintiff worked directly on Tyler's general business operations. As a result, Tyler appears to have conceded this point. Yet, even absent any such concession, Tyler has not carried its burden of showing by "clear and affirmative evidence" that Ms. Greene's work was directly related to Tyler's management or general business operations.

Ms. Greene was undisputedly not part of Tyler's management: she had no supervisory responsibility and could not hire or fire any other employees, and she reported to a supervisor that she checked in with daily or multiple times a day. Moreover, under the production-administrative dichotomy described above, Ms. Greene's work was clearly production rather than administrative. There is no evidence in the record that Ms. Greene's duties involved any aspect of running Tyler's business, formulating policy, negotiating contracts, or the like. The service Ms. Greene provided to Tyler's government customers — implementation and training on ExecuTime software — was, according to Tyler's corporate representative, *always* provided to customers purchasing the ExecuTime software. It is therefore clear that the ExecuTime training was an "output of the business."

Tyler's contention that Ms. Greene's work was "critical" to its own business operations because her failure to perform would "leave Tyler vulnerable" and at reputational risk is an argument that could be applied to nearly any employee in any workplace and is legally without merit. Whether or not an employee is indispensable is insufficient to prove that her primary duties are administrative. In sum, Tyler does not seriously appear to rely on this argument, for good reason. The uncontroverted evidence shows that Ms. Greene did not perform work directly related to Tyler's general business operations.

Tyler next and principally argues that Ms. Greene's work was directly related to servicing the general business operations *of Tyler's clients.* According to Tyler, because Ms. Greene "led the deployment of ExecuTime software based on the client's policies and procedures, trained clients on the software, and helped troubleshoot issues," she was an "adviser or consultant on the ExecuTime software for Tyler's clients." Plaintiff responds that:

> Plaintiff Greene did not consult municipal governments about how to compensate their employees or how to track their time. Rather, she assisted them in teaching them how to use their new time and pay software and how to configure its functionalities—a fancy way of saying "changing the settings." How the customers used the software was based on their own needs, which were determined long before Plaintiff ever became involved. Simply acting as a conduit for information about how ExecuTime software works does not even arguably constitute the "general business operations" of Tyler's local government clients.

On the issue of whether an employee is subject to the administrative exemption based on work related to their employer's *customers,* the DOL regulations provide:

> c. An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consults, for example) may be exempt.

29 C.F.R. § 541.201(c). Courts interpreting this subsection have explained that "while the regulations provide that 'servicing' a business may be administrative, 'advising the management' as used in subsection (c) is directed at advice on matters that involve policy determinations, *i.e.,* how a business should be run or run more efficiently, not merely providing information in the course of the customer's daily business operation."

Here, Tyler's customers are not other businesses with private financial incentives but local and state governments. The Wage & Hour Division of the DOL recently explained that there is "scarce authority regarding what constitutes the general business operations of a government." However, it is often more useful to ask whether the job duties involve, "on the one hand, the day-to-day carrying out of the government's functions or, on the other, *running* the government (or a component of the government) itself or determining its overall course and policies."

Accordingly, regardless of the details of the general business operations of Tyler's particular government customers, a reasonable jury could not find that Ms. Greene primary duties involved *advising* those government customers on matters involving running a component of the government or determining the overall course and policies of the government. Indeed, there is no record evidence that Ms. Greene *advised* any government customer, for example, how to run their personnel department, what benefits to offer (comp time, overtime, vacation time), or even what software to use to administer their time and attendance policies. As characterized by Tyler, Ms. Greene's role was entirely distinct from that of a tax adviser or financial consultant who may direct a customer on matters of policy determination about how to better or more efficiently run their business operation or how to comply with particular regulations (an example Defendant cites in its reply at 7).

The DOL regulations identify the following areas as connected to general business operations of a business: tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. 29 C.F.R. § 541.201(b). Of these categories, the only ones Tyler even suggests are implicated here are "quality control" and "database administration." But Defendant does not provide any explanation or theory, let alone record evidence, to show how or when Plaintiff *advised* any government customer in either capacity. In contrast, Plaintiff argues, and the uncontroverted record supports, that Ms. Greene did not advise government customers how to set up, modify, test or secure their government databases; how to program, design, or modify software; what software or functionalities to buy; or how to update or reconfigure the software to function more efficiently. The decision of what software to buy was made in collaboration with a Tyler sales representative and a product owner. After a customer had decided to purchase ExecuTime software, Ms. Greene did not advise it on what ExecuTime features or functionalities to purchase — such as whether to have advanced scheduling or a milestone contract, or how many timeclocks to have as those decisions too were made prior to her involvement and in conjunction with a Tyler sales representative.

The Parties agree that the majority of Plaintiff's work time was spent conducting trainings and preparing to conduct trainings. With respect to her time actually conducting the trainings with power users, super users, and end users, the Wage & Hour Division has instructed that providing routine education by way of "delivering educational lectures, materials, and presentations would be day-to-day work and would be nonexempt." And while Tyler makes much of Plaintiff's time spent reviewing client information, such as the questionnaire, and familiarizing herself with their policies, such review time certainly doesn't meet the standard of *advising* a government customer on its general business operations as contemplated by 29 C.F.R. § 541.201(c).

Tyler's attempt to dress up Ms. Greene's duties is no substitute for evidence of the actual duties she performed. In this vein, Tyler's reliance on Ms. Greene's title of "implementation *consultant*" is misplaced. "A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part." 29 C.F.R. § 541.2.

Similarly, Tyler's heavy-handed reliance on Ms. Greene's post-employment resume, which is framed at a high level of generality, first is not evidence of the actual duties she performed as an implementation consultant, as numerous courts have explained. Second, the duties as described in Ms. Greene's resume do not indicate that her work was in any way directly related to the general business operations of Tyler's customers. "Directing project teams to meet project objectives," (which were in fact undisputedly pre-determined), "setting clear expectations for project teams," or "holding regular meetings with clients to ensure that milestones are met" in no way establishes that Ms. Greene guided local policy or procedure, or ran/serviced the government customer's operations, or advised in any capacity listed in 29 C.F.R. § 541.201(b).

Defendant's argument that Ms. Greene's work of "troubleshooting" for the government customers renders her exempt is not supported by the DOL regulations, the legal authority, or the facts. The Wage & Hour Division has explained that IT support work, such as work involving "installing, configuring, testing, and troubleshooting computer applications, networks and hardware" does not qualify for the administrative exemption under Section 13(a)(1) of the FLSA. Here, not only did Plaintiff spend a minimal amount of time "troubleshooting" but she undisputedly did not have a role creating or managing computer systems, did not repair computer systems, and did not do work involving any programming expertise. In fact, she explicitly stated that she was not able to do such technical work:

> Q: But in terms of what your responsibility was to, quote, unquote, build the schedule, are you actually programming the software or what is it that you're doing?
>
> A: No, I'm not very technical, so when it comes to, like, programming and things in depth on the technical side, I did not handle any of that.

Instead, Ms. Greene was able to fix straightforward problems related to the software's functionality, like overtime not populating, by something as "simple" as fixing the preferences on the back end. (Greene Dep. p. 135:11-17.) If a problem was at all technical, a ticket would be sent to the support team to handle it.

Also misplaced is Defendant's reliance on Plaintiff's alleged indispensable role in allowing local government customers to schedule and pay their employees. By Defendant's logic, nearly any employee would be rendered exempt as indispensable in some manner or other, for example, a store clerk indispensable because a customer could not make a purchase without their involvement.

Tyler's cited cases in support all involve employees directly engaged in advising the policies and operations of their employer or its relevant customers and are therefore inapplicable to the facts of this case. In *Verkuilen v. MediaBank, LLC,* 646 F.3d 979 (7th Cir. 2011) the plaintiff was an account manager for a media company who worked with clients (companies) to determine their specific advertising needs and customize the advertising products accordingly, as follows:

> Identifying customers' needs, translating them into specifications to be implemented by the developers, assisting the customers in implementing the solutions — in the words of the employer's chief operating officer, account managers are expected to 'go out, understand the customers' requirements, build specifications, understand the competency level of our customers. Then they will build functional and technical specifications and turn it over to developers who will then build the software, checking in with the account manager, making sure what they are building is ultimately what the customer wanted.

Here, there is no evidence that Ms. Greene built any specifications or customizations or advised in any capacity related to the development of new software. She did not interact with anyone who engineered software. All of the decisions about what functionalities a local government preferred were made prior to Ms. Greene's involvement and she was not in a powerful intermediary role, as described in *Verkuilen.*

In *Brooks v. Healthcare-Iq, Inc.,* 2019 WL 497693 (M.D. Fla. Feb. 8, 2019), the plaintiff, who was primarily a training and development manager, performed a "complete redesign" of the complex medical software training curriculum and also "managed the curriculum design." He testified that he "completely redesigned the approach that was taken in the curriculum," and either designed teaching modules himself or gave instructions to his colleague/assistant to do so, without any approval from higher-ups. Here, Ms. Greene's duties did not involve the design or redesign of any software, she certainly did not have anyone at a lower level or in another department design modules or training materials at her request, and she did not approve any other employee's expense reports, as in *Brooks.*

For the reasons above, Tyler has not met its burden of demonstrating that Ms. Greene's primary duties were directly related to the management or general business operations of Tyler or of its local government customers under the applicable legal standard and as contemplated by 29 C.F.R. § 541.200. A reasonable jury could not find otherwise. In contrast, Plaintiff has met her burden in establishing that the exemption is not applicable under the present facts as construed in the light most favorable to Tyler. Therefore, the Court finds that Ms. Greene did not fall within the administrative exemption and summary judgment in favor of Plaintiff is appropriate. For good measure, however, the Court addresses the third prong of the administrative exemption test below.

ii. Primary duties consisting of the exercise of discretion and independent judgment with respect to matters of significance

Tyler argues that Ms. Greene exercised discretion and independent judgment because she made recommendations to and worked directly with the government customer with little supervision. Further, when troubleshooting, she had to "evaluate issues presented, escalate issues as appropriate and ensure they were resolved to the client's satisfaction." On the flipside, Ms. Greene argues that her duties of ExecuTime instruction and troubleshooting existed within "constrained and pre-established parameters that did not permit any real discretion with respect to matters of significance, much less as a *primary duty,*" and that no factfinder could conclude otherwise based on the applicable regulations and law.

In order to qualify as an exempt administrative employee, the DOL's regulations provide:

> in general, the exercise of discretion and independent judgment involves the comparison and the evaluations of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed.

29 C.F.R. § 541.202(a). Factors to consider in determining whether the "discretion and independent judgment" criteria is satisfied include, but are not limited to: (1) whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; (2) whether the employee carries out major assignments in conducting the operations of the business; (3) whether the employee

performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; (4) whether the employee has authority to commit the employer in matters that have significant financial impact; (5) whether the employee has authority to waive or deviate from established policies and procedures without prior approval; (6) whether the employee has authority to negotiate and bind the company on significant matters; (7) whether the employee provides consultation or expert advice to management; (8) whether the employee is involved in planning long- or short-term business objectives; (9) whether the employee investigates and resolves matters of significance on behalf of management; and (10) whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

Although the "exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. Thus, the term 'discretion and independent judgment' does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action." The regulations further provide that the "exercise of discretion and independent judgment *must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.*" It "does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work." Finally, "an employee does not exercise discretion and judgment in matters of significance merely because the employer will experience financial losses if the employee fails to properly perform his or her job."

The Court turns first to Plaintiff's "troubleshooting" work as the law is abundantly clear on this front. The Wage & Hour Division has clearly articulated that IT support work, including troubleshooting computer applications, networks, and hardware and ensuring that computer equipment or a computer application is "working properly according to the specifications designed by others" are examples of work that "lacks the requisite exercise of discretion and independent judgment within the meaning of the administrative exemption."

Likewise unavailing is Tyler's contention that Ms. Greene exercised discretion in determining whether to escalate a troubleshooting question to the support team. Not only does the record indicate that Ms. Greene had to go through her supervisor before a ticket could be sent to the support team but moreover, an employee does not exercise discretion by following prescribed procedures.

Next, Tyler's argument that Plaintiff exercised discretion because she coordinated and prioritized her own schedule also does not meet the requirements of 29 C.F.R. § 541.202(a). It is insufficient to show discretion on matters of significance only through evidence that an employee makes decisions regarding "when and where to do different tasks, as well as the manner in which to perform them." Such decisions assuredly do not meet the standard for "matters of significance" which generally includes "responsibilities dealing with matters of broad scope and significant detail that have a profound effect on the employer's business," such as: "matters that have significant financial impact, negotiating and binding the company on significant matters; and planning long- or short-term business objectives."

Tyler next argues that Ms. Greene exercised discretion and independent judgment because, for each project she worked on, she "assessed client protocols and procedures, managed competing client deadlines and priorities, and created custom training agendas based on client feedback." Not only is this characterization devoid of any specifics and unsupported by record evidence, but it is not indicative of any duties emblematic of discretion and independent judgment in matters of significance: that is, actions that "involve the comparison and the *evaluations of possible courses of conduct,* and *acting or making a decision* after the various possibilities have been considered."

Tyler admits that Ms. Greene herself had no involvement in making decisions to set deadlines for the projects she was involved in. Tyler's suggestion that Ms. Greene herself made decisions to delay "go live" dates finds no support in the record and nevertheless is not a matter of significance.

As a result, the evidence before the Court indicates that any decision-making capacity Ms. Greene held was a matter of following prescribed procedures, and that it was her supervisor who had to make any substantive change to a customer's project plan or timeline. Under the applicable legal authority, this does not constitute the exercise of discretion, let alone in matters of significance.

Likewise, Tyler's position that Ms. Greene had the "discretion to make recommendations" to its government customers that "shaped the course and trajectory of any given implementation" is inconsistent with the record evidence. Ms. Greene declared that she "never made any recommendations to Tyler customers about the possibility of purchasing additional hours"; "the decision whether a customer would have in-person trainings or remote trainings was made before I was brought in on a project"; "at no point in my employment did I ever recommend that a customer have me come back on-site for additional training"; she "never made any recommendations to customers about making any changes to their payroll practices"; she "cannot recall a single instance of ever making a recommendation to a customer about purchasing timeclocks that would be the job of Tyler salespeople,"; and she "never made any recommendations to customers on how to manage their information databases". Ms. Greene's deposition also indicates that she never recommended to a client that they needed more training hours, and instead, if the client was getting low on their pre-allotted hours, she would merely indicate that to the project manager. Tyler has identified no instances where Ms. Greene made any recommendations to a government customer in contravention of her sworn testimony, let alone shown that making such recommendations on *matters of significance* was a *primary duty* of her job.

Tyler's cited legal authority, previously discussed, does not persuade otherwise, as the facts in those cases are inapposite. The plaintiff in *Brooks* testified that he had discretion to develop training materials and pedagogic examples without the approval or supervision of anyone at headquarters and had the authority to supervise another employee who assisted him in these tasks. The court in *Carbaugh,* found that the plaintiff exercised discretion in consulting with client businesses on new product ideas and enhancements, approving new product versions and fixes, and developing cost savings to increase profit revenue for customers. In *Cruz v. Lawson Software, Inc.,* the plaintiffs testified to almost "nonexistent supervision," as they did not communicate on a regular basis with supervisors, and also made decisions in connection with configuring software for specific clients, upgrading software, adding new features, developing the interface, converting data, and more.

Finally, Tyler stresses that Plaintiff's work was done at home or the customer's site as confirmation of her independent judgment and discretion. Tyler has pointed to no regulation or guidance making this distinction as indicative of independent decision-making on matters of significance on its own, without other persuasive indicators of such discretion. In the increasingly technological (and currently, pandemic-ridden) waters in which we swim, working remotely and separate from other employees and supervisors is not unusual, and companies have developed ways to track employee time while not physically on the premises, as Tyler well knows. The location of Ms. Greene's work alone is insufficient to show that she exercised independent judgment on matters of significance.

As detailed thoroughly herein, Tyler has not supplied the Court with any concrete evidence to create a genuine fact issue on whether Ms. Greene exercised discretion and independent judgment in matters of significance as a primary function of her job as implementation consultant. Plaintiff Greene, however, has shown, based on the facts construed in Tyler's favor, that she did not hold primary duties that included the exercise of independent judgment. For this separate reason, the Court concludes that Ms. Greene is not subject to the administrative exemption and summary judgment for Plaintiff on this issue is warranted.

3. Wage Payment, Deductions, & Reimbursements

Glaxiola v. Williams Seafood of Arapahoe, Inc., 776 F.Supp.2d 117 (E.D.N.C. 2011)

MALCOLM J. HOWARD, Senior District Judge.

BACKGROUND

This is an action alleging claims under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA") and the North Carolina Wage and Hour Act, N.C. Gen. Stat. §§ 95-25.1 *et seq.* ("NCWHA"). Gaxiola is a former employee of defendants who was recruited in Mexico to work as a crab picker at defendants' seafood processing facility in Arapahoe, North Carolina. Gaxiola alleges that she and other individuals employed by defendants on H-2B guestworker visas from 2005 through 2008 were not paid minimum wage for all hours worked in violation of the FLSA. Specifically, Gaxiola alleges: (1) that she and other employees were paid on a piece-rate basis (by weight of crab picked) even when the weekly pay earned through a piece rate was less than the minimum wage mandated by federal law; and (2) that defendants reduced her wages and the wages of her coworkers below minimum wage by deducting from their paychecks costs incurred for the benefit of defendants, such as visa, transportation and border crossing expenses. Additionally, Gaxiola brings a claim pursuant to NCWHA alleging defendants failed to pay plaintiff and members of the proposed NCWHA class at least he promised wage each week in which they performed work for defendants. Gaxiola alleges that defendants also violated NCWHA by making unauthorized deductions from her pay and the pay of the proposed plaintiff class members for transportation, visa and border crossing expenses.

The court's discussion of the piece-rate claim appears in § 2: Minimum Wage.

STATEMENT OF THE FACTS

Plaintiff class members were employed by defendants pursuant to the H-2B visa program, which allows the temporary employment of foreign workers. The terms of the H-2B visa program are controlled by statute, as well as by United States Department of Labor ("USDOL") regulations applicable to the temporary labor certification process.

During the time period relevant to the instant matter, defendants relied on returning workers and word of mouth to fill job openings each year. Two of defendants' H-2B employees, Alba Gloria Acosta and Amado Segura, along with their daughter, acted on behalf of defendants while in Mexico by communicating with new and returning workers and making arrangements for those workers. Defendant Midyette made visa interview appointments for the workers and then notified them of their appointments. Acosta and Segura made arrangements for the workers to travel together to their visa interviews as well as from their homes in Mexico to Arizona.

Defendants loaned money to Gaxiola as well as some other H-2B workers to cover some of their travel costs and visa expenses. Additionally, defendants purchased airline tickets for the named plaintiff and all of the other H-2B workers to fly from Arizona to North Carolina.

Defendants recovered the cost of the flights and the money advanced to workers to cover the other H-2B related expenses primarily through payroll deductions. Defendants never received written authorization to make those deductions.

Defendants did not advance money to all their employees to cover these expenses; some of the workers paid all of these costs except for their airline tickets. These workers were not reimbursed for the visa, border crossing or transportation expenses that they paid themselves.

COURT'S DISCUSSION

I. Summary Judgment

B. Parties' Contentions

Plaintiffs seek an order granting summary judgment as to liability, contending that:

1. Defendants willfully violated the minimum wage provisions of the FLSA by shifting the transportation, visa, and border crossing expenses, costs which were incurred for the benefit of defendants, to Gaxiola and the other members of the FLSA class when those costs brought their pay below minimum wage.

2. Defendants violated the NCWHA by deducting from the weekly wages due Gaxiola and the proposed NCWHA class members transportation, visa and border crossing expenses incurred for the benefit of defendants.

II. FLSA Claims

A. Coverage by the FLSA

The FLSA is a remedial statute designed to "eliminate substandard labor conditions" in the United States. It was enacted to protect workers who lack sufficient bargaining power to secure a subsistence wage. Under the FLSA, an employer is required to pay each employee wages at or above the minimum wage rate for the hours worked during each workweek. The FLSA applies to all employees for whom there is not a specific exemption. H-2B workers are not specifically exempt; therefore, they are protected by the provisions of the FLSA.

C. Deductions for Visa, Transportation and Border Crossing Fees

Compliance with the FLSA's minimum wage requirements also means that employees are entitled to minimum wage for the number of hours worked during the workweek "free and clear" of improper deductions. 29 C.F.R. §§ 531.35, 776.4. The FLSA defines "wage" to include both cash wages and the reasonable cost of providing "board, lodging, or other facilities;" thus, an employer may count these costs toward satisfying its minimum wage obligations. An employer may not deduct from employee wages the cost of facilities which primarily benefit the employer if such deductions drive wages below the minimum wage.

Additionally, failing to reimburse plaintiffs for their expenditures is equivalent to the employer paying for these expenses and then improperly deducting them from the employees' pay for the first workweek. Known as a *de facto* deduction, "there is no legal difference between deducting a cost directly from the worker's wages and shifting a cost, which they could not deduct, for the employee to bear." The FLSA was implemented to protect workers and to "eliminate substandard labor conditions throughout the nations."

In *De Luna-Guerrero,* this court previously held:

> The employer may count as "wages" under the FLSA the reasonable cost "of furnishing an employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees." 29 U.S.C. § 203(m). "Other facilities" have been further defined by the regulations contained in 29 CFR § 531.32(a) to include "transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the Act and the transportation is not an incident of and necessary to the employment." However, the regulations also note "that under § 531.3(d)(1), the cost of furnishing 'facilities' which are primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages." 29 CFR § 531.32(c) (Items held for benefit of employer defined as "transportation charges where such transportation is an incident of and necessary to the employment (as in the case of maintenance-of-way employees of a railroad)").

Therefore, the ultimate question before the court is whether the transportation and visa costs incurred by Gaxiola and the other class members were primarily for the benefit or convenience of the employer and incident of and necessary to the employment. If the costs are determined to have been primarily for the benefit of the employer, the FLSA requires that the plaintiffs be reimbursed for such costs to the extent necessary to ensure that the workers receive minimum wage for each workweek.

1. Transportation Costs and Border Crossing Fees

The case law in this district is well settled as to transportation costs and border crossing fees. Transportation charges are an inevitable and inseparable consequence of having foreign nationals employed in the United States pursuant to an H-2B visa. These costs are "an incident of and necessary to the employment" and are "primarily for the benefit of the employer." As such, these costs cannot be the subject of a deduction, either actual or de facto, that reduces a worker's wage below federal minimum wage. Therefore, defendants are liable for any deductions taken from plaintiffs' pay, whether actual or de facto, for transportation expenses "to the extent these deductions drove plaintiffs' first week's wages below the statutory minimum."

2. Visa Costs

In *De Luna-Guerrero,* this court found that visa expenses for H-2A employees are "an incident of and necessary to employment" (not "other facilities") as defined by 29 C.F.R. § 531.32(a) and therefore cannot be subject to deduction, either actual or de facto, if such deduction results in a worker receiving less than the minimum wage. Plaintiff asks this court to extend its holding in *De Luna-Guerrero* to H-2B workers.

The reasons this court found visa expenses to be incident of and necessary to employment of H-2A workers in *De Luna-Guerrero* apply equally to H-2B visas. The type of visa required for H-2B workers has no value outside of the employment and arises directly out of the employment. Additionally, the visa restricts a worker to one employer for one season, and the visas are integral to the program and are required for employment.

However, *Frog Island Seafood* held that the employer was not liable for reimbursement of passport and visa expenses incurred by the plaintiffs in that action. Central to the court's ruling was a 2009 amendment to the H-2B regulations, effective January 18, 2009, which provides that H-2B employers are "not prohibited from receiving reimbursement for costs that are the responsibility of the worker, such as government required passport or visa fees." 20 C.F.R. § 655.22(g)(2) (emphasis added). In *Frog Island,* the court stated that these DOL regulations "speak directly to the issue of passport and visa expenses" and held for the defendants. Defendants in the instant matter ask the court to follow *Frog Island.*

Plaintiffs, however, argue that while the regulation does speak directly to the costs associated with visas and passports, the regulation does not change the relationship between those costs and the FLSA. Plaintiffs argue that the correct interpretation of § 655.22(g)(2) is that employers or their agents are not prohibited from seeking reimbursement for the costs of H-2B visas and/or passports from their employees, as long as the reimbursement does not bring the employees' pay below minimum wage. This court agrees.

Title 20 C.F.R. § 655.22 regulates the obligation of employers under the H-2B labor certification program. It does not speak to compliance with the FLSA. The issue before the court today is not whether defendants have complied with the H-2B regulations, but rather whether there was compliance with the minimum wage requirements of the FLSA. Even the amendment to the H-2B regulation itself cautions that "an employer subject to the FLSA may not make deductions which would violate the FLSA." Additionally, since the court's decision in *Frog Island Seafood,* the USDOL has reiterated that under the FLSA, transportation and visa costs associated with the H-2B program are primarily for the benefit of the employer. *See* USDOL Field Assistance Bulletin No. 2009-2 (DE # 39-17) ("This Bulletin clarifies that employers are responsible for paying the transportation and visa expenses of H-2B employees, where shifting these costs to employees would effectively bring their wages below the FLSA minimum wage in their first workweek of employment.")

This court finds no reason to stray from its prior holding in *De Luna-Guerrero.* Under the FLSA, visa expenses are "incident of and necessary to the employment" and therefore do not qualify as "other facilities" and cannot be the subject of deductions, either actual or de facto, that would reduce an employee's wages below the minimum wage.

D. Willfulness

Defendants move for summary judgment as to plaintiffs' FLSA claims arising prior to August 1, 2006. Defendants contend there is no genuine issue of material fact that any alleged violations were not willful and these claims are therefore barred by the statute of limitations.

The statute of limitations for claims under the FLSA is two years, unless plaintiffs can prove that defendants acted willfully. If willfulness is shown, then the statute of limitations is increased to three years. Plaintiffs bear the burden of proving that defendants' acts or omissions were "willful" within the meaning of the FLSA. An employer's violation of the FLSA is willful if the employer either "knew or showed reckless disregard for the matter of whether its conduct was prohibited by" the FLSA. Unreasonable or negligent conduct is not enough to constitute "willful" conduct.

2. Deduction Violations

Plaintiffs also argue that defendants acted willfully by deducting from their pay, via either actual or de facto deductions, transportation and visa expenses which brought their wages below the required minimum wage. Defendants argue otherwise, asserting that defendant Midyette attended a training session about the H-2B program in 1992 sponsored by the North Carolina Employment Security Commission (not the USDOL). Additionally, they say she did her own research online and by speaking to other crab processors about deduction practices. She did not seek a legal opinion on her practices, but she was never notified by anyone, either worker or government agency, that defendants' practices were unlawful or improper.

This court finds that plaintiffs have not shown evidence sufficient to satisfy their burden of proof on the issue of defendants' willfulness as to the deductions. In making this decision, this court notes the nature of *de facto* deductions and the fact that the propriety of such deductions has been the subject of ongoing litigation in the federal courts for a number of years. Therefore, the court finds that defendants' "piece-rate violations" were willful, but defendants' deduction violations were not.

III. NCWHA Claims

B. Analysis of NCWHA Claims

1. Failure to Obtain Written Authorization for Deductions

Under the NCWHA, an employer may withhold a portion of an employee's wages provided that the employer has

> written authorization from the employee which (i) is signed on or before the payday(s) for the pay period(s) from which the deduction is to be made; (ii) indicates the reason for the deduction; and (iii) states the actual dollar amount of wages which shall be deducted from one or more paychecks.

N.C. Gen. Stat. § 95-25.8(a)(2). Defendants have admitted that they did not obtain authorization for the deductions made from their employees' pay. Therefore, as a matter of law, they are liable for violating N.C. Gen. Stat. § 95-25.8.

2. Failure to Pay the Promised Wage

The NCWHA requires employers to pay their employees at least the promised wage for each hour or part of an hour that they perform labor for their employers. N.C. Gen. Stat. § 95-25.6. In this case, defendants were required to pay each of their H-2B workers the prevailing wage, and they advertised the job openings with the prevailing wage, $6.17 in 2007 and $5.17 in 2006 and 2005, all higher than the federal minimum wage at that time. Defendants have admitted to failing to pay some workers at least the prevailing wage. Additionally, since plaintiffs have shown that defendants violated the FLSA's minimum wage provisions, and the prevailing wage was higher than the FLSA minimum wage, defendants violated N.C. Gen. Stat. § 95-25.6.

3. Deductions for Visa, Transportation and Border Crossing Fees

Defendants have also violated the NCWHA by shifting the cost of visa, transportation and border crossing expenses to Gaxiola and other members of the NCWHA class to the extent those deductions brought their pay below the promised wage. As previously stated, the promised wage that defendants were required to pay plaintiff class members under N.C. Gen. Stat. § 95-25.6 was the H-2B prevailing wage, which at all times relevant to this case exceeded the minimum wage required by federal law. Therefore, in every situation where defendants failed to pay the minimum wage, they also failed to pay the promised wage and therefore violated the NCWHA.

Defendants argue that the NCWHA is inapplicable to the claim that defendants brought the plaintiff class members' pay below the promised wage through deductions because "there is no case supporting the application of any part of the 'de facto' deduction analysis to the NCWHA." In *Frog Island Seafood,* the court held:

> With respect to the definition of 'wages,' there is no material difference between the NCWHA and the FLSA. In particular, regulations implementing both Acts provide that an employee's wage includes the reasonable cost of furnishing board, lodging and other facilities, but excludes items which are primarily for the benefit of the employer. Accordingly, whether the issue of wages is analyzed under the FLSA or NCWHA, "there is no legal difference between deducting a cost directly from the workers' wages and shifting a cost, which they could not deduct, for the employee to bear." Under North Carolina law, therefore, this court must follow the administrative and judicial interpretations of the FLSA when considering whether Plaintiff's promised wages have been paid when due under the NCWHA.

Where, as here, the court has found a violation of the FLSA for improper deductions, be it actual or de facto, defendants are also liable for violation of the NCWHA for failing to pay the promised wage.

4. Good Faith Defense

As to the good faith defense argument made by defendants regarding the NCWHA violations, the court finds that defendants cannot meet the heavy burden required. Defendants admit they did not always pay the promised wage and do not rely on any administrative regulation or ruling in asserting this defense.

Therefore, the court GRANTS plaintiffs' motion for summary judgment as to defendants' liability for violation of the NCWHA.

Garcia v. Frog Island Seafood, Inc., 644 F.Supp.2d 696 (E.D.N.C. 2009)

JAMES C. FOX, Senior District Judge.

II. STATEMENT OF FACTS

This lawsuit arises from Defendants' alleged underpayment of wages and record-keeping violations during Plaintiffs' employment with Defendants. Plaintiffs are citizens of Mexico who were admitted as temporary foreign workers under the H-2B provisions of the Immigration and Nationality Act, to work in Defendants' seafood processing plant as "crab pickers." During 2004-2006, Defendants sought permission to bring Mexican nationals to work in their seafood processing plant by filing annually an Application for Alien Employment Certification ("Clearance Orders") with the United States DOL. Each Clearance Order set forth the number of workers requested by Defendants, the period of employment, the type of work and rate of pay being offered by Defendants. The DOL approved the terms of work described in Defendants' Clearance Orders, and granted their request for H-2B visas to allow Plaintiffs to fill the jobs described in those orders.

Defendants required Plaintiffs to use knives while performing certain tasks in the course of Plaintiffs' employment with Defendants. Defendants provided Plaintiffs with the knives at no cost at the beginning of the season; however, Plaintiffs were advised that replacement knives would be deducted from their wages. Such deductions were made without obtaining Plaintiffs' written authorizations. Due to the unpredictability of crab supply, Plaintiffs worked variable hours each week.

Plaintiffs assert an FLSA claim with a proposed opt-in plaintiff class under 29 U.S.C. § 216(b), alleging violations of the federal minimum wage provision by deducting the costs of replacement knives from Plaintiffs' pay and requiring Plaintiffs to purchase items required for work, to the extent these deductions and purchases reduced wages below the minimum wage.

III. CROSS MOTIONS FOR PARTIAL SUMMARY JUDGMENT

A. Plaintiffs' Motion for Partial Summary Judgment

2. Wage deductions for boots and replacement knives

Plaintiffs allege that their boot expenses, a required work item, operated as *de facto* wage deductions and violated the FLSA to the extent these deductions reduced Plaintiffs' wages below the minimum wage and promised wage, respectively, in any given workweek. Plaintiffs contend further that Defendants are liable under (1) the FLSA for actual deductions of the cost of replacement knives from Plaintiffs' wages to the extent those deductions reduced wages below the minimum wage; and (2) the NCWHA for failing to obtain Plaintiffs' written authorizations prior to deducting the costs of replacement knives from Plaintiffs' wages.

a. FLSA

i. Boots

If an employer requires an employee to purchase an item which is "specifically required for the performance of the employer's particular work, there would be a violation of the FLSA in any workweek when the cost of such item purchased by the employee cuts into the minimum wages required to be paid him under the FLSA." 29 C.F.R. § 531.35; *see also* 29 C.F.R. § 531.32(c) (explaining the cost to the employer of purchasing items, such as uniforms, are primarily for the benefit or convenience of the employer and may not therefore be included in computing wages). In this case, Defendants acknowledge that Plaintiffs were required to wear rubber boots, which Plaintiffs bore the responsibility of purchasing. However, Defendants contend Plaintiffs failed to establish that "any such deductions ever reduced their wages below minimum wage." Indeed, Plaintiffs supply no evidence indicating that boot expenses reduced Plaintiffs' wages below the minimum wage in contravention of the FLSA. In fact, Plaintiffs state only that their purchase of boots operated as *de* *facto* deductions.Accordingly, as to reimbursement for the cost of boots, Plaintiffs motion for partial summary judgment is DENIED.

ii. Knives

Generally, the costs an employer incurs purchasing and providing tools of trade, such as the knives in this case, may not be included in computing wages, since such items are "primarily for the benefit or convenience of the employer." 29 C.F.R. § 531.32(c). Nevertheless, deductions for the costs of such items "may be made if the employee received the required minimum wages in cash free and clear; but to the extent they reduce the wages of the employee in any such workweek below the minimum required by the FLSA, they are illegal." 29 C.F.R. § 531.36(b). Defendants provided Plaintiffs with knives at no cost at the beginning of the season; however, Plaintiffs were advised that replacement knives would be deducted from their wages. Defendants admit requiring Plaintiffs to use certain knives for crab picking, and making nine dollar deductions from Plaintiffs' pay for replacement knives. However, Defendants contend the nine dollar deductions did not reduce Plaintiffs' wages below the required minimum and fault Plaintiffs for failing to prove that such deductions "were a daily or even a weekly event."

Despite Defendants' contention to the contrary, liability under the FLSA is not dependent on any specified frequency of deductions. Rather, compliance with the FLSA is measured by the workweek; thus, the issue is whether any deduction occurring during a particular workweek reduced a worker's wages for that workweek below the minimum wage. A review of Defendants' payroll records reveals instances in which the nine-dollar deduction for the cost of a replacement knife during a particular week did reduce a worker's wages for that week below the minimum wage. For example, during the week of May 19, 2005, Plaintiff Mercedalia Hernandez Garcia ("Mercedalia") worked 37.53 hours at a rate of $5.17 per hour, grossing $194.03. After a nine dollar deduction for the cost of the replacement knife, Mercedalia's wages were reduced to $185.03 ($194.03-$9.00), which equates to an hourly rate of $4.93 ($185.03/37.53 hours). Accordingly, Defendants must reimburse Plaintiffs up to the point that the minimum wage is met, and Plaintiffs motion for summary judgment as to Defendants' liability regarding replacement knives is ALLOWED.

Ketner v. Branch Banking and Trust Company, 143 F.Supp.3d 370 (M.D.N.C. 2015)

LORETTA C. BIGGS, District Judge.

Plaintiffs, R. Andrew Ketner ("Ketner") and Stephen Baker ("Baker"), bring this putative collective action, individually and on behalf of similarly situated individuals, against their former employer, Defendant Branch Banking and Trust Company ("BB & T"), for damages and declaratory relief, alleging violations of The Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2012) ("FLSA" or "Act"). Before the Court is BB & T's Partial Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Court heard oral argument on this motion on September 3, 2015. For the reasons that follow, the Court denies BB & T's motion.

I. BACKGROUND

A. The Fair Labor Standards Act

Congress enacted FLSA in 1938 to ensure that the nation's workers received "a fair day's pay for a fair day's work." Though it has been amended over the years, "FLSA establishes federal minimum-wage, maximum-hour, and overtime guarantees that cannot be modified by contract". The Act requires that employers pay their employees at least the federal minimum wage and provide them overtime in the amount of one and one-half times their regular rate of pay for each hour worked beyond forty hours in a given work week. 29 U.S.C. §§ 206(a)(1), 207(a)(1). FLSA, however, provides for a number of exemptions to this general rule. § 213. One type of exemption involves employees who work "in a bona fide executive, administrative, or professional capacity." § 213(a)(1). These exemptions are commonly known as the "white collar exemptions," and such employees are exempt from FLSA's minimum wage and overtime compensation requirements. While the Act does not define the terms "executive," "administrative," or "professional," Congress has granted the Secretary of the Department of Labor ("DOL") broad authority to define the scope of the white collar exemptions. DOL has promulgated regulations defining these terms and the scope of these exemptions. *See* 29 C.F.R. §§ 541.0-541.710 (2015).

These regulations have been amended since the date of the *Ketner* decision.

In determining whether an employee qualifies for a white collar exemption, "job titles alone are insufficient." Rather, employees must satisfy certain tests related to their job duties and salary as set forth in the regulations. In general, the job duties test is satisfied if an employee's primary duty is the performance of exempt work. For each of the white collar exemptions, the regulations specify what job duties qualify for exemption. Under the salary-basis test, employees must be paid on a salary-basis of at least $455 per week. *Id.* §§ 541.600(a), 602(a). With some exceptions, this test is satisfied if an employee "regularly receives each pay period a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed" or based on the "operating requirements of the business." *Id.* § 541.602(a). "An actual practice of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis." *Id.* § 541.603(a). The exemption status of an employee "is a matter of affirmative defense on which the employer has the burden of proof." The burden of proof is high, as the employer must prove "by clear and convincing evidence" that the exemption applies, and such exemptions are to be narrowly construed against the employer.

The salary requirement for the executive, administrative or professional exemption has since been increased to $684 per week (except in Northern Mariana Islands, Guam, Puerto Rico, the U.S. Virgin Islands, and American Samoa). § 541.600.

B. Plaintiffs' Complaint

BB & T is a North Carolina-based company that provides financial services to its customers in several states throughout the country. BB & T employs, among others, recent college and MBA graduates who must, as a condition of employment, participate in BB & T's Leadership Development Program ("LDP" or "training program") and execute a Training Cost Agreement ("TCA"). The training program is six to ten months in duration and is offered by BB & T twice per year. The TCA requires that LDP participants repay the training costs associated with the LDP if they resign or are terminated for cause within five years of their first day of employment as an associate with BB & T. BB & T forgives 1/60th of the training costs for each full month worked by the associate. BB & T has valued the training costs at $46,000 per LDP participant.

In July 2012, after signing the TCA, Ketner and Baker entered the LDP. Like other LDP participants, Plaintiffs were paid by the hour as non-exempt employees. Ketner's annual salary was $46,000 and Baker's salary was $100,000. During the training program, Plaintiffs attended classes, took examinations, and participated in training events. In November 2012, Ketner, while still in the training program, was placed in a "Business Process and Project Improvement Analyst" position at BB & T. On March 8, 2013, Plaintiffs and their classmates from the July 2012 class graduated from the training program, and BB & T changed their classification from non-exempt employees to exempt employees. Baker was assigned the position of "Research & Strategy Specialist I." Ketner, however, continued to work as a "Business Process and Project Improvement Analyst." On August 12, 2013, Ketner resigned from his position at BB & T, and Baker resigned about a year later. Following their resignations, BB & T notified Plaintiffs that it intended to enforce the TCA and retained a law firm to collect the outstanding balance for the training costs associated with the LDP. The law firm sent Ketner and Baker demand letters, stating that legal action would be taken against them if they did not repay the balance remaining on the training costs under the TCA. The letters demanded $35,982.92 from Ketner and $27,600.00 from Baker. Although Plaintiffs have not repaid any portion of the training costs demanded, BB & T has collected payments from at least two other graduates of the LDP who left BB & T within five years.

On November 17, 2014, Plaintiffs filed this action, asserting four claims against BB & T: (1) Count I alleges that BB & T failed to pay them for overtime hours worked during the LDP even though they were classified as non-exempt; (2) Count II alleges that BB & T misclassified them as exempt employees following their graduation from the LDP; (3) Count III alleges that BB & T failed to pay Ketner and other similarly situated individuals the minimum wage as required by FLSA; and (4) Count IV requests that the court enter a declaratory judgment that the TCA is unenforceable against Plaintiffs and other LDP graduates. BB & T moves to dismiss Counts II, III, and IV of Plaintiffs' Complaint for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

III. DISCUSSION

A. Count II: Whether BB & T Misclassified LDP Graduates as Exempt

In Count II of their Complaint, Plaintiffs allege that BB & T misclassified them as exempt employees following their graduation from the training program, making them ineligible for overtime compensation. In particular, Plaintiffs assert that BB & T has, by enforcing the TCA and requiring them to repay their training costs, “subjected them to an actual practice and clear policy” of improper reductions to their salary as proscribed by the salary-basis test. According to Plaintiffs, this reimbursement policy demonstrates that BB & T never intended to pay them a predetermined salary as required by the test. BB & T denies that Plaintiffs were misclassified as exempt. It argues further that Plaintiffs’ Complaint has failed, as a matter of law, to state a violation of the salary-basis test since it does not allege that Plaintiffs’ paychecks were actually reduced or subject to reduction during their employment with BB & T.

Neither party has cited any cases that directly address whether enforcement of an agreement such as the TCA violates the salary-basis test. BB & T cites to cases involving whether an employer can deduct from an exempt employee’s fringe benefits, such as vacation time and accrued leave. Plaintiffs cite to cases where exempt employees were suspended for disciplinary reasons without pay. None of these cases appears to be dispositive.

While there does not appear to be a case that specifically addresses whether enforcement of an agreement like the TCA violates the salary-basis test, *Hoffmann v. Sbarro, Inc.,* 982 F.Supp. 249 (S.D.N.Y. 1997), provides some guidance, though, likewise, not dispositive. In *Hoffmann,* the plaintiffs, who were exempt restaurant managers, brought a collective action under FLSA, alleging violations of FLSA’s overtime compensation requirements. In particular, the managers argued that their employer’s policy of requiring them to, among other things, make out-of-pocket reimbursements to the company for cash shortages and other losses that occurred under their supervision violated the salary-basis test. The company moved to dismiss the complaint, contending, as BB & T contends in this case, that the managers’ paychecks were never docked and that their out-of-pocket expenses could not be considered reductions in determining whether the salary-basis test had been violated. Then-District Court Judge Sotomayor declined to dismiss for failure to state a claim, explaining,

> Because this claim raises factual issues as to the nature of the out-of-pocket payments and defendant's intent in requiring them, the Court reserves judgment on this question until there is a clearer factual record as to what defendant's policies and practices were, and under what conditions defendant required employees to make out-of-pocket reimbursements.

Additional guidance is provided by two DOL opinions. In 2001, DOL was called upon to provide an opinion on whether two proposed incentive programs for exempt pharmacists violated the salary-basis test. Under the first incentive program, pharmacy students would be eligible for summer internship loans provided that they, among other things, sign a written agreement and participate in the company's summer internship program. Loan recipients who accepted employment with the company would have the amount of each loan payment forgiven for each year worked. If the pharmacist did not stay at the company for the specified length of time, the company would deduct the loan's principal from the pharmacist's final paycheck. Similarly, under the second incentive program, the company would provide newly hired pharmacists with a "one-time career incentive payment similar to a sign-on bonus," and if the pharmacist remained employed with the company for two consecutive years, then there would be no repayment obligations. If the pharmacist resigned or was terminated before completing two years of employment, then the incentive amount would be deducted from the employee's final paycheck.

DOL opined that the incentive programs involved neither a bona fide loan nor a cash advance because "pharmacists who accept employment with the firm do not have an absolute obligation to repay the funds." The incentive programs involved "conditional bonuses, designed to motivate the pharmacists to accept and maintain employment with the company, rather than loans." It was DOL's position that these programs made the pharmacists' salary subject to reduction based on the quantity of work they performed. DOL opined that "the entire class of pharmacists who participate in these programs cannot meet the exemption's 'salary basis' requirement for all workweeks during which this policy is in effect," "irrespective of whether deductions are actually taken, or, if taken, reduce the pharmacist's salary below the minimum salary amount required under the regulations."

In 2006, DOL issued an opinion on whether an employer could make deductions from an exempt employee's salary or require that employee to reimburse the employer for damage to or loss of company equipment without violating the salary-basis test. DOL concluded that a policy that allowed for such deductions violated the salary-basis test. DOL opined that "deductions from the salaries of otherwise exempt employees for the loss, damage, or destruction of the employer's funds or property due to the employees' failure to properly carry out their managerial duties would defeat the exemption because the salaries would not be 'guaranteed' or paid 'free and clear' as required by the regulations." Such deductions were made based on "the quality of the work performed by the employee." DOL made clear that "it would not matter whether an employer implements such a policy by making periodic deductions from employee salaries, or by requiring employees to make out-of-pocket — reimbursements from compensation already received," as "either approach would result in employees not receiving their predetermined salaries when due on a 'guaranteed' basis or 'free and clear.'"

Here, Plaintiffs allege that BB & T has violated the salary-basis test by "subjecting them to an actual practice and clear policy of requiring them to pay back 'Training Costs' up to $46,000" if they left BB & T within five years. As in *Hoffmann,* Plaintiffs allege that because BB & T has violated the salary-basis test, they are nonexempt employees who have worked in excess of forty hours per week without overtime pay in violation of the Act's overtime compensation requirements. Although the employer in *Hoffmann* advanced the same argument BB & T is advancing in this action, *i.e.,* that an exemption is lost only when an employer makes deductions from its employees' paychecks, the court declined to dismiss the restaurant managers' complaint for failure to state a claim as a matter of law. Rather, the court stated that factual development was necessary to determine "the nature of the out-of-pocket payments and defendant's intent in requiring them." Moreover, the 2001 DOL opinion appears to reject BB & T's contention that a reimbursement policy such as the TCA is similar to a bona fide loan and therefore does not violate the salary-basis test. Like the incentive program at issue in that opinion, Plaintiffs' allegations demonstrate that they do not have an absolute obligation to repay the training costs since, if they remain with the company for five years, BB & T forgives the loan. Although the 2001 opinion referred only to deductions in the pharmacists' paychecks, DOL's 2006 opinion makes it clear that an out-of-pocket reimbursement policy like the TCA can also violate the salary-basis test, even though no deductions are made from an employee's paycheck. The Court is therefore persuaded that Plaintiffs have sufficiently stated a cognizable violation of the salary-basis test in Count II of the Complaint.

In its effort to distinguish the DOL opinions, BB & T asserts that the 2001 opinion dealt only with payroll deductions and the 2006 opinion "disregards the plain language of the interpreting regulations." BB & T argues that the regulations "contain no mention whatsoever of kick-backs, *de facto* deductions, or deductions from sources of compensation other than the salary." BB & T therefore urges the Court to "lend no credence to the 2006 opinion letter."

BB & T is correct that 29 C.F.R. §§ 541.602 and 541.603 do not expressly speak to whether a reimbursement policy, such as the TCA, implicates the salary-basis test. However, the Court must reject BB & T's argument that an employee's paycheck must actually be reduced or be subject to reduction for there to be a violation of the salary-basis test. If that were the case, rather than making deductions from an employee's paycheck, an employer could easily manipulate the exemption requirements by mandating that exempt employees write a check payable to the employer — for the same amount of the would-be payroll deduction — immediately after the employer hands over the payroll check. The only difference in these two approaches is one of form, as the substance of either practice would effectively yield the same result. For this Court to dismiss this action based on BB & T's rigid interpretation of FLSA's implementing regulations would make the salary-basis test a nullity.

Nor does the Court believe that the language of the regulations bars a claim that out-of-pocket reimbursements violate the salary-basis test. Contrary to BB & T's argument that "salary reductions refer only to mandatory deductions from an employee's guaranteed salary," the regulations do not exclude alternative interpretations. Nowhere in the regulations are the terms "compensation" or "salary" defined. The regulations are thus silent on whether the TCA or similar agreements fall within the scope of practices covered by the salary-basis test. Such silence demonstrates that the regulations are ambiguous because they are susceptible to BB & T's interpretation or the one expressed in the 2006 DOL opinion. Consequently, this Court defers to DOL's interpretation of its regulations as contained in the 2006 opinion letter. To do otherwise, as BB & T advocates, would not only hamper DOL's ability to enforce the salary-basis test, it would also frustrate Congress's goals in enacting FLSA in the first place. "The FLSA should be broadly interpreted and applied to effectuate its goals."

Because the 2006 DOL opinion is reasonable and conforms to the purpose of FLSA and the salary-basis test, the Court denies BB & T's request to disregard it. This Court concludes Plaintiffs have stated a plausible claim that BB & T misclassified them as exempt based on alleged violations of FLSA's salary-basis test.

BB & T further contends that Count II of Plaintiffs' Complaint should be dismissed because Plaintiffs' allegations about their job duties are nominal and insufficient for the Court to conduct the duties analysis. The Court disagrees. Plaintiffs' Complaint alleges that when Ketner graduated from the LDP, there was "no material change in his primary job responsibilities" and that "he continued to work overtime on a regular basis, and received no overtime compensation for his overtime hours." The Complaint also alleges that Plaintiffs "were placed in job positions that did not require them to exercise discretion and independent judgment with respect to matters of significance" and "were assigned to clerical-type positions." Although Baker earned $100,000 and therefore was subject to a more relaxed job duties analysis as a "highly compensated employee," he must still satisfy the requirements for exemption. Because exemptions are affirmative defenses and must be narrowly construed against the employer with the employer bearing the burden of proof, the Court concludes that Plaintiffs have sufficiently alleged a violation of the duties test to survive a motion to dismiss under Rule 12(b)(6).

B. Count III: Whether BB & T Violated FLSA's Minimum Wage Requirement

In Count III of the Complaint, Ketner asserts[32] that enforcement of the TCA violates FLSA because it has the effect of requiring employees to work for wages lower than minimum wage and further that their wages were not paid "free and clear" as required by the Act. BB & T argues that Ketner and other similarly situated employees have failed to allege a plausible

32. (n.6 in opinion) Baker is unable to assert this claim since he earned $100,000 and repayment of the training costs as required by the TCA would not cause his salary to fall below the minimum wage.

claim that BB & T's enforcement of the TCA violates FLSA's minimum wage requirement.

To state a claim for violation of FLSA's minimum wage provision, a plaintiff must allege that "(1) he was employed by Defendant; (2) his work 'involved interstate activity'; and (3) 'he performed work for which he was undercompensated.'" There is no dispute that the first two factors have been satisfied. As it relates to the third factor, Ketner alleges that his "wages were conditionally paid" and not "free and clear" because BB & T now seeks to recoup $35,982.92 in earned wages by enforcing the TCA. He further alleges that enforcement of the TCA would result in him earning less than $7.25, the minimum wage, for the thirteen months he worked for BB & T. Ketner points to 29 C.F.R. § 531.35 of FLSA's implementing regulations, which provides that "whether in cash or in facilities, 'wages' cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or 'free and clear,'" 29 C.F.R. § 531.35. BB & T, however, maintains that the TCA is a voluntarily accepted loan and not a kick-back prohibited by 29 C.F.R. § 531.35. As support, BB & T relies primarily on *Heder v. City of Two Rivers,* 295 F.3d 777 (7th Cir.2002) and *Gordon v. City of Oakland,* 627 F.3d 1092 (9th Cir.2010).

BB & T's reliance on *Heder* is misplaced. *Heder* was on appeal after the district court's entry of partial summary judgment and did not address whether out-of-pocket reimbursements, such as the TCA, constituted kick-backs under 29 C.F.R. § 531.35. Rather, *Heder* dealt with whether an agreement that required firefighters to reimburse the city for their paramedic training if they failed to remain employed with the city for the required length of time was valid and enforceable under Wisconsin law. *Gordon's* reliance on *Heder* for the proposition that the police training agreement was not a kick-back under 29 C.F.R. § 531.35 is therefore misplaced.

Moreover, unlike in *Heder* and *Gordon,* where the plaintiffs received a certification recognized beyond their former employers, Ketner challenges BB & T's training program as not conferring to him any benefit that is recognized within the broader marketplace or to him as an associate. Further, the costs of the training programs in *Heder* and *Gordon* were substantially less than the alleged costs of BB & T's training program. In this case, the training costs of the LDP is the same as Ketner's entire yearly salary. BB & T did not adjust the cost of the training despite some training programs allegedly lasting six months while others ten months. This Court concludes that Ketner has alleged a plausible claim that the $35,982.92 BB & T seeks to collect from him constitutes a kick-back of the $46,000 BB & T paid to him and, thus, would violate FLSA's minimum wage requirement. Ultimately, factual development of this case will determine whether the costs of training for the LDP is a bona fide loan as asserted by BB & T or a kick-back of salary as alleged by Ketner. BB & T's motion to dismiss Count III is denied.

Like non-compete agreements, training reimbursement requirements have been criticized for inhibiting employee mobility by imposing a substantial cost on those who wish to change jobs, while leaving employers free to discharge those employees at-will without any liability. *See* Stuart Lichten & Eric M. Fink, 'Just When I Thought I was Out …': Post-Employment Repayment Obligations, 25 Washington & Lee Journal of Civil Rights & Social Justice 51 (2018); Jonathan F. Harris, Unconscionability in Contracting for Worker Training, 72 Ala. L. Rev. 723 (2021); Student Borrower Protection Center, Trapped at Work: How Big Business Uses Student Debt to Restrict Worker Mobility (July 2022).

Chapter 7: Employee Health & Safety

1. Family & Medical Leave

Family and Medical Leave Act, 29 U.S.C. § 2601 et seq.

See also, Wage & Hour Division, Family & Medical Leave Act regulations, 29 CFR Part 825

§ 2601 - Definitions

(2) Eligible employee

(A) In general

The term "eligible employee" means an employee who has been employed—

(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

(B) Exclusions

The term "eligible employee" does not include—

(i) […]

(ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

(4) Employer

(A) In general

The term "employer"—

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes—

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer;

[...]

(11) Serious health condition

The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves—

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider.

§ 2602 - Leave requirement

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title and subsection (d)(3), an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(E) Because of any qualifying exigency [...] arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.

(F) During the period beginning on the date the Emergency Family and Medical Leave Expansion Act takes effect, and ending on December 31, 2020, because of a qualifying need related to a public health emergency in accordance with section 2620 of this title.

(4) Combined leave total

Subject to subsection (d)(3), during the single 12-month period described in paragraph (3), an eligible employee shall be entitled to a combined total of 26 workweeks of leave under paragraphs (1) and (3). Nothing in this paragraph shall be construed to limit the availability of leave under paragraph (1) during any other 12-month period.

§ 2614 - Employment and benefits protection

(a) Restoration to position

(1) In general

Except as provided in subsection (b), any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave—

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits

The taking of leave under section 2612 of this title shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) Limitations

Nothing in this section shall be construed to entitle any restored employee to—

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(4) Certification

As a condition of restoration under paragraph (1) for an employee who has taken leave under section 2612(a)(1)(D) of this title, the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) Construction

Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section 2612 of this title to report periodically to the employer on the status and intention of the employee to return to work.

(b) Exemption concerning certain highly compensated employees

(1) Denial of restoration

An employer may deny restoration under subsection (a) to any eligible employee described in paragraph (2) if—

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) Affected employees

An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

(c) Maintenance of health benefits

(1) Coverage

Except as provided in paragraph (2), during any period that an eligible employee takes leave under section 2612 of this title, the employer shall maintain coverage under any “group health plan” (as defined in section 5000(b)(1) of title 26) for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave.

(2) Failure to return from leave

The employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave under section 2612 of this title if—

(A) the employee fails to return from leave under section 2612 of this title after the period of leave to which the employee is entitled has expired; and

(B) the employee fails to return to work for a reason other than—

(i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 2612(a)(1) of this title or under section 2612(a)(3) of this title; or

(ii)other circumstances beyond the control of the employee.

(3) Certification

(A) Issuance

An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of the serious health condition described in paragraph (2)(B)(i) be supported by—

(i) a certification issued by the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(C) of this title;

(ii) a certification issued by the health care provider of the eligible employee, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(1)(D) of this title; or

(iii) a certification issued by the health care provider of the servicemember being cared for by the employee, in the case of an employee unable to return to work because of a condition specified in section 2612(a)(3) of this title.

§ 2615 - Prohibited acts

(a) Interference with rights

1. Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual—

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

Ramji v. Hospital Housekeeping Systems, LLC, 992 F.3d 1233 (11th Cir. 2021)

ROSENBAUM, Circuit Judge:

The Family Medical Leave Act ("FMLA") is a federal statute that entitles eligible workers who need to recover from a serious injury to take up to twelve weeks of unpaid leave during any twelve-month period. Employers are prohibited from interfering with, restraining, or denying an employee's efforts to exercise any FMLA right. Separately, most states require employers to provide their employees with workers' compensation benefits. Workers' compensation allows an employee who is injured in a work-related incident to receive payments for all reasonable medical care and lost wages resulting from that injury.

Sometimes the benefits of these laws can overlap. That's what happened here. Now, Defendant-Appellee Hospital Housekeeping Systems seeks to use one—workers' compensation—as a shield against the other—the FMLA. Hospital Housekeeping's employee Plaintiff-Appellant Noorjahan Ramji seriously injured her knee while at work. Hospital Housekeeping told her nothing about her rights under the FMLA, instead handling the injury solely as a workers' compensation claim.

After a few days off and a temporary light-duty assignment, Ramji received medical clearance to resume her regular-duty position. But before Hospital Housekeeping would allow her to do so, Ramji first had to pass an essential-functions test, which required her to complete certain physical tasks that the doctor who cleared her was not advised of. Among other things, Ramji had to repeatedly engage in deep squats and bend to one knee. Though Ramji was able to perform several of these exercises, she began to experience pain in her injured knee before she finished all of them. As a result, Ramji did not pass the test. So Hospital Housekeeping discharged Ramji. At no point before Hospital Housekeeping fired Ramji did Hospital Housekeeping advise Ramji of her rights under the FMLA or give Ramji an opportunity to take twelve uninterrupted weeks of leave to rehabilitate her knee, even though the FMLA entitled her to that relief.

Ramji filed suit for interference with her FMLA rights. At the district court, the parties filed cross-motions for summary judgment. Hospital Housekeeping sought in part to avoid liability under the FMLA by pointing to its compliance with its workers' compensation responsibilities. The district court granted summary judgment in favor of Hospital Housekeeping.

But the FMLA does not set up a clash of Titans between itself and workers' compensation. So providing workers' compensation benefits cannot absolve an employer of all obligations under the FMLA. For this reason and others, and with the benefit of oral argument, we vacate the entry of summary judgment and remand for further proceedings.

I.

A.

For nearly eleven years, Ramji worked as a housekeeper, cleaning patient-examination rooms, hallways, and bathrooms at Eastside Medical Center in Snellville, Georgia. Her daily tasks included mopping, sweeping, dusting, cleaning walls, removing trash, and making beds.

In 2013, Hospital Housekeeping, which provides contracted cleaning and facilities-management services to hospitals, took over maintenance operations at Eastside Medical Center. Ramji's employment fell under Hospital Housekeeping.

On the morning of September 15, 2016, as Ramji was getting ready to clock out from her night shift, she tripped on the leg of a breakroom table, fell face down onto the ground, and injured her right knee. Pamela Merriweather, then the director of Hospital Housekeeping's division at Eastside Medical Center, assisted Ramji into a wheelchair and took her to the emergency room for an X-ray of her swollen knee.

Upon examining Ramji's knee, Physician Assistant Christina Eid issued Ramji a medical work excuse: "Ramji was seen on 9/15/2016 and is excused from work from 9/15/2016 through 9/18/2016."

At the time of her injury, Hospital Housekeeping did not provide Ramji with any information about eligibility for leave and rights under the FMLA. Instead, Hospital Housekeeping immediately handled Ramji's injury as a workers' compensation claim. And when Ramji needed to take eleven days off between the date of her accident and her return to work in a light-duty position, Hospital Housekeeping required Ramji to use sick leave.

During this eleven-day period, on September 23, Ramji had her first follow-up medical appointment with Dr. David Harkins of Athens Orthopedics. In accordance with Hospital Housekeeping's workers' compensation policy, Merriweather accompanied Ramji to all follow-up appointments and treatments. At the September 23 appointment, Dr. Harkins injected a cortisone shot into Ramji's knee and diagnosed her injury as right knee pain and derangement. Dr. Harkins also referred Ramji for physical-therapy sessions to occur two to three times per week for six to eight weeks. The goal of these sessions was to increase the knee's range of movement and strength while decreasing pain. Besides treating Ramji, Dr. Harkins issued a light-duty medical release permitting Ramji's return to work—but with the following restrictions: no squatting, kneeling, or climbing.

Three days after that appointment, Hospital Housekeeping offered Ramji the chance to return to a light-duty position with restrictions on kneeling, squatting, and climbing. That position included tasks like making copies, folding rags and mops, creating washcloth origami, cleaning small items, counting inventory, and rolling silverware. Ramji accepted the offer and returned to work that day.

On October 10, Ramji, once again accompanied by Merriweather, attended her first physical-therapy session. The physical therapist observed signs and symptoms consistent with right knee derangement and recommended that Ramji initially be seen twice a week for four weeks, for a total of eight visits. But, the physical therapist added, therapy might be extended and occur more frequently, depending on Ramji's progression. Ramji found these physical-therapy sessions helpful in reducing her knee pain.

On October 21, before completing the physical therapist's full recommended physical-therapy course, Ramji had a second follow-up appointment with Dr. Harkins. She told Dr. Harkins that the cortisone injection she received during her September 23 appointment "took away all of her pain," that "physical therapy has helped tremendously," and that she was ready to return to work. After observing the knee's full range of motion without pain or instability, Dr. Harkins concluded that Ramji's right knee and ankle pain had been resolved and that she had reached maximum medical improvement with a zero-percent disability rating. As a result, Dr. Harkins reasoned, Ramji could return to regular-duty work that day.

Significantly, though, Merriweather, who once again accompanied Ramji to her appointment with Dr. Harkins, never advised Dr. Harkins about Ramji's regular duties at Eastside Medical Center. Nor did Merriweather explain that company policy required Ramji to complete an essential-functions test upon her return to work from her injury or what tasks the essential-functions test demanded. Dr. Harkins also did not address the need for Ramji's remaining physical-therapy sessions, and he did not opine on Ramji's ability to complete specific tasks required in her regular-duty position.

With her medical release in hand, Ramji returned to work that same day. Marcia Gordon, then the Assistant Director of Hospital Housekeeping's second and third shifts at Eastside Medical Center, explained that the company's workers' compensation policy required that "all injured employees returning to regular duty complete an Essential Functions Test." Ramji, who was unaware of this requirement, the content of the test, or consequences of failing it, took the test.

The essential-functions test required Ramji to successfully complete twenty tasks assessing her ability to grip, bend, lift, twist, climb, and push. An employee unable to complete every task listed on the test is subject to termination of her employment.

Five of the twenty tasks gave Ramji particular difficulty. Ramji had to complete ten deep-knee bends or squats. Deep-knee squats require the employee to squat down until her calves touch the backs of her thighs. After Ramji completed five deep-knee squats, her right knee began to hurt. Ramji informed Gordon of her knee pain and her inability to perform any more squats. Gordon then brought in Merriweather to help finish administering the essential-functions test. Despite Ramji's recent injury and her complaints of knee pain, Merriweather insisted that Ramji complete the remaining deep-knee squats.

But Ramji's knee pain persisted, and she was concerned about exacerbating her injury. So Ramji asked Merriweather whether she could use accrued sick and vacation leave to give herself additional recovery time to allow her to be able to finish the essential-functions test upon her return from leave. Merriweather refused, stating that Ramji could not use her sick or vacation leave and insisting that Ramji finish the essential-functions test that day.

With no other choice, Ramji continued plugging along with the test. As the test progressed, Ramji had trouble when Merriweather instructed Ramji to kneel on one knee until it touched the floor and then to stand up and kneel on the other knee until it touched the floor. Ramji's knee pain prevented her from being able to complete this task.

Next, Merriweather directed Ramji to use one hand to lift a twenty-pound bag out of a hamper and place into a soiled-linen cart. Ramji struggled to lift a ten-pound bag with one hand.

Merriweather also told Ramji to walk up and down a flight of stairs without using a handrail. Although Ramji walked up and down the stairs, she had to use the guardrail for support. Merriweather also noted that Ramji was "very wobbly coming down" and lost balance on the steps.

The last task that caused difficulty required Ramji to stand on her toes and hold for 30 seconds. Ramji claimed that she was able to hold the pose for more than 30 seconds, but the essential-functions test notes indicated that she did not successfully complete the task. After failing the essential-functions test, Ramji went home for the weekend.

When Ramji returned the following Monday, October 24, Merriweather issued written warnings to Ramji for past incidents, including the September 2016 accident that led to her knee injury, a December 2015 accident in which Ramji tripped on a phone cord and injured her forehead, and an August 2014 insubordination matter where Ramji failed to attend a mandatory staff meeting. Merriweather also notified Ramji that Hospital Housekeeping was terminating her employment for failing to complete five tasks on the essential-functions test. Ramji responded by again asking to use unused sick and vacation leave, but Merriweather denied the request, noting that she was firing Ramji.

Ramji could not pay out of her own pocket for medical appointments and physical-therapy treatments even though the treatments offered promising benefits. So she hired a workers' compensation lawyer, who helped her successfully reinstate medical care and ultimately obtain a financial settlement. But the process of restoring benefits and approving medical providers resulted in somewhat delayed and interrupted follow-up medical and physical-therapy treatments, as we summarize below.

Four months after her termination, Ramji resumed medical appointments when she had her first appointment with Dr. Maurice Jove, who tried a variety of methods to reduce Ramji's knee pain, including a cortisone shot, unloader knee brace, six weeks of physical therapy, and an eight-week supply of an anti-inflammatory medication. After returning to physical-therapy sessions, Ramji felt improvements but wanted to continue physical therapy to ensure her knee completely healed.

Dr. Jove subsequently released Ramji to work “immediately with no restrictions,” but he prescribed an additional three physical-therapy sessions per week for six weeks. Despite Dr. Jove’s recommendation, Hospital Housekeeping never approved the additional physical-therapy sessions under workers’ compensation, so Ramji stopped attending physical therapy. After a review of Ramji’s MRI results, Dr. Jove observed that Ramji had osteoarthritis in her knee and recommended a knee replacement, since arthroscopic treatment would be ineffective.

Ramji obtained a second opinion from Dr. Scott Barbour, who also ultimately recommended a knee replacement. But Dr. Barbour concluded that Ramji’s condition requiring treatment, including surgery, resulted primarily from the September 16 workplace accident.

Ramji and Hospital Housekeeping ultimately agreed to a settlement of her workers’ compensation claim. Because of the costs, at no point until this time was Ramji able to receive an uninterrupted twelve-week period of treatment, including physical-therapy sessions.

After the settlement, Ramji began working with a physical therapist again. She fully recovered when she was finally able to take twelve continuous weeks of physical-therapy sessions and appropriate treatment. Ramji now maintains that she can perform all duties and functions required of her regular-duty position at Hospital Housekeeping.

III.

The FMLA entitles employees to take leave for certain family and medical reasons. 29 U.S.C. §§ 2601 and 2612. Among these, an eligible employee may take up to twelve weeks of leave because of a serious health condition that renders the employee unable to perform the functions of her position. § 2612(a)(1)(D). The FMLA also guarantees an eligible employee the right to be restored to her former position, or an equivalent position, at the end of her leave, provided she can execute the essential functions of her job. § 2614(a)(1). But if, after twelve weeks, the employee cannot perform an essential function of her job, her employer may choose to end her employment. 29 C.F.R. § 825.216(c).

Under the FMLA, a covered employer may not interfere with, restrain, or deny the employee's exercise or attempted exercise of her FMLA rights to coverage, leave entitlement, notice, benefits continuation, and job restoration. 29 U.S.C. § 2615(a)(1); 29 U.S.C. §§ 2601-2654; 29 C.F.R. §§ 825.100-825.803.

To establish an FMLA interference claim, an employee must show she was entitled to a benefit under the FMLA and her employer denied her that benefit. But a technical FMLA violation alone is not enough. Rather, the employee must also "demonstrate some harm" from the alleged interference, and that harm must be "remediable by either"damages' or 'equitable relief.'" Below, we address each of these requirements as they relate to Ramji's claim.

A.

We begin by considering whether Ramji showed she was entitled to an FMLA benefit. To satisfy this requirement, an eligible employee must demonstrate that she sought leave for a qualifying reason and that she provided notice meeting certain criteria.

The record contains ample evidence that Ramji's knee injury served as a qualifying reason to take FMLA leave. An employee is entitled to FMLA leave if she has "a serious health condition that makes her unable to perform the functions of her position." 29 U.S.C. § 2612(a)(1)(D). A "serious health condition" means "an illness, injury, impairment, or physical or mental condition that involves continuing treatment by a health care provider." § 2611(11)(B). To qualify as "continuing treatment" under FMLA regulations, treatment (1) must involve a period of incapacity of more than three consecutive, full calendar days, and (2) must require either (a) treatment by a healthcare provider at least twice within 30 days of the first day of incapacity or (b) treatment by a healthcare provider at least once that results in a regimen of continuing treatment under the supervision of the healthcare provider. 29 C.F.R. § 825.115(a)(1)-(a)(2).

Ramji's knee injury satisfies all these definitions.

First, Ramji injured her knee on the morning of September 15, and, after an emergency-room visit, she was excused from work from September 15 through September 18. That's more than three consecutive, full days, so it meets the first half of the "continuing treatment" standard 29 C.F.R. § 825.115(a)(1) articulates.

Second, Ramji attended a follow-up appointment with Dr. Harkins on September 23. At that appointment, he gave her a cortisone injection in her knee, restricted her to light duty, and referred her to physical-therapy sessions occurring two to three times each week for six to eight weeks. That satisfies the second qualifying condition for "continuing treatment," since Dr. Harkins prescribed a continuing regimen of physical therapy for Ramji. 29 C.F.R. § 825.115(a)(2).

Ramji therefore had a qualifying "serious health condition." 29 U.S.C. § 2611(11)(B). And that condition caused her to be unable to perform the essential functions of her job. § 2612(a)(1)(D).

As for whether Ramji placed Hospital Housekeeping on sufficient notice for its duty to inform her of her right to FMLA leave, Ramji provided enough evidence there as well to allow a reasonable jury to conclude she met this requirement. This inquiry presents a mixed question of fact and law: the factfinder identifies the notice given, and the court assesses whether that notice was legally sufficient to cause the employer's obligations to be triggered.

The critical question we must consider asks whether the "employee adequately conveyed to the employer sufficient information to put the employer on notice that her absence was potentially FMLA-qualifying." An employee must provide proper notice to make out an FMLA interference claim. To fulfill this requirement, an employee's notice must be timely and contain sufficient information—requirements that differ, depending on whether the employee's need for leave is foreseeable or unforeseeable.

When, as here, the employee's need for leave is unforeseeable, she must give notice "as soon as practicable under the facts and circumstances of the particular case." 29 C.F.R § 825.303(a). As for the content of the notice, an employee seeking FMLA leave for the first time need not "expressly assert rights under the FMLA or even mention the FMLA to meet her obligation to provide notice." §§ 825.301(b) and 825.303(b). Rather, notice must simply allow the employer to understand that the employee potentially qualifies for FMLA rights. FMLA regulations offer examples of sufficient notice, such as providing information about the "condition that renders the employee unable to perform the functions of the job" or "the anticipated duration of the absence, if known." § 825.303(b).

Ramji contends that Hospital Housekeeping had real-time, sufficient notice of both her need for leave and the nature of her health condition. She points to the fact that Merriweather, who was Hospital Housekeeping's FMLA administrator for Eastside Medical Center, was there when Ramji injured herself. Not only that, but Merriweather handled Ramji's workers' compensation and workplace-injury forms. Hospital Housekeeping also knew that Ramji was excused from work from September 15 through September 18. Plus, Merriweather personally accompanied Ramji to follow-up medical appointments and the doctor-prescribed physical-therapy sessions. We agree that these facts demonstrate that Hospital Housekeeping knew of the nature of Ramji's injury and her potential qualification for FMLA leave.

So taking the evidence in the light most favorable to Ramji, Ramji has established that she was entitled to an FMLA benefit. For that reason, Ramji meets the first element of an FMLA-interference claim.

B.

That brings us to the second element of an FMLA interference claim—whether Ramji demonstrated that Hospital Housekeeping denied her a leave benefit under the FMLA.

When an employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, that triggers the employer's obligation to evaluate whether the employee's requested absence in fact qualifies for FMLA protection. The employer must also provide notice to the employee of her eligibility for and rights under the FMLA within a certain timeframe. 29 C.F.R. § 825.300. A "failure to follow the notice requirements may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights." § 825.300(e).

Ramji argues that Hospital Housekeeping denied her two types of FMLA notice: "eligibility notice" and "rights and responsibilities notice." To satisfy its eligibility-notice requirement, an employer must advise its employee of her "eligibility to take FMLA leave within five business days, absent extenuating circumstances." § 825.300(b)(1). Rights-and-responsibilities notice must "detail the specific expectations and obligations of the employee and explain any consequences of a failure to meet these obligations." § 825.300(c)(1). As relevant here, rights-and-responsibilities notice must advise the employee of (1) the fact that "the leave may be designated and counted against the employee's annual FMLA leave entitlement and the applicable 12-month period for FMLA entitlement," (2) "the employee's right to substitute paid leave ," as applicable, and (3) "the employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave." § 825.300(c)(1)(i), (iii), and (vi). The employer must give the employee the rights-and-responsibilities notice at the same time it provides eligibility notice. § 825.300(c)(1).

Here, on September 16, a formal workers' compensation claim for Ramji was filed with Hospital Housekeeping. That claim included information about the nature of Ramji's knee injury, the need for emergency medical and follow-up treatment, and a release excusing Ramji from three days of work. And this information, in turn, activated Hospital Housekeeping's duty to provide Ramji with FMLA notice within five business days, or in this case, by September 23. § 825.300(b)(1). But Hospital Housekeeping never offered Ramji FMLA eligibility and rights-and-responsibilities notice at any point during Ramji's knee-injury recovery. So a reasonable jury could conclude that Hospital Housekeeping interfered with Ramji's FMLA rights.

Hospital Housekeeping offers two excuses for why Ramji was not entitled to notice of her FMLA rights. First, it notes that it handled Ramji's on-the-job injury through workers' compensation. And Hospital Housekeeping asserts that, as Ramji was compensated for the excused days of work between September 15 and September 18 and was expected to return to work on September 19, it had no reason to believe Ramji needed FMLA leave for that period, and Ramji did not request FMLA leave. Second, Hospital Housekeeping observes that Ramji's September 23 follow-up appointment fell on the same day as the purported deadline for the employer's FMLA notice requirement. Based on this circumstance, Hospital Housekeeping contends that extenuating circumstances prevented it from offering Ramji FMLA leave before her appointment. And because Hospital Housekeeping waited until after the appointment before making an FMLA determination, it reasons, offering Ramji FMLA leave at that time would have contradicted Dr. Harkin's medical assessment that Ramji could return to light-duty work on September 23.

Hospital Housekeeping's first argument fails as a matter of law. Hospital Housekeeping cannot exempt itself from its FMLA notice obligations by offering Ramji paid workers' compensation from the date of her injury on September 15 through her return to light-duty work on September 26. In fact, the FMLA regulations contemplate this scenario and specify that "the workers' compensation absence and FMLA leave may run concurrently." 29 C.F.R. § 825.702(d)(2) ("An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employer).").

Hospital Housekeeping's second argument similarly lacks merit. Ramji's acceptance of a light-duty position did not relieve Hospital Housekeeping of its FMLA obligations. The FMLA regulations unambiguously prohibit precisely this employer conduct: "if FMLA entitles an employee to leave, *an employer may not, in lieu of FMLA leave entitlement,* require an employee to take a job with a reasonable accommodation." 29 C.F.R. § 825.702(d)(1) (emphasis added); § 852.702(d)(2) ("If the employer offers a light-duty position, the employee is permitted but not required to accept the position. As a result, the employee may no longer qualify for payments from the workers' compensation benefit plan, but the employee is entitled to continue on unpaid FMLA leave until either the employee is able to return to the same or equivalent job the employee left or until the 12-week FMLA leave entitlement is exhausted.") (citation omitted).

So once Dr. Harkins cleared Ramji for a light-duty position instead of the same or equivalent position she had, Ramji was entitled to decline Hospital Housekeeping's light-duty job offer. 29 C.F.R. § 825.207(e). But Ramji never had the opportunity to decide between taking a light-duty position or taking unpaid FMLA leave. Hospital Housekeeping made that choice for her by offering only a light-duty assignment. § 825.220(d) (specifying that an "employee's acceptance of such light duty assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held at the time the employee's FMLA leave commenced or to an equivalent position").

And even assuming Hospital Housekeeping had the best of intentions in adopting a wait-and-see approach after Ramji's September 23 follow-up appointment, an "employer's motives are irrelevant" under the FMLA. We also find no basis to conclude that this reason for Hospital Housekeeping's delay qualifies as an extenuating circumstance justifying its failure to provide Ramji with notice within the five-day period. 29 C.F.R. § 825.300(b)(1). Because Hospital Housekeeping did not give Ramji any FMLA notice whatsoever, it did not satisfy its FMLA notice obligations under 29 C.F.R. § 825.300(b)(1) and (c)(1). It therefore denied her a leave benefit under the FMLA, so Ramji established the second element of the FMLA interference claim.

C.

Finally, we must determine whether Ramji can demonstrate harm, or prejudice, resulting from the employer's interference with her exercise (or attempted exercise) of an FMLA benefit to which she is entitled. An employee may obtain relief for interference with an FMLA right only if she "has been prejudiced by the violation." So an employee must show that the FMLA violation caused her to suffer injury that could be remedied in a way that the FMLA allows: damages or equitable relief.

First, as relevant here, when an employee has been denied or lost wages, the employer can be liable for "damages," including "any wages, salary, employment benefits, or other compensation" that the employee has not received "by reason of" the FMLA violation. 29 U.S.C. § 2617(a)(1)(A)(i)(I). Second, employers are liable for "such equitable relief as may be appropriate, including employment, reinstatement, and promotion." § 2617(a)(1)(B). Ramji contends that she can demonstrate two forms of prejudice resulting from Hospital Housekeeping's violations: Hospital Housekeeping's refusal to reinstate her and its denial to her of a lump-sum payment.

Beginning with reinstatement, Ramji observes that the FMLA notice provisions exist to ensure that employees "make informed decisions about leave." She asserts that, consistent with its notice duties, Hospital Housekeeping should have advised Ramji of her right to take FMLA leave. Had Hospital Housekeeping done so, Ramji asserts, she would have used that knowledge to (1) make informed decisions about her healthcare with the knowledge that her job would be protected, (2) receive additional physical therapy and medical treatment for her knee, and (3) return to work after further treatment.

More specifically, when faced with the essential-functions test (or at the first sign of pain from the essential-functions test) that would end her employment if she did not pass it, she would have made the informed decision to first take the full twelve weeks of FMLA leave. Then she could have used that time to undergo a complete course of continuous physical therapy and to have longer to heal and regain her strength before attempting to take the essential-functions test. As Ramji explained,

> If Ms. Merriweather let me take FMLA leave, I would have gotten physical therapy during my leave knowing that my job would be held for me while I was on leave. I did not know that they had to keep my job open. I would have found a way to pay for the treatment to keep my job. I could have borrowed money from my sister or other family members. I would have gotten the therapy because I really wanted my job back.

Hospital Housekeeping retorts that providing Ramji with the required notice would have made no difference. In its view, even if Ramji received notice of her right to FMLA leave and benefits (whether on September 15, the date of her injury, or October 21, the date she failed the essential-functions test), Ramji would not have been able to completely recover before the twelve weeks of FMLA leave expired. So, Hospital Housekeeping reasons, she would not have been reinstated because she still would have failed the essential-functions test. In support of this argument, Hospital Housekeeping relies on the statements of Dr. Jove, who testified in the resolution of Ramji's state workers' compensation claim. Dr. Jove opined that Ramji could have returned to complete knee function after only a total knee replacement, for which Ramji would have required more than twelve weeks to fully recover.

On this record, we conclude that a material issue of fact exists over whether an uninterrupted twelve-week FMLA leave period would have made a difference to whether Ramji could have passed her essential-functions test and returned to work. True, a reasonable jury might accept Dr. Jove's medical opinion that Ramji would not have successfully recovered during twelve weeks of FMLA leave. But a reasonable jury would not be required to agree with Dr. Jove, in view of the other evidence in the record. This record also supports the conclusion that Ramji aggravated her condition during the essential-functions test administered so soon after her injury. And that, along with the delay in uninterrupted physical therapy, contributed to the injury and impaired her chances for a faster recovery by the time Dr. Jove met with Ramji.

In particular, Dr. Jove did not meet with Ramji until five months after her workplace injury. And even at that time, because Ramji no longer received medical benefits from Hospital Housekeeping following her termination, Ramji had been able to complete only four of the approved 24 physical therapy sessions.

A reasonable jury could draw the inference that when Ramji presented her knee to Dr. Jove five months after her injury, the injured knee Dr. Jove saw was not in the condition it would have been had Ramji taken twelve weeks of FMLA leave after the accident and received the entirety of her necessary treatment, instead of aggravating the injury by trying to complete the essential-functions test too early in her recovery period and having her necessary physical therapy delayed. Indeed, Ramji attested that once she eventually did receive a full twelve weeks of physical therapy, her knee regained its original ability, and she can now perform all tasks from the essential-functions test. A jury might find this evidence particularly compelling in light of Dr. Barbour's conclusion that Ramji's condition requiring treatment resulted primarily from the September 16 accident, not arthritis. In other words, unlike Dr. Jove, Dr. Barbour did not think that Ramji had a preexisting condition that would have substantially hindered her recovery.

That is enough to create a material issue of fact concerning whether Hospital Housekeeping's failure to give Ramji the required FMLA notice prejudiced Ramji's ability to obtain reinstatement to her job. To the extent that Hospital Housekeeping suggests that Ramji must definitively prove she would have been able to recover within twelve weeks, it is mistaken.

The evidence Ramji has produced is enough to allow a reasonable jury to find in her favor. Requiring ironclad proof is more than summary judgment requires, and in a situation like this one, it would allow an employer to benefit from its failure to comply with the FMLA and provide the required notice.

This alone is sufficient for Ramji to have demonstrated prejudice.[33]

33. (n. 7 in opinion) Similarly unavailing is Hospital Housekeeping's argument that an ADA reasonable-accommodation claim offered Ramji her sole option for relief. Hospital Housekeeping cannot shirk its FMLA obligations and force Ramji into an ADA claim by depriving her of a chance to take FMLA leave to which she is entitled.

But Ramji has also presented enough evidence to demonstrate a material issue of fact over whether Hospital Housekeeping's failure to provide FMLA notice prejudiced her by inflicting damages. As Ramji points out, Hospital Housekeeping's FMLA policy requires that employees "must use earned, but unused, paid time off, such as vacation and sick pay during the absence." Significantly, it further explains that "all unused vacation and sick time runs concurrently with FMLA leave and will be paid out in one lump sum at the time of the FMLA start date" (emphasis omitted). So had Hospital Housekeeping given the proper FMLA notice, Ramji asserts, she would have taken her leave as FMLA leave and received a lump-sum payout of her accrued paid sick and vacation leave. But because Hospital Housekeeping failed to provide the required notice, Ramji continues, she lost out on that lump-sum payment.

Hospital Housekeeping disagrees that Ramji can show prejudice this way. It notes that it initially handled Ramji's claim as a workers' compensation claim. So, it reasons, if Ramji later tried to designate her leave, she would be unable to do so, since, in Hospital Housekeeping's view, the regulations render "substitution of the employee's accrued paid leave inapplicable." 29 C.F.R. § 825.207(e).

The problem with Hospital Housekeeping's position is that it accounts for only the leave Ramji took that was covered by workers' compensation. But that leave amounted to just a small portion of the total twelve-week period of leave that Ramji could have taken under the FMLA. And as soon as the FMLA leave kicked in exclusively, the regulations again would have permitted substitution of accrued paid leave. So Ramji could have chosen or Hospital Housekeeping could have required Ramji to use her accrued paid leave. In fact, under Hospital Housekeeping's own policy, Ramji would have been entitled to her accrued-leave payout. So Ramji has additionally and alternatively pointed to evidence in the record that establishes a material issue of fact concerning prejudice in the form of damages. Whether by damages or equitable relief (or both), Ramji satisfies the final requirement for a successful FMLA-interference claim—harm—so her claim survives summary judgment.

2. Disability Discrimination

Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.

See also, EEOC, Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 CFR Part 1630.

§ 12102 - Definition of disability

As used in this chapter-number:

(1) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)) .

(2) Major life activities

(A) In general

For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions

For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(3) Regarded as having such an impairment

For purposes of paragraph (1)(C):

(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(4) Rules of construction regarding the definition of disability

The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.

(B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E)

(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as—

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses) , prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

[…]

§ 12111 - Definitions

As used in this subchapter-number:

(1) Commission

The term “Commission” means the Equal Employment Opportunity Commission […].

(2) Covered entity

The term “covered entity” means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term “direct threat” means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(8) Qualified individual

The term “qualified individual” means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term “reasonable accommodation” may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term “undue hardship” means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

§ 12112 - Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Frilando v. New York City Transit Authority, 513 F.Supp.3d 356 (S.D.N.Y. 2021)

JED S. RAKOFF, United States District Judge.

Kenneth Frilando is a profoundly deaf man whose primary language is American Sign Language ("ASL"). Between 2016 and 2018, Mr. Frilando applied for three civil service positions: bus operator with the Manhattan and Bronx Surface Transit Operating Authority ("MaBSTOA"), train operator with the New York City Transit Authority (the "NYCTA"), and track worker with the NYCTA. Each position required applicants to pass a multiple-choice exam and "to understand and be understood in English."

The Department of Citywide Administrative Services ("DCAS") regulates the examination procedures for the train operator, bus operator, and track worker exams and — as a matter of DCAS policy — the exams are not offered in languages other than English. For each exam, Mr. Frilando sought additional time and ASL interpretation of the oral instructions, exam questions, and exam answer choices. The NYCTA and MaBSTOA offered Mr. Frilando extra time and ASL interpretation of oral exam instructions, but denied Mr. Frilando's request for ASL interpretation of exam questions and answers. Mr. Frilando did not ultimately take the exams for any of the three positions.

Kenneth Frilando then sued the NYCTA and MaBSTOA (collectively, "Defendants"), alleging violations of the Americans with Disabilities Act (the "ADA") and NY state and city law.

The Court has carefully reviewed the parties' pretrial submissions, the transcript of the trial, the trial exhibits, and the parties' post-trial submissions. In addition, the Court has made credibility determinations based, among other things, on its observation of each witness's demeanor and the consistency and logic of the witness's accounts. Based on all this, the Court now issues its findings of fact and conclusions of law and, for the reasons that follow, grants judgment in favor of Defendants.

Findings of Fact

Kenneth Frilando is profoundly deaf. With hearing aids, Mr. Frilando can detect environmental noises like car horns, but he cannot understand spoken English and "has extremely poor speech and lip reading skills." Specifically, Mr. Frilando reads English at only a third-grade reading level. Even with the aid of a dictionary or computerized "auto-correct," he can write only hesitantly in English. In contrast, "he is completely fluent in American Sign Language."

To his credit, Mr. Frilando has periodically sought employment, but has had difficulty achieving that goal. Around 2017, Mr. Frilando found the track worker, train operator, and bus operator positions on the career section of the MTA website and reviewed the job description and requirements for each position.

Track workers maintain, install, inspect, and repair subway and elevated train tracks, a job that requires lifting heavy equipment and working in the path of oncoming trains. Because they work under hazardous conditions, track workers work in "gangs" that verbally communicate with one another about the safety aspects of the work being performed. One core function of a track worker is "flagging," in which track workers verbally communicate with train operators about when it is safe to proceed.

Train operator responsibilities include operating subway cars and trains, preparing trains for road service, making announcements, and "responding to audible signals such as alarm bells, train whistles, horns and radio conversation."

Bus operators drive passenger buses in compliance with state law and local traffic regulations, collect fares, write reports on "revenues, accidents, faulty equipment and unusual occurrences," and must be able to "hear horns, buzzers and verbal warnings."

After reading the requirements for each application, Mr. Frilando applied for each position. He believed he was suited for the MaBSTOA bus operator position and NYCTA track worker position because these positions did not require formal education. However, the train operator position at the NYCTA required a year of "work experience continuous with one employer," which Mr. Frilando did not have. Although not referenced in the Notices of Examination, the track worker and train operator positions with the NYCTA and the bus operator position with MaBSTOA also require candidates to meet a minimum hearing standard, which Mr. Frilando did and does not meet. Each position also required applicants "to understand and be understood in English,"As noted, Mr. Frilando does not speak English clearly or fluently. Finally, each position requires applicants to take and pass a multiple-choice exam.

Pursuant to Memoranda of Understanding between the NYCTA and DCAS entered into in 2011 and 2018, the NYCTA must adhere to DCAS protocols in the administration and development of civil service exams. Although MaBSTOA is a separate legal entity from the NYCTA, nevertheless, pursuant to a 2006 Memorandum of Understanding, the NYCTA also develops and administers examinations for MaBSTOA positions, adhering to the aforementioned DCAS regulations. Among other things, DCAS regulations specify that all "candidates must be able to understand and be understood in English." Per DCAS policy, examinations must be administered in English and the questions may not be translated into any other language.

An examination development group (the "Exams Unit") develops qualifying exams for both NYCTA and MaBSTOA positions after producing a detailed "job analysis," which must be updated at least every five years. Through field interviews, surveys, and on-the-job observation of employees and their supervisors, the job analysis identifies the "knowledge, skills, and abilities required to perform essential tasks on the job." The Exams Unit also asks "incumbents in the position to give importance and frequency ratings" to these core tasks. Based on incumbents' ratings, the Exams Unit determines what knowledge, skill, or abilities the qualifying exams should test.

For the train operator position, the Exams Unit determined based on the job analysis that "written comprehension" and "written expression" were sufficiently important and frequently used skills to "be included in the competitive multiple-choice test plan." Accordingly, 10 of the 60 questions on the train operator exam test "written comprehension" and 9 test "written expression." Similarly, the job analysis for the track worker exam indicates that "written comprehension" and "written expression" abilities should be tested on the qualifying exam.

The bus operator exam was primarily developed for MaBSTOA by an outside company. However, the bus operator exam was also developed using a job analysis report. The job analysis for the bus operator exam indicates that it is "important" for a bus operator to be able to "read and interpret bulletins and directives," "report unusual circumstances," and "report delays, mechanical problems and emergencies to the Dispatcher via two-way radio." Accordingly, the multiple-choice bus operator exam includes questions testing "written comprehension" and "written expression."

On April 20, 2017, Mr. Frilando emailed the Exams Unit to request an ASL interpreter for the instructions and test questions on the train operator exam. Mr. Frilando submitted an audiological report and a doctor's note with his accommodation request. Although Mr. Frilando did not initially request additional time in taking the exam, the doctor's note stated that "as the result of his disability, Mr. Frilando will need some additional time to complete his DCAS testing."

A month later, Jennifer Garcia, an associate analyst at the NYCTA, informed Mr. Frilando that the NYCTA would provide extra time for taking the exam and an ASL interpreter to interpret the test instructions in ASL but not to interpret the exam questions themselves, adding that "you need to be able to read in English if you want to take the exam."

While waiting for Mr. Frilando to confirm whether he wanted to take the train operator exam, Ms. Garcia sent the accommodation request and supporting documentation to her manager, Michael Quiery. Mr. Quiery believed that more documentation was needed to support Mr. Frilando's request for an interpreter. Accordingly, on June 2, 2017, the Exams Unit informed Mr. Frilando that "upon further review of the document submitted to support your request, we can only grant your request for additional time" and sought additional documentation from a licensed medical professional specifically supporting Mr. Frilando's request for an ASL interpreter.

On November 21, 2017, Mr. Frilando requested ASL interpretation of the instructions and questions on the bus operator exam. On March 1, 2018, Mr. Frilando requested ASL interpretation of the instructions and questions on the track worker exam. A week later, Michael Nigro confirmed that the NYCTA was "in the process of planning your accommodation(s)" for the track worker, train operator, and bus operator exams and inquired whether Mr. Frilando sought additional time as well as ASL interpretation. In response, Mr. Frilando confirmed that he was requesting additional time. Michael Nigro inquired about Mr. Frilando's calendar availability to take the exams, but Mr. Frilando did not respond until several weeks later. On April 2, 2018, Mr. Frilando confirmed his availability and asked for 100% extra time.

In late August 2018, the Exams Unit ultimately offered Mr. Frilando 200% of the time otherwise prescribed for taking each exam, as well as ASL interpretation of the spoken and printed exam instructions. However, the Exams Unit maintained that it would "not provide translation or interpretation services of test examination questions for any candidate whose primary language is not English," because "the positions require that the candidate understand and be understood in English." The NYCTA offered Mr. Frilando several late August and early September 2018 test dates for the track worker, train operator, and bus operator exams, but Mr. Frilando did not take any of the three exams.

Conclusions of Law

Against this factual background, Mr. Frilando argues that Defendants discriminated against him on the basis of disability in violation of the ADA, the NYSHRL, the NYCHRL, and the Rehabilitation Act by failing to accommodate his request for ASL interpretation of the questions and answers on the track worker, train operator, and bus operator exams. For the reasons that follow, the Court concludes that Defendants are not liable for disability discrimination under any of these laws.

To succeed on a reasonable accommodation claim under the ADA, a plaintiff must be "otherwise qualified" for the position, meaning that he "can perform the essential functions of the employment position" at issue "with or without reasonable accommodation." 42 U.S.C. §§ 12111(8), 12112(a).

When a job applicant claims he or she was denied a reasonable accommodation to take a preemployment exam, courts ask (1) whether the applicant is qualified to perform the essential functions of job with (or without) an accommodation and (2) whether the preemployment exam measures the skills it intends to measure.

This two-step inquiry follows from the text and structure of the ADA. Title I of the ADA prohibits employers from denying a reasonable accommodation to "an otherwise qualified individual with a disability who is an applicant," unless "the accommodation would impose an undue hardship." 42 U.S.C. § 12112(b)(5)(A). Separately, the ADA specifically addresses the use of preemployment tests in the application process by defining "discrimination against a qualified individual" to include "failing to select and administer tests concerning employment to ensure that, when such test is administered to a job applicant or employee who has an impairment, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired skills (except where such skills are the factors that the test purports to measure)." 42 U.S.C. § 12112(b)(7). However, unlike the general reasonable accommodation provision, the preemployment test provision does not repeat the term "qualified individual," and thus does not expressly incorporate the requirement that a candidate be able to perform the essential functions of the job.

As a result, Mr. Frilando can succeed on his disability discrimination claim if he can prove either of two things: either that he can perform the essential functions of the track worker, train operator, or bus operator jobs with (or without) an accommodation; or, alternatively, that Defendants' preemployment exams do not purport to measure English comprehension and expression. The Court considers each in turn.

I. The Essential Functions of the Positions

Mr. Frilando has not proven that he could perform the essential functions of the track worker, train operator, or bus operator jobs. When determining the "essential functions" of a position, courts look to (1) "the employer's judgment as to which functions are essential," (2) "written job descriptions prepared before advertising or interviewing applicants for the job," (3) "the amount of time spent on the job performing the function," and (4) "the work experience of past incumbents in the job." 29 C.F.R. § 1630.2(n)(3). The essential functions of a position "are a matter of judgment and opinion," and "the NYCTA has a statutory responsibility to operate the transit system 'for the safety of the public.'" The NYCTA "may properly deem" a function essential for operating public transport because the function "conduces to the safety of passengers and because it serves to limit NYCTA's tort liability in situations where an impairment might cause an accident as well as where it may be alleged to have done so."

The NYCTA and MaBSTOA consider both the ability to engage in oral and written communication in English and sufficient hearing ability to meet the minimum hearing standard to be essential to the jobs here in issue. Because the job analyses are based on interviews with incumbents and survey data on the importance and frequency of certain tasks in each position, the job analyses are also instructive on the "essential functions" of each position. In addition, the Notices of Examination are "written job descriptions prepared before advertising or interviewing applicants for the job," and should also be given significant weight when analyzing the essential functions of the track worker, train operator, and bus operator jobs. 29 C.F.R. § 1630.2(n).

The job analyses and Notices of Examination indicate that the essential functions of the track worker position include spoken communication with train operators and track workers about track hazards. The essential functions of the train operator position include making announcements in English and responding to bells, whistles, horns, and radio conversation. The essential functions of the bus operator position include writing reports on accidents and defective equipment, hearing horns and buzzers, and understanding verbal warnings in English. These functions are conducive to the safety of passengers, and thus the NYCTA and MaBSTOA have reasonably deemed them essential. Mr. Frilando is not qualified for any of the positions for which he applied, both because, as he concedes, he cannot understand or be understood in spoken English, and because trial testimony shows that Mr. Frilando cannot satisfy the minimum hearing standard for any position.

II. Defendants' Use of Preemployment Exams

Mr. Frilando also has not proven that Defendants' preemployment exams do not intend to measure English comprehension. While the civil service exams may not have been designed to identify a particular grade level of reading proficiency, the exams are designed to test the written comprehension and expression necessary to perform transit job functions. The Exams Unit determined that the track worker, train operator, and bus operator exams should test "written comprehension" and "written expression." The Notices of Examination for the train operator and track worker exams confirm that the multiple-choice exams may test "the ability to understand written sentences or paragraphs" or "to use English for words or sentences in writing so others will understand."

The Court's review of the evidence related to the exams — including a review of one of the current examinations — convinces the Court that the tests not only purport to measure English comprehension and expression, but also do in fact function as English comprehension and expression tests. For instance, certain exam questions test only whether applicants can read signs to write accurate reports. Because the exams plainly purport to and do measure comprehension of written English and Mr. Frilando's proposed accommodation would eliminate that very skill, Mr. Frilando cannot prove that Defendants discriminated against him in test selection or administration within the meaning of 42 U.S.C. § 12112(a).

Good-Faith Interactive Process

Separate from the above, Mr. Frilando claims that Defendants can be held independently liable for failure to engage in an interactive process to assess his needs. Although federal, city, and state laws envision that employers will "engage in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested," the precedents are clear that failure to engage in a good-faith interactive process is evidence tending to show disability discrimination, not an independent cause of action.

Separately, the Court also finds that Defendants did in fact engage in a good faith interactive process with Mr. Frilando, at least to the extent reasonably required at the early stage before Mr. Frilando chose not to take the exams. An adequate interactive process can involve "meeting with the employee who requests an accommodation, requesting information about the condition and what limitations the employee has, asking the employee what he or she specifically wants, showing some sign of having considered the employee's request, and offering and discussing available alternatives when the request is too burdensome." Defendants corresponded with Mr. Frilando over sixteen months, sought details and documentation about Mr. Frilando's disability and resulting limitations, repeatedly attempted to clarify Mr. Frilando's requests, considered the requests, and discussed alternative accommodations. This lengthy exchange satisfies the interactive process requirement.

Searls v. Johns Hopkins Hospital, 158 F.Supp.3d 427 (D. Md. 2016)

Catherine C. Blake, United States District Judge.

Lauren Searls brings this action against Johns Hopkins Hospital ("JHH"), claiming that the defendant discriminated against her on the basis of disability in violation of Title I of the Americans with Disabilities Act, 42 U.S.C. §§ 12112(a) (the "ADA" or "Title I") and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"). She seeks declaratory and injunctive relief, compensatory damages, attorneys' fees and costs, and other appropriate equitable and legal relief. The plaintiff

The Rehabilitation Act (1973), 29 U.S.C. § 701 et seq., prohibits disability discrimination by federal government agencies, federally-funded programs, and federal contractors. The employment discrimination standards under the Rehabilitation Act are the same as under the ADA. 29 U.S.C. §§ 791(f) and 794(d).

has filed a motion for partial summary judgment on the issue of liability under the ADA and Section 504, leaving the issue of damages to be resolved at trial. The defendant has filed a cross-motion for summary judgment on all of the plaintiff's claims. For the reasons stated below, the court will grant the plaintiff's motion for partial summary judgment, and deny the defendant's cross-motion for summary judgment.

BACKGROUND

Searls is a deaf 2012 graduate of the Johns Hopkins School of Nursing. She can read lips but understands better through American Sign Language ("ASL"). When communicating with hearing individuals, she voices for herself. As a nursing student, Searls completed two clinical rotations in the Halsted 8 unit at JHH. During her clinical placements at JHH, the School of Nursing provided a full-time ASL interpreter. At the end of her final rotation, she received a faculty summary of her clinical performance. In the summary, the faculty member wrote that Searls "worked well with others on the team and communicated appropriately and with empathy with the patients and their families." Under "overall performance," the faculty member wrote:

> Lauren provided quality nursing care in a very professional, caring and skilled manner. She has shown a strong work ethic and very positive attitude that helped to create a very positive work environment. She has performed as an entry-level graduate nurse on Johns Hopkins Hospital Halstead sic 8 unit. Lauren Searls has met all of the course objectives at the expected and frequently at a higher level.

On July 13, 2012, a few days before Searls' graduation from the School of Nursing, Nurse Manager Stacey Rotman sent Searls an email giving her advance notice that she would be posting two openings for Nurse Clinician I positions in Halsted 8 and encouraging Searls to apply. Rotman later sent her an e-mail with the two job postings.

JHH's job description of the Nurse Clinician I position states that a nurse is responsible for coordinating care, providing evidence-based patient care, working collaboratively, supporting safety standards, and using resources in a cost-effective manner. A requisite skill is "highly effective verbal communication and interpersonal skills to establish working relationships." Communication is listed as an "essential job function," and a nurse is required to "listen actively to opinions, ideas and feelings expressed by others and respond in a courteous and tactful manner." Another essential job function is "communcating unresolved issues to appropriate personnel." Nurses must also be competent in "general physiologic monitoring and patient care equipment such as defibrillator and glucometer monitor."

Searls applied for the Nurse Clinician I position, and JHH offered her an interview. She interviewed with Rotman on August 15 and was offered the Nurse Clinician I position on Halsted 8 the next day. Searls accepted the offer that same day. Her offer letter included the provision that "the offer of employment and start date are contingent upon successful completion of a health screening and clearance by the Office of Occupational Health Services." The annual salary for the position was $59,508.80.

After Searls received the offer, she asked Rotman whom to contact to request an ASL interpreter. Rotman told her to notify the Department of Occupational Health during her pre-employment screening. Searls told a staff member from the Department of Occupational Health that she would require full-time ASL interpretation as an accommodation. The staff member told Searls that Rhodora Osborn, JHH's ADA Compliance Specialist, would be in touch with her to discuss the request. Mary Henderson from the Department of Occupational Health sent Osborn an email informing her that Searls "has a hearing deficit since age 2 and has bilateral hearing aids" and that she was "requesting a sign language interpreter." Osborn then notified Kate Demers, the ADA/Accessibility Consultant at JHH at the time, and spoke with Henderson about Searls' request for an interpreter.

Demers investigated the cost of providing one or two interpreters and determined that the average annual salary of an ASL interpreter proficient in medical terminology would be between $40,000 and $60,000 and concluded that Searls would require a team of two interpreters with her at all times at an annual cost of $240,000. In 2012, Halsted 8 had an operational budget of $3.4 million. Halsted 8 was a part of JHH's Department of Medicine, which had an operational budget of $88 million in 2012. JHH had an overall operational budget of $1.7 billion in 2012.

On September 12, Demers sent Rotman an email with the estimate of the cost of an interpreter. Rotman forwarded this email to Karen Davis, the director of Medical and Radiology Nursing, commenting, "I know that we can't afford this." She also wrote, "They are expecting the department to pay for this. Why isn't the hospital responsible?" Davis forwarded the emails to her supervisor, Vice President of Nursing Karen Haller, to ask for her thoughts. Davis wrote that Searls "is qualified," but because of the cost of an interpreter, her "first response to this, given our financial issues, is to respond that I cannot accommodate this." Davis also speculated that having an interpreter could create scheduling issues and that the interpreter might tell Searls the wrong medicine to use during an emergency situation. Davis concluded her email by writing that "Stacey Rotman tells me the nurse is bright and would be a good hire other than this hearing issue." In response, Haller wrote, "I do not think we can accommodate this." Following this exchange, Rotman responded to Demers' email stating that she had talked to her director "and the department cannot accept the restrictions." Demers then asked for Rotman's reasoning, although she noted, "I assume it is cost." She also wrote, "I want to be sure we have thoroughly investigated all avenues as Searls is a qualified applicant, and we are part of the larger JHH." Rotman responded, "Yes, the reason is cost."

On September 17, Demers asked Rotman for a "further breakdown" on the reason for rejecting the accommodation request, explaining her desire to "demonstrate we have shown good effort." She asked Rotman to "try to include as much information as possible to illustrate hardship on the organization." The next day, Demers asked Rotman to "determine what your department's threshold would be for interpreting costs," explaining that "it would be helpful to know what your department would be able to spend so we can see if a compromise would be a solution."

Davis, who was also on the email chain, responded to Demers that while she would like to accommodate Searls, "this will not be possible." She wrote, "There are no other funds to pull from within our department. The interpreters would be an ongoing operating expense that is not budgeted or funded. Thus, our threshold is zero for interpreter costs." Davis further explained that because the overall budget of the unit was $3.4 million and the overall budget of the department was $88 million, "we would have to lay off 4 nurses to fund this as we cannot incur any new expenses." She cautioned that laying off nurses "would cause inappropriate nurse patient ratios on this unit and an enormous safety risk." Davis did not express any of the concerns she had raised in her email to Haller about scheduling and emergency situations, and only raised cost as the reason for not hiring Searls. During the time Searls' accommodation request was evaluated, no one asked Searls how she would work with an interpreter, including during an emergency situation or when an alarm sounded, or proposed any alternative accommodation.

On September 20, Searls explained to Osborn that she was only seeking one full-time ASL interpreter. A few days later, Demers sent Rotman an email explaining that with one interpreter, instead of two, the cost of providing the accommodation would decrease to $120,000 per year, but "the undue hardship based on cost would still apply from my understanding." Demers wrote that "a letter is being drafted for Lauren explaining the undue hardship based on cost," but asked Rotman to let her know "if there are other reasons we should add." Rotman never provided Demers with any reason other than cost for not hiring Searls.

Osborn and Rotman rescinded Searls' job offer in a letter dated September 28. They explained:

> After several interactive consultations with you and other resources as appropriate, we regret to inform you that we are unable to provide the interpreter services. We are unable to provide the accommodation because of its effect on the resources and operation of the department. As a result of the decision, we must rescind the offer of employment.

In January 2013, after several months of searching for a new job, Searls began working as a nurse at the University of Rochester Medical Center's Strong Memorial Hospital ("Strong"), where she continues to work today. After Strong offered her the job, Searls requested a full-time ASL interpreter. Strong agreed, and since January 2013, Searls has worked with an ASL interpreter. Searls' supervisor at Strong testified that Searls' deafness and use of an interpreter have never negatively affected patient care, her response to alarms, or her participation in codes. At Strong, Searls has exceeded standards on her performance reviews and has received promotions.

ANALYSIS

Searls claims that JHH violated the ADA and Section 504 of the Rehabilitation Act by rescinding her job offer even though she was a qualified individual who, with the accommodation of an ASL interpreter, was fully able to perform the essential job functions of a nurse. The ADA makes it illegal for an employer to "discriminate against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). To establish a prima facie case on her failure-to-accommodate claim, Searls must show that (1) she is an individual with a disability within the meaning of the ADA; (2) JHH had notice of her disability; (3) she could perform the essential functions of her job with a reasonable accommodation; and (4) JHH refused to make such reasonable accommodation. Section 504 of the Rehabilitation Act mandates that "no otherwise qualified individual with a disability shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). Employment discrimination claims brought under Section 504 are evaluated using the same standards as those "applied under Title I of the Americans with Disabilities Act of 1990."

Even if Searls establishes her prima facie failure-to-accommodate case, JHH may avoid liability "if it can show as a matter of law that the proposed accommodation will cause undue hardship in the particular circumstances," or that Searls constituted a "direct threat," meaning that she posed a significant risk to the health or safety of others that could not be eliminated or reduced to an acceptable level by a reasonable accommodation.

The parties do not dispute that Searls is deaf and therefore has a disability within the meaning of the ADA and Section 504. JHH had notice of Searls' disability because she had previously worked at the hospital with ASL interpreters during her clinical rotations, and she formally requested an ASL interpreter during her employee health screening. Furthermore, it is undisputed that JHH declined to provide Searls with her requested accommodation of a full-time ASL interpreter and rescinded her job offer as a result. Thus, whether Searls can make out a prima facie case of disability discrimination depends on whether an ASL interpreter was a reasonable accommodation, which in turn depends on whether hiring an

ASL interpreter to work with Searls would have reallocated essential job functions.

I. Reasonable Accommodation

The parties dispute whether Searls' request for a full-time accommodation was reasonable. To defeat an employer's motion for summary judgment, a plaintiff must "present evidence from which a jury may infer that the proposed accommodation is reasonable on its face, i.e., ordinarily or in the run of cases. A reasonable accommodation is one that is feasible or plausible." The reasonableness of an accommodation depends on whether it "enables the employee to perform the essential functions of the job in question." Essential job functions are "functions that bear more than a marginal relationship to the job at issue."

In defining "reasonable accommodation," Congress expressly included "the provision of qualified readers or interpreters" as an illustration. 42 U.S.C. § 12111(9)(B). The Second Circuit recently explained that although an ASL interpreter may not always be a reasonable accommodation, interpreters are a well-recognized accommodation:

> First, the term "reasonable accommodation" is defined by regulation to include "the provision of qualified readers or interpreters." 29 C.F.R. § 1630.2(o)(2)(ii). Per se rules are unreliable in the disability context, so ASL interpretive services may not *always* constitute a reasonable accommodation. But according to the regulations, interpreters are a common form of reasonable accommodation. *See* 29 C.F.R. § 1630 app. ("Part 1630 lists the examples, specified in title I of the ADA, of the most common types of accommodation that an employer or other covered entity may be required to provide.").

Searls further supports the reasonableness of her accommodation request through evidence from her experts, her current experience as a nurse at Strong where she works with an ASL interpreter and has received positive performance reviews, and her clinical rotation at Halsted 8 during which she was provided an ASL interpreter and received a positive review. Notably, Rotman offered Searls the nursing position at Halsted 8 because she thought she would be a strong addition to the unit, based in part on her colleagues' opinion that Searls was able to perform her nursing duties during her Halsted 8 clinical rotation in which she worked with an ASL interpreter. Given that Congress included an "interpreter" as an illustrative example of a "reasonable accommodation," employers commonly provide interpreters as a reasonable accommodation, and Searls has worked effectively with interpreters at Halsted 8 and in her current nursing job, Searls' proposed accommodation was reasonable unless, as JHH argues, hiring a full-time ASL interpreter would have reallocated essential job functions.

"A reasonable accommodation 'does not require an employer to reallocate essential job functions or assign an employee 'permanent light duty.'" "The ADA simply does not require an employer to hire an additional person to perform an essential function of a disabled employee's position." The Equal Employment Opportunity Commission's regulations explain that:

> An employer or other covered entity is not required to reallocate essential functions. The essential functions are by definition those that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be considered qualified for the position. For example, suppose a security guard position requires the individual who holds the job to inspect identification cards. An employer would not have to provide an individual who is legally blind with an assistant to look at the identification cards for the legally blind employee. In this situation the assistant would be performing the job for the individual with a disability rather than assisting the individual to perform the job.

29 C.F.R. § 1630 app.

In determining which job functions are essential, "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description for the job, this description shall be considered evidence of the essential functions of the job." 42 U.S.C. § 12111(8). The two essential job functions included in the JHH Nurse Clinician I job description that are relevant to this case are (1) communicating with patients, family members, and other hospital personnel, and (2) monitoring and responding to alarms. The parties agree that Searls could not have performed these essential functions without an accommodation, but they disagree whether providing an ASL interpreter would have reallocated these duties.

Searls' case is distinguishable from other cases where providing the requested accommodation amounted to reallocating essential job functions. In those cases, the accommodation request was found unreasonable because the employee requested that another employee perform the entirety of an essential job function, leaving the employee with no portion of the essential job function to perform. In contrast, even with the assistance of an ASL interpreter, Searls would perform a significant portion of the essential job functions of communicating and responding to alarms herself: Searls would decide which questions to ask, she would voice for herself in speaking to patients and other professionals, and she would act in response to alarms. An interpreter, lacking the requisite medical training, could not act independently of Searls to communicate about patient care and respond to alarms.

Therefore, because it is clear that Searls would retain responsibility for a substantial portion of the duties of communicating and responding to alarms if she were provided an ASL interpreter, the question becomes whether her inability to hear affected her ability to communicate and respond to alarms such that she would be "unable to 'perform' these essential functions within the meaning of the ADA. When the question is thus a matter of degree a plaintiff fails to perform the essential function only if her failure detrimentally affects the purpose of the employment." As noted, with the aid of an interpreter, Searls could perform a substantial portion of the essential job functions of communicating and responding to alarms — most importantly, those portions requiring nursing judgment — so that her inability to hear did not detrimentally affect the purpose of employing her as a nurse. A nurse's duties with respect to communicating and responding to alarms go beyond hearing what patients are saying and hearing an alarm ringing. Searls would have used her own medical expertise and training when speaking to patients, families, and other hospital personnel; providing care based on her exchanges with patients; and taking the appropriate action in response to an alarm after an interpreter communicated the sound of an alarm visually. Therefore, Searls' accommodation request would not have reallocated the essential job functions of communicating with others and responding to alarms. Searls' request for a full-time ASL interpreter was reasonable, and Searls has established a prima facie case of disability discrimination.

II. Undue Hardship Defense

JHH argues that providing Searls with an interpreter would have caused an undue hardship on the hospital's operations. An employer is not liable if it "can demonstrate that the accommodation would impose an undue hardship on the operation of its business." 42 U.S.C. § 12112(b)(5)(A). Title I of the ADA defines "undue hardship" as "an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B)." § 12111(10)(A). Subparagraph (B), in turn, provides a non-exhaustive list of relevant factors to be considered:

> i. the nature and cost of the accommodation needed under this chapter; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

§ 12111(10)(B). To demonstrate undue hardship, the employer "must show special (typically case-specific) circumstances."

JHH's overall budget, the Department of Medicine's operational budget, and Halsted 8's operational budget are all relevant factors. 42 U.S.C. § 12111(10)(B)(ii)-(iii). Despite the relevance of JHH's overall budget, JHH's motion for summary judgment focuses exclusively on the resources and operations of Halsted 8 and the Department of Medicine and ignores the question of how providing an interpreter costing at most $120,000, or 0.007% of JHH's 2012 operational budget of $1.7 billion, could impose an undue hardship on the hospital.

JHH essentially argues that it had no money in its budget for reasonable accommodations. The employer's budget for reasonable accommodations is "an irrelevant factor in assessing undue hardship" because "allowing an employer to prevail on its undue hardship defense based on its own budgeting decisions would effectively cede the legal determination on this issue to the employer that allegedly failed to accommodate an employee with a disability. Taken to its logical extreme, the employer could budget $0 for reasonable accommodations and thereby always avoid liability." In its motion for summary judgment, JHH maintains that "neither of the operating budgets of the Halsted 8 unit nor the Department of Medicine, in which Halsted 8 was then located, had the budgeted resources to absorb the additional $120,000 cost." JHH then claims that because a nurse's starting salary is about $60,000, and a full-time ASL interpreter would cost $120,000, "in order to fund the $120,000 annual cost, the nursing unit would have needed to lay-off at least two full-time Registered Nurses." The nursing unit would only have to discharge two nurses, however, and thereby reallocate the nurses' combined salaries totaling $120,000, if it had budgeted $0 for reasonable accommodations. JHH's position in its motion for summary judgment is consistent with the statement from Davis, the director of Medical and Radiology Nursing, that the department's "threshold is zero for interpreter costs."

Additionally, even if it is correct that the salary of a full-time ASL interpreter would be twice the salary of a nurse, that in itself does not establish that an ASL interpreter would be an undue hardship. The EEOC's interpretive guidance on its Title I ADA regulations explains that "simply comparing the cost of the accommodation to the salary of the individual with a disability in need of the accommodation will not suffice." 29 C.F.R. § 1630 app. Furthermore, it is "particularly relevant" that Strong has been able to accommodate deaf nurses. Because Strong has been able to provide Searls with an ASL interpreter, and because JHH seeks to prevail on its undue hardship defense based on its decision to budget $0 for reasonable accommodations, while failing to account for its $1.7 billion budget, JHH has not met its burden of establishing undue hardship. The plaintiff's motion for summary judgment on this defense will be granted.

III. Direct Threat Defense

JHH also argues that employing Searls as a nurse would have imposed a direct threat. The ADA defines a "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3). An "employer must determine whether a reasonable accommodation would either eliminate the risk or reduce it to an acceptable level." In its motion for summary judgment, JHH notes that some alarms were only auditory and argues that "it would have been a significant patient safety risk to rely on an interpreter, without any nursing training, to engage in nursing judgment by determining which alarm was sounding and to rely on the interpreter's judgment to determine when a patient emergency was occurring, requiring nursing assistance."

JHH's direct threat defense is based on post-hoc rationalizations and is therefore suggestive of pretext. The only statement JHH uses to support its direct threat defense that was made contemporaneously with its decision to rescind Searls' offer of employment was Rotman's September 23 email that noted Searls would need an interpreter during all work hours because "she will have unexpected phone calls, call bells ringing, critical patient situations, etc." Nowhere in the email did Rotman state that Searls could not manage unexpected phone calls, call bells, or critical patient situations with the aid of an interpreter. All other contemporaneous evidence indicates that JHH rescinded the job offer because of the cost of providing a full-time ASL interpreter. Notably, Rotman explained that "the reason is cost" for not providing the accommodation. Additionally, when Demers wrote to Rotman to inform her that she was drafting a letter to Searls explaining "the undue hardship based on cost," she asked "if there are other reasons we should add please let us know," but Rotman never provided Demers any other reasons for denying the accommodation. Because JHH did not raise patient safety concerns until after Searls brought the lawsuit, because the issue of patient safety is absent from contemporaneous communications concerning the reason for denying Searls an ASL interpreter, and because the only explanation JHH gave to Searls for revoking her job offer was the cost of providing a full-time interpreter, JHH has not met its burden on its direct threat defense.

JHH's direct threat defense also fails because the record shows that JHH failed to base its determination "on an individualized assessment of Searls' present ability to safely perform the essential functions of her job." Such an assessment must "be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence" and must consider factors such as: "(1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm." 29 C.F.R. § 1630.2(r). No such individualized assessment occurred here. Instead, JHH relied on stereotypes or generalizations about deafness. Aside from Rotman's September 23 email previously discussed, the only other evidence JHH presents to support its direct threat defense is Rotman's deposition where she testified that she was concerned about Searls' "ability to function safely as a nurse on Halsted 8" based on whether "she would be able to hear the alarms." Rotman admitted that she had never observed Searls fail to respond to an alarm. She also said that it "wouldn't be a safe situation" for a non-nurse to be trained to differentiate between the alarms. Rotman never expressed this concern to Searls. In fact, the defendant does not dispute that no JHH employee ever raised patient safety concerns with Searls or asked how she planned to work with an interpreter to respond to alarms. Rotman speculated that because Searls is deaf and cannot hear alarms she would endanger patient health, but she "failed to provide any medical basis for her conclusion, and she does not discuss whether the safety concerns could be alleviated by reasonable accommodation." Therefore, JHH has not met its burden of establishing that Searls constituted a "direct threat" to the safety of others at Halsted 8. The court will grant the plaintiff's motion for partial summary judgment on the issue of direct threat.

3. Occupational Health & Safety Act

Occupational Safety & Health Act, 29 U.S.C. § 641 et seq.

See Also, Occupational Safety & Health Administration regulations, 29 CFR chap. XVII.

§ 651 - Congressional statement of findings and declaration of purpose and policy

(a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under this chapter;

§ 654 - Duties of employers and employees

(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

§ 655 - Standards

(a) Promulgation by Secretary of national consensus standards and established Federal standards; […]

[T]he Secretary shall, […], by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

§ 657 - Inspections, investigations, and recordkeeping

(a) Authority of Secretary to enter, inspect, and investigate places of employment; time and manner

In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and

materials therein, and to question privately any such employer, owner, operator, agent, or employee.

(f) Request for inspection by employees or representative of employees; [...]

(1) Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. [...] If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

(2) Prior to or during any inspection of a workplace, any employees or representative of employees employed in such workplace may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this chapter which they have reason to believe exists in such workplace. The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation and shall furnish the employees or representative of employees requesting such review a written statement of the reasons for the Secretary's final disposition of the case.

§ 658 - Citations

(a) Authority to issue; grounds; contents; notice in lieu of citation for de minimis violations

If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 654 of this title, of any standard, rule or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, he shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health.

§ 659 - Enforcement procedures

(a) Notification of employer of proposed assessment of penalty subsequent to issuance of citation; [...]

If, after an inspection or investigation, the Secretary issues a citation under section 658(a) of this title, he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 666 of this title and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under subsection (c) within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(b) Notification of employer of failure to correct in allotted time period violation for which citation was issued and proposed assessment of penalty for failure to correct; [...]

If the Secretary has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction (which period shall not begin to run until the entry of a final order by the Commission in the case of any review proceedings under this section initiated by the employer in good faith and not solely for delay or avoidance of penalties), the Secretary shall notify the employer by certified mail of such failure and of the penalty proposed to be assessed under section 666 of this title by reason of such failure, and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the Secretary's notification or the proposed assessment of penalty. If, within fifteen working days from the receipt of notification issued by the Secretary, the employer fails to notify the Secretary that he intends to contest the notification or proposed assessment of penalty, the notification and assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(c) Advisement of Commission by Secretary of notification of contest by employer of citation or notification or of filing of notice by any employee or representative of employees; hearing by Commission; orders of Commission and Secretary; rules of procedure

If an employer notifies the Secretary that he intends to contest a citation issued under section 658(a) of this title or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 658(a) of this title, any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing […]. The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

§ 660 - Judicial review

(c) Discharge or discrimination against employee for exercise of rights under this chapter; prohibition; procedure for relief

(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

(3) Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph (2) of this subsection.

§ 666 - Civil and criminal penalties

(a) Willful or repeated violation

Any employer who willfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation.

(b) Citation for serious violation

Any employer who has received a citation for a serious violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, shall be assessed a civil penalty of up to $7,000 for each such violation.

(c) Citation for violation determined not serious

Any employer who has received a citation for a violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of regulations prescribed pursuant to this chapter, and such violation is specifically determined not to be of a serious nature, may be assessed a civil penalty of up to $7,000 for each such violation.

(d) Failure to correct violation

Any employer who fails to correct a violation for which a citation has been issued under section 658(a) of this title within the period permitted for its correction […], may be assessed a civil penalty of not more than $7,000 for each day during which such failure or violation continues.

(e) Willful violation causing death to employee

Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both.

(f) Giving advance notice of inspection

Any person who gives advance notice of any inspection to be conducted under this chapter, without authority from the Secretary or his designees, shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or by both.

(g) False statements, representations or certification

Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(i) Violation of posting requirements

Any employer who violates any of the posting requirements, as prescribed under the provisions of this chapter, shall be assessed a civil penalty of up to $7,000 for each violation.

(j) Authority of Commission to assess civil penalties

The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

(k) Determination of serious violation

For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Seaworld of Florida, LLC v. Perez, 748 F.3d 1202 (D.C. Cir. 2014)

ROGERS, Circuit Judge:

SeaWorld of Florida, LLC, operates a theme park in Orlando, Florida, that is designed to entertain and educate paying customers by displaying and studying marine animals. Following the death of one of SeaWorld's trainers while working in close contact with a killer whale during a performance, the Occupational Safety and Health Review Commission found that SeaWorld had violated the general duty clause, § 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 654(a)(1), by exposing the trainers to recognized hazards when working in close contact with killer whales during performances, and that the abatement procedures recommended by the Secretary of Labor were feasible. SeaWorld challenges the order with respect to one citation. Concluding its challenges are unpersuasive, we deny the petition for review.

I.

On February 24, 2010, SeaWorld trainer Dawn Brancheau was interacting with Tilikum, a killer whale, during a performance before a live audience in a pool at Shamu Stadium in Orlando. Ms. Brancheau was reclined on her back on a platform a few inches below the water surface. Tilikum was supposed to mimic her behavior by rolling over. Instead, the killer whale grabbed her and pulled her off the platform into the pool, refusing to release her. She suffered traumatic injuries and drowned as a result of Tilikum's actions.

The Secretary of Labor issued three citations to SeaWorld after an investigation by an Occupational Safety and Health Administration ("OSHA") compliance officer. Only the second citation is at issue. It alleged two instances of a "willful" violation of the general duty clause for exposing animal trainers to the recognized hazards of drowning or injury when working with killer whales during performances. The first instance related to animal trainers working with Tilikum being exposed to "struck-by and drowning hazards" by being "allowed unprotected contact with Tilikum" while conducting "'drywork' performances on pool ledges, slideouts and platforms." In SeaWorld's terms, when trainers are out of the pool or on submerged ledges called "slideouts" in water no deeper than their knees, their interactions with killer whales are called "drywork." Any interaction in deeper water is "waterwork." According to the Secretary, "among other methods, one feasible and acceptable means of abatement would be to not allow animal trainers to have any contact with Tilikum unless they are protected by a physical barrier." The second instance concerned animal trainers working with killer whales other than Tilikum who were exposed to struck-by and drowning hazards when they were "allowed to engage in 'waterwork' and 'drywork' performances with the killer whales without adequate protection." The Secretary listed as possible abatement methods “prohibiting animal trainers from working with killer whales, including ‘waterwork’ or ‘dry work,’ unless the trainers are protected through the use of physical barriers or through the use of decking systems, oxygen supply systems or other engineering or administrative controls that provide the same or greater level of protection for the trainers.” The Secretary proposed a penalty of $70,000.

Following an evidentiary hearing, the Administrative Law Judge (“ALJ”) found that on February 24, 2010, a “performance” was still in progress when Tilikum seized Ms. Brancheau and pulled her into the pool water. The ALJ found that the first and third elements of a violation of the general duty clause — existence of a workplace condition presenting a hazard that likely caused death or serious physical harm — were established by the events on February 24, 2010: Ms. Brancheau’s death demonstrated that close contact with killer whales was a hazard likely to cause death or serious injury. Based on evidence regarding three previous deaths involving killer whales (beginning in 1991 with Tilikum), SeaWorld’s written training manuals and safety lectures as implemented specifically to Tilikum, and SeaWorld’s incident reports, the ALJ found that the Secretary had established by “abundant” record evidence that “SeaWorld recognized the hazard created when its trainers worked in close contact with Tilikum during drywork performances,” satisfying the second element of a violation. Further, the ALJ found that evidence, including SeaWorld’s incident reports, established that SeaWorld recognized the hazard when trainers worked in close contact with other killer whales; SeaWorld’s statistics regarding the predictability of killer whale behavior, on the other hand, were unpersuasive because not based on rigorous, scientific data. The ALJ concluded that SeaWorld’s claim that “it was unaware working with killer whales presents a recognized hazard is difficult to reconcile with numerous comments made over the years by SeaWorld management personnel, including two corporate curators of animal training whose comments were documented and circulated among all of the SeaWorld parks.”

The ALJ also found that the Secretary had established the fourth element of a violation: feasible abatement of the hazard for trainers working with Tilikum and other killer whales. SeaWorld had not argued, the ALJ noted, that it is infeasible to install barriers or implement a minimum distance between trainers and whales, but rather “considers the extensive safety training of its trainers and the operant conditioning of its killer whales to be an adequate means of abatement that materially reduces the hazard the killer whales present to the trainers." The ALJ found the Secretary had met her burden to show SeaWorld's safety program is inadequate. Despite SeaWorld's contention that its operant conditioning "materially reduces the recognized hazard," the ALJ concluded that "SeaWorld's reliance on its trainers to recognize precursors and prevent unpredictable behavior by the killer whales runs counter to the requirements of the Act. 'The duty to comply with section 5(a)(1) rests with the employer.'" The ALJ further concluded that "SeaWorld holds trainers to a near — impossible standard set by upper management, who engage in a form of Monday morning quarterbacking." Additionally, the ALJ noted that SeaWorld had already implemented the means of abatement recommended by the Secretary for trainers working with Tilikum — namely, maintaining a minimum distance from the killer whale, or imposing a physical barrier between the killer whale and trainers — and concluded the same or similar abatement involving other killer whales was no less feasible.

Although crediting the testimony of a SeaWorld curator of animal training regarding the educational and inspirational justification for continuing "waterwork" with killer whales, the ALJ concluded that justification "must be measured against the risk incurred by allowing trainers to interact closely with killer whales." Observing that OSHA has "no specific standard" regulating employees working in close contact with killer whales, and that the Secretary had presented no evidence SeaWorld had a "heightened awareness of the illegality of its conduct" or manifested "plain indifference to employee safety," the ALJ found that violations were "serious," not "willful," and imposed a fine of $7,000 for the general duty clause violation, emphasizing that his order was limited to show performances. SeaWorld unsuccessfully sought discretionary review by the Commission, whereupon the ALJ's decision and order became final.SeaWorld petitions for review of the general duty violation.

II.

The general duty clause, § 5(a)(1) of the Occupational Safety and Health Act, provides: "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1). As explained by the House

Committee on Education and Labor, “bearing in mind the fact that there is no automatic penalty for violation of the general duty, this clause enables the Federal Government to provide for the protection of employees who are working under such *unique* circumstances that no standard has yet been enacted to cover this situation.” In a seminal case this court, in turn, observed that “though novel in approach and sweeping in coverage, the legislation is no more drastic than the problem it aims to meet.” Notwithstanding the “unqualified and absolute” textual imperative that the workplace be “free” of the recognized hazard, the court further observed that “Congress quite clearly did not intend the general duty clause to impose strict liability: The duty was to be an achievable one”. So understood, the court held that “all preventable forms and instances of hazardous conduct must be entirely excluded from the workplace.”

“To establish a violation of the General Duty Clause, the Secretary must establish that: (1) an activity or condition in the employer’s workplace presented a hazard to an employee, (2) either the employer or the industry recognized the condition or activity as a hazard, (3) the hazard was likely to or actually caused death or serious physical harm, and (4) a feasible means to eliminate or materially reduce the hazard existed.” Tempering the range of potential remedies that might be imposed upon finding a violation of the clause, the court explained: “In other words, ‘the *Secretary* must prove that a reasonably prudent employer familiar with the circumstances of the industry would have protected against the hazard in the manner specified by the Secretary’s citation.’”

SeaWorld contests only the second and fourth elements regarding recognized hazard and feasibility. In challenging the general duty citation, SeaWorld does not perforce contend that the Secretary of Labor or the Occupational Safety and Health Review Commission lack legal authority to require employers to provide a reasonably safe working environment for employees. Rather, SeaWorld takes issue with the interpretation by these officials of what constitutes a recognized hazard that would subject an employer to citation under the Occupational Safety and Health Act. First, SeaWorld contends that the finding that it exposed its employees to a “recognized hazard” is unsupported by substantial evidence. Second, it contends that “when some risk is inherent in a business activity, that risk cannot constitute a ‘recognized hazard.’” Pet’r Br. at 33. Third, it contends that the ALJ’s decision was based on unreliable expert testimony about the extent of killer whale predictability after SeaWorld’s training and precautions. As regards the feasibility of physical barriers and minimum distances SeaWorld contends that the Secretary failed to prove feasible abatement methods (or that SeaWorld had already implemented these measures), and that the ALJ failed to consider evidence these abatement measures present additional hazards and erred because eliminating close contact changes the nature of a trainer's job. Finally, SeaWorld contends the general duty clause is unconstitutionally vague as applied because SeaWorld lacked fair notice of the Secretary's abatement measures.

The court must uphold the Commission's decision unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The factual findings of the Commission, "if supported by substantial evidence on the record considered as a whole, shall be conclusive." 29 U.S.C. § 660(a). Under this standard, the court must "uphold Commission findings so long as there is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Likewise, the court "must accept the ALJ's credibility determinations unless they are patently unsupportable." The court will "defer to the Secretary's interpretation of the Act and regulations, upholding such interpretations so long as they are consistent with the statutory language and otherwise reasonable."

A.

Whether a work condition poses a recognized hazard is a question of fact. Substantial evidence supports the finding that "drywork" and "waterwork" with killer whales were recognized hazards. Tilikum is a 32-year-old male killer whale with known aggressive tendencies who in 1991 killed a whale trainer at a marine park in Vancouver, British Columbia. SeaWorld had established special protocols for Tilikum, which prohibited "waterwork" and, among other things, required non-killer whale personnel and guests to stay five feet behind pool walls or three feet from Tilikum's head, indicating that SeaWorld recognized the possibility of harm to people standing outside of the pool on land. Although "drywork" with Tilikum continued, SeaWorld limited it to a team of experienced trainers who used extra caution. The caution with which SeaWorld treated Tilikum even when trainers were poolside or on "slideouts" in the pool indicates that it recognized the hazard the killer whale posed, not that it considered its protocols rendered Tilikum safe.

As to other killer whales, SeaWorld suggests that close contact with these whales was not a recognized hazard because all whales behave differently and its incident reports help SeaWorld improve training. But SeaWorld's incident reports demonstrate that it recognized the danger its killer whales posed to trainers notwithstanding its protocols. At the time of Ms. Brancheau's death, seven killer whales were at the Orlando park. Even though SeaWorld had not recorded incident reports on all of its killer whales, a substantial portion of SeaWorld's killer whale population had at least one reported incident. The ALJ also relied on the many comments by SeaWorld management personnel, including corporate curators of animal training, who described the need for caution around killer whales generally, not only around certain killer whales. Killer whales bit trainers' body parts on several occasions (although not generally puncturing skin) and in 2006 a killer whale pulled a trainer underwater by the foot and submerged him repeatedly for approximately 10 minutes. Although this incident occurred during "waterwork," substantial evidence supports the finding with regard to "drywork" as well. On numerous occasions, trainers fell or were pulled into the water, as later happened with Tilikum and Ms. Brancheau, or killer whales lunged out of the water toward trainers. These incidents constitute substantial evidence to support the ALJ's finding that "drywork" was also a recognized hazard.

SeaWorld's position is that working with killer whales was not a recognized hazard because its training and safety program adequately controlled the risk. To train its killer whales, SeaWorld uses "operant conditioning" to reinforce desired behaviors with food or other rewards. It also trains its employees who work with killer whales to recognize particular behaviors that it calls "precursors," which indicate that the killer whales may act aggressively, and keeps detailed incident reports of when its killer whales had behaved aggressively or otherwise undesirably toward trainers, including pulling trainers into the pool. The Secretary presented evidence that the killer whales posed a hazard in spite of SeaWorld's safety measures. On multiple occasions, including the death of Ms. Brancheau, SeaWorld's incident reports indicated that the killer whales showed no immediate precursors of aggressive behavior or ignored SeaWorld's emergency procedures designed to make them cease aggressive behavior. Statements by SeaWorld managers do not indicate that SeaWorld's safety protocols and training made the killer whales safe; rather, they demonstrate SeaWorld's recognition that the killer whales interacting with trainers are dangerous and unpredictable and that even senior trainers can make mistakes during performances, and the managers repeatedly urged caution in working with the killer whales. The evidence thus supports the ALJ's finding that a recognized hazard existed, even beyond the impact of SeaWorld's safety protocols.

In relying on SeaWorld's safety program to establish a recognized hazard, the ALJ did not, as SeaWorld suggests, "invert the requirement of the General Duty Clause that the Secretary, 'as a threshold matter,' 'submit evidence proving that the methods undertaken by the employer to address the alleged hazard were inadequate.'" In the *Postal Service* case, the Secretary alleged that letter carriers risked being hit by cars in dim or dark conditions and proposed carriers be required to wear reflective garments that complied with industry standards, but failed to show that carriers had been hit because of lack of visibility when wearing the reflective garments provided by their employer, or that the proposed reflective garments would have made a difference. Here, there was substantial record evidence that SeaWorld recognized its precautions were inadequate to prevent serious bodily harm or even death to its trainers and that the residual hazard was preventable.

The remedy imposed for SeaWorld's violations does not change the essential nature of its business. There will still be human interactions and performances with killer whales; the remedy will simply require that they continue with increased safety measures. SeaWorld itself has limited human interactions. After Ms. Brancheau's death in 2010, SeaWorld ceased "waterwork" with all of its killer whales. It also imposed distance between trainers and Tilikum during drywork and, to a lesser degree, between other killer whales and trainers during drywork. These self-imposed limitations are relevant to the assessment of which aspects of SeaWorld's business are essential and indicate that the Secretary's remedy will not eliminate any essential element. SeaWorld does not assert (and at oral argument disavowed) that a public perception of danger to its trainers is essential to its business. Nor has SeaWorld ever argued that limiting interactions in the way that the remedy requires would have a detrimental economic impact on its profits. And SeaWorld is, after all, a for-profit entity owned, at times relevant to the Commission proceedings, by the Blackstone Group, an investment firm.

Pelron Corp., 12 BNA OSHC 1833 (No. 82-388, 1986), on which SeaWorld relies, is inapposite. That case involved an enforcement action against a company that manufactured products by mixing, *inter alia,* ethylene oxide. The ALJ had defined the alleged hazard as the "possibility" of accumulations of unreacted ethylene oxide, which the Commission found could never be prevented. Thus, impliedly, the only remedy would have been to close the plant. Here, the Secretary and the Commission could reasonably conclude that the danger to SeaWorld's trainers during performances from killer whales can be prevented by use of physical barriers and distance, and closing SeaWorld is not at issue. The hazard killer whales pose during performances is not "so idiosyncratic and implausible" that it cannot be considered preventable. SeaWorld controls its employees' access to and contact with its killer whales, unlike the employer in *Megawest Financial Inc.,* 17 BNA OSHC 1337 (No. 93-2879, 1995) (ALJ), who could not prevent the potentially criminal, violent actions of third parties residing in the apartment buildings it managed. SeaWorld's reliance on the Commission's observation in *Pelron* that "some industrial activities are by their very nature dangerous. To permit the normal activities in such an industry to be defined as a 'recognized hazard' within the meaning of section 5(a)(1) is to eliminate an element of the Secretary's burden of proof," is misplaced; the Commission was addressing the requirement that recognized hazards be "preventable" and "be defined in a way that identifies conditions or practices over which the employer can reasonably be expected to exercise control."

To the extent SeaWorld maintains that close contact is integral to cleaning and caring for their animals (*i.e.,* "husbandry"), and that it was arbitrary and capricious to find a recognized hazard in the performance context but not in the husbandry context, its position is unfounded. Contact during husbandry was not at issue before the ALJ or the Commission. Regardless, although some aspects of husbandry may require close contact, according to SeaWorld's vice president for veterinary services, many procedures can be conducted in a medical pool with a lifting bottom that restricts the killer whale's mobility, or can be performed from poolside behind a short wall. In his opinion, notwithstanding performance-contact limitations, "SeaWorld is adequately caring for these animals to this day."

SeaWorld's suggestion that because trainers "formally accepted and controlled their own exposure to risks," the hazard of close contact with killer whales cannot be recognized, contravenes Congress's decision to place the duty to ensure a safe and healthy workplace on the employer, not the employee. This court has long held "this duty is not qualified by such common law doctrines as assumption of risk, contributory negligence, or comparative negligence." SeaWorld's reliance on *Oil, Chemical & Atomic Workers International Union v. American Cyanamid Co.,* 741 F.2d 444 (D.C.Cir.1984), is misplaced; the alleged hazard in that case was the employer's policy prohibiting women of childbearing age from working in high lead-exposure positions unless they had been surgically sterilized, and the court held that "the general duty clause does not apply to a policy as contrasted with a physical condition of the workplace." The court explained that the optional sterilization policy "does not affect employees while they are engaged in work or work-related activities." The potential harm to SeaWorld's trainers exists in their workplace and involves conditions over which SeaWorld has control.

The Secretary and the Commission could also reasonably determine that the remedy does not go to the essence of SeaWorld's productions. SeaWorld has had no "waterwork" performances since Ms. Brancheau's death in 2010, and it temporarily suspended "waterwork" after other incidents, such as the killing of a trainer by a killer whale in 2009 at a nonSeaWorld park in Spain. With distance and physical barriers between Tilikum and trainers during drywork, Tilikum can still perform almost the same behaviors performed when no barriers were present. The nature of SeaWorld's workplace and the unusual nature of the hazard to its employees performing in close physical contact with killer whales do not remove SeaWorld from its obligation under the General Duty Clause to protect its employees from recognized hazards.

C.

Substantial evidence supports the ALJ's findings that it was feasible for SeaWorld to abate the hazard to its employees by using barriers or minimum distance between trainers and killer whales, most notably because SeaWorld has implemented many of these measures on its own. When an employer has existing safety procedures, the burden is on the Secretary to show that those procedures are inadequate. The record evidence showed that SeaWorld's training and protocols did not prevent continued incidents, including the submerging and biting of one trainer in 2006, the killing of a trainer by a SeaWorld-trained and — owned killer whale in 2009 at an amusement park in Spain, and Ms. Brancheau's death in 2010. SeaWorld employees repeatedly acknowledged the unpredictability of its killer whales. This record evidence supports the ALJ's finding that existing protocols were inadequate to eliminate or materially reduce the hazard to SeaWorld's trainer employees performing with killer whales.

Abatement is "feasible" when it is "economically and technologically capable of being done." After Ms. Brancheau's death, SeaWorld required that all trainers work with Tilikum from a minimum distance or behind a barrier, and "waterwork" ceased with all of its killer whales. Implementing the ordered abatement is feasible because it would involve extending these practices to all killer whales and into the future. As the ALJ noted, SeaWorld had not argued the Secretary's proposed abatement was not economically or technologically feasible and had already implemented abatement for at least one of its killer whales and needed only to apply the same or similar protective contact measures it used with Tilikum to other killer whales. Consequently, the Secretary was not required to specify the precise manner in which abatement should be implemented. That the ALJ subsequently granted SeaWorld's request for a six-month extension of the abatement deadline, in view of SeaWorld's difficulty in scheduling two consulting experts, does not undermine the substantial evidence that SeaWorld could feasibly abate the hazard. SeaWorld does not dispute that the Secretary's abatement measures would materially reduce, if not eliminate, the hazard killer whales pose to its employees during performances. SeaWorld's use of protective contact with Tilikum, the three-year moratorium on "waterwork" after Ms. Brancheau's death, and repeated temporary cessation of "waterwork" with all killer whales or particular killer whales after other incidents support the finding that these changes were feasible and would not fundamentally alter the nature of the trainers' employment or SeaWorld's business.

To the extent SeaWorld suggests that veterinary care would be less effective and dangers to trainers from killer whales might increase absent close contact during performances, this issue is not properly before the court. SeaWorld's petition to the Commission for review did not include this issue, and SeaWorld presents no extraordinary circumstances to excuse its failure to do so. The court, therefore, lacks jurisdiction to consider it.

D.

Facial challenges to the general duty clause have been rejected, and although an as-applied challenge would be possible, courts have long accommodated possible constitutional problems with fair notice in this context by interpreting "recognized hazard" only to include preventable hazards, or applying the clause only "when a reasonably prudent employer in the industry would have known that the proposed method of abatement was required,"

SeaWorld contends the general duty clause is unconstitutionally vague as applied because it lacked fair notice that the abatement measures would be required. But the administrative record establishes that SeaWorld did not lack fair notice because the hazard arising from trainers' close contact with killer whales in performance is preventable. Given evidence of continued incidents of aggressive behavior by killer whales toward trainers notwithstanding SeaWorld's training, operant conditioning practices, and emergency measures, SeaWorld could have anticipated that abatement measures it had applied after other incidents would be required. SeaWorld suggests that it was entitled to rely on the fact that the State of California's Division of Occupational Safety and Health ("Cal/OSHA") did not issue a citation for killer whale hazards after a killer whale bit and dragged a trainer underwater during a performance, puncturing the trainer's skin on both feet and breaking the metatarsal in his left foot. Cal/OSHA, however, inspected a different SeaWorld facility (in San Diego) and it, not the federal OSHA, resolved the citation question. In any event, the State inspection report included a warning on point. Although noting that SeaWorld had been following industry standards and was a recognized leader in training killer whales for performance, and that its employees were well-trained and followed emergency procedures, Cal/OSHA concluded that SeaWorld of San Diego's procedures "were not entirely effective at stopping the unwanted behaviors of the killer whale during this attack" and that "short of eliminating all of the water interactions with the killer whales, there is no guarantee that employees can be kept safe from an attack by the killer whale once they get in the water with the animal."

Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980)

JUSTICE STEWART delivered the opinion of the Court.JUSTICE

The Occupational Safety and Health Act of 1970 (Act) prohibits an employer from discharging or discriminating against any employee who exercises "any right afforded by" the Act. The Secretary of Labor (Secretary) has promulgated a regulation providing that, among the rights that the Act so protects, is the right of an employee to choose not to perform his assigned task because of a reasonable apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available. The question presented in the case before us is whether this regulation is consistent with the Act.

I

The petitioner company maintains a manufacturing plant in Marion, Ohio, for the production of household appliances. Overhead conveyors transport appliance components throughout the plant. To protect employees from objects that occasionally fall from these conveyors, the petitioner has installed a horizontal wire-mesh guard screen approximately 20 feet above the plant floor. This mesh screen is welded to angleiron frames suspended from the building's structural steel skeleton.

Maintenance employees of the petitioner spend several hours each week removing objects from the screen, replacing paper spread on the screen to catch grease drippings from the material on the conveyors, and performing occasional maintenance work on the conveyors themselves. To perform these duties, maintenance employees usually are able to stand on the iron frames, but sometimes find it necessary to step onto the steel mesh screen itself.

In 1973, the company began to install heavier wire in the screen because its safety had been drawn into question. Several employees had fallen partly through the old screen, and on one occasion an employee had fallen completely through to the plant floor below but had survived. A number of maintenance employees had reacted to these incidents by bringing the unsafe screen conditions to the attention of their foremen. The petitioner company's contemporaneous safety instructions admonished employees to step only on the angle-iron frames.

On June 28, 1974, a maintenance employee fell to his death through the guard screen in an area where the newer, stronger mesh had not yet been installed. Following this incident, the petitioner effectuated some repairs and issued an order strictly forbidding maintenance employees from stepping on either the screens or the angle-iron supporting structure. An alternative but somewhat more cumbersome and less satisfactory method was developed for removing objects from the screen. This procedure required employees to stand on power-raised mobile platforms and use hooks to recover the material.

On July 7, 1974, two of the petitioner's maintenance employees, Virgil Deemer and Thomas Cornwell, met with the plant maintenance superintendent to voice their concern about the safety of the screen. The superintendent disagreed with their view, but permitted the two men to inspect the screen with their foreman and to point out dangerous areas needing repair. Unsatisfied with the petitioner's response to the results of this inspection, Deemer and Cornwell met on July 9 with the plant safety director. At that meeting, they requested the name, address, and telephone number of a representative of the local office of the Occupational Safety and Health Administration (OSHA). Although the safety director told the men that they "had better stop and think about what they were doing," he furnished the men with the information they requested. Later that same day, Deemer contacted an official of the regional OSHA office and discussed the guard screen.

The next day, Deemer and Cornwell reported for the night shift at 10:45 p.m. Their foreman, after himself walking on some of the angle-iron frames, directed the two men to perform their usual maintenance duties on a section of the old screen. Claiming that the screen was unsafe, they refused to carry out this directive. The foreman then sent them to the personnel office, where they were ordered to punch out without working or being paid for the remaining six hours of the shift. The two men subsequently received written reprimands, which were placed in their employment files.

A little over a month later, the Secretary filed suit in the United States District Court for the Northern District of Ohio, alleging that the petitioner's actions against Deemer and Cornwell constituted discrimination in violation of § 11(c)(1) of the Act. As relief, the complaint prayed, *inter alia,* that the petitioner be ordered to expunge from its personnel files all references to the reprimands issued to the two employees, and for a permanent injunction requiring the petitioner to compensate the two employees for the six hours of pay they had lost by reason of their disciplinary suspensions.

Following a bench trial, the District Court found that the regulation in question justified Deemer's and Cornwell's refusals to obey their foreman's order on July 10, 1974. The court found that the two employees had "refused to perform the cleaning operation because of a genuine fear of death or serious bodily harm," that the danger presented had been "real and not something which had existed only in the minds of the employees," that the employees had acted in good faith, and that no reasonable alternative had realistically been open to them other than to refuse to work. The District Court nevertheless denied relief, holding that the Secretary's regulation was inconsistent with the Act and therefore invalid.

The Court of Appeals for the Sixth Circuit reversed the District Court's judgment. Finding ample support in the record for the District Court's factual determination that the actions of Deemer and Cornwell had been justified under the Secretary's regulation, the appellate court disagreed with the District Court's conclusion that the regulation is invalid. It accordingly remanded the case to the District Court for further proceedings. We granted certiorari, because the decision of the Court of Appeals in this case conflicts with those of two other Courts of Appeals on the important question in issue. That question, as stated at the outset of this opinion, is whether the Secretary's regulation authorizing employee "self-help" in some circumstances, [29 CFR § 1977.12(b)(2), is permissible under the Act.

II

The Act itself creates an express mechanism for protecting workers from employment conditions believed to pose an emergent threat of death or serious injury. Upon receipt of an employee inspection request stating reasonable grounds to believe that an imminent danger is present in a workplace, OSHA must conduct an inspection. 29 U.S.C. § 657(f)(1). In the event this inspection reveals workplace conditions or practices that "could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by" the Act, 29 U.S.C. § 662(a), the OSHA inspector must inform the affected employees and the employer of the danger and notify them that he is recommending to the Secretary that injunctive relief be sought. § 662(c). At this juncture, the Secretary can petition a federal court to restrain the conditions or practices giving rise to the imminent danger. By means of a temporary restraining order or preliminary injunction, the court may then require the employer to avoid, correct, or remove the danger or to prohibit employees from working in the area. § 662(a).

To ensure that this process functions effectively, the Act expressly accords to every employee several rights, the exercise of which may not subject him to discharge or discrimination. An employee is given the right to inform OSHA of an imminently dangerous workplace condition or practice and request that OSHA inspect that condition or practice. 29 U.S.C. § 657(f)(1). He is given a limited right to assist the OSHA inspector in inspecting the workplace, §§ 657(a)(2), (e), and (f)(2), and the right to aid a court in determining whether or not a risk of imminent danger in fact exists. See § 660(c)(1). Finally, an affected employee is given the right to bring an action to compel the Secretary to seek injunctive relief if he believes the Secretary has wrongfully declined to do so. § 662(d).

In the light of this detailed statutory scheme, the Secretary is obviously correct when he acknowledges in his regulation that, "as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace." By providing for prompt notice to the employer of an inspector's intention to seek an injunction against an imminently dangerous condition, the legislation obviously contemplates that the employer will normally respond by voluntarily and speedily eliminating the danger. And in the few instances where this does not occur, the legislative provisions authorizing prompt judicial action are designed to give employees full protection in most situations from the risk of injury or death resulting from an imminently dangerous condition at the worksite.

As this case illustrates, however, circumstances may sometimes exist in which the employee justifiably believes that the express statutory arrangement does not sufficiently protect him from death or serious injury. Such circumstances will probably not often occur, but such a situation may arise when (1) the employee is ordered by his employer to work under conditions that the employee reasonably believes pose an imminent risk of death or serious bodily injury, and (2) the employee has reason to believe that there is not sufficient time or opportunity either to seek effective redress from his employer or to apprise OSHA of the danger.

Nothing in the Act suggests that those few employees who have to face this dilemma must rely exclusively on the remedies expressly set forth in the Act at the risk of their own safety. But nothing in the Act explicitly provides otherwise. Against this background of legislative silence, the Secretary has exercised his rulemaking power under 29 U.S.C. § 657(g)(2) and has determined that, when an employee in good faith finds himself in such a predicament, he may refuse to expose himself to the dangerous condition, without being subjected to "subsequent discrimination" by the employer.

The question before us is whether this interpretative regulation constitutes a permissible gloss on the Act by the Secretary, in light of the Act's language, structure, and legislative history. Our inquiry is informed by an awareness that the regulation is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act.

A

The regulation clearly conforms to the fundamental objective of the Act—to prevent occupational deaths and serious injuries. The Act, in its preamble, declares that its purpose and policy is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to *preserve* our human resources.." 29 U.S.C. § 651(b).

To accomplish this basis purpose, the legislation's remedial orientation is prophylactic in nature. The Act does not wait for an employee to die or become injured. It authorizes the promulgation of health and safety standards and the issuance of citations in the hope that these will act to prevent deaths or injuries from ever occurring. It would seem anomalous to construe an Act so directed and constructed as prohibiting an employee, with no other reasonable alternative, the freedom to withdraw from a workplace environment that he reasonably believes is highly dangerous.

Moreover, the Secretary's regulation can be viewed as an appropriate aid to the full effectuation of the Act's "general duty" clause. That clause provides that "each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1). As the legislative history of this provision reflects, it was intended itself to deter the occurrence of occupational deaths and serious injuries by placing on employers a mandatory obligation independent of the specific health and safety standards to be promulgated by the Secretary. Since OSHA inspectors cannot be present around the clock in every workplace, the Secretary's regulation ensures that employees will in all circumstances enjoy the rights afforded them by the "general duty" clause.

The regulation thus on its face appears to further the over-riding purpose of the Act, and rationally to complement its remedial scheme. In the absence of some contrary indication in the legislative history, the Secretary's regulation must, therefore, be upheld, particularly when it is remembered that safety legislation is to be liberally construed to effectuate the congressional purpose.

B

In urging reversal of the judgment before us, the petitioner relies primarily on two aspects of the Act's legislative history.

1

Representative Daniels of New Jersey sponsored one of several House bills that led ultimately to the passage of the Act. As reported to the House by the Committee on Education and Labor, the Daniels bill contained a section that was soon dubbed the "strike with pay" provision. This section provided that employees could request an examination by the Department of Health, Education, and Welfare (HEW) of the toxicity of any materials in their workplace. If that examination revealed a workplace substance that had "potentially toxic or harmful effects in such concentration as used or found," the employer was given 60 days to correct the potentially dangerous condition. Following the expiration of that period, the employer could not require that an employee be exposed to toxic concentrations of the substance unless the employee was informed of the hazards and symptoms associated with the substance, the employee was instructed in the proper precautions for dealing with the substance, and the employee was furnished with personal protective equipment. If these conditions were not met, an employee could "absent himself from such risk of harm for the period necessary to avoid such danger without loss of regular compensation for such period."

This provision encountered stiff opposition in the House. Representative Steiger of Wisconsin introduced a substitute bill containing no "strike with pay" provision. In response, Representative Daniels offered a floor amendment that, among other things, deleted his bill's "strike with pay" provision.He suggested that employees instead be afforded the right to request an immediate OSHA inspection of the premises, a right which the Steiger bill did not provide. The House ultimately adopted the Steiger bill.

The bill that was reported to and, with a few amendments, passed by the Senate never contained a "strike with pay" provision. It did, however, give employees the means by which they could request immediate Labor Department inspections. These two characteristics of the bill were underscored on the floor of the Senate by Senator Williams, the bill's sponsor.

After passage of the Williams bill by the Senate, it and the Steiger bill were submitted to a Conference Committee. There, the House acceded to the Senate bill's inspection request provisions.

The petitioner reads into this legislative history a congressional intent incompatible with an administrative interpretation of the Act such as is embodied in the regulation at issue in this case. The petitioner argues that Congress' overriding concern in rejecting the "strike with pay" provision was to avoid giving employees a unilateral authority to walk off the job which they might abuse in order to intimidate or harass their employer. Congress deliberately chose instead, the petitioner maintains, to grant employees the power to request immediate administrative inspections of the workplace which could in appropriate cases lead to coercive judicial remedies. As the petitioner views the regulation, therefore, it gives to workers precisely what Congress determined to withhold from them.

We read the legislative history differently. Congress rejected a provision that did not concern itself at all with conditions posing real and immediate threats of death or severe injury. The remedy which the rejected provision furnished employees could have been invoked only after 60 days had passed following HEW's inspection and notification that improperly high levels of toxic substances were present in the workplace. Had that inspection revealed employment conditions posing a threat of imminent and grave harm, the Secretary of Labor would presumably have requested, long before expiration of the 60-day period, a court injunction pursuant to other provisions of the Daniels bill. Consequently, in rejecting the Daniels bill's "strike with pay" provision, Congress was not rejecting a legislative provision dealing with the highly perilous and fast-moving situations covered by the regulation now before us.

It is also important to emphasize that what primarily troubled Congress about the Daniels bill's "strike with pay" provision was its requirement that employees be paid their regular salary after having properly invoked their right to refuse to work under the section. It is instructive that virtually every time the issue of an employee's right to absent himself from hazardous work was discussed in the legislative debates, it was in the context of the employee's right to continue to receive his usual compensation.

When it rejected the "strike with pay" concept, therefore, Congress very clearly meant to reject a law unconditionally imposing upon employers an obligation to continue to pay their employees their regular paychecks when they absented themselves from work for reasons of safety. But the regulation at issue here does not require employers to pay workers who refuse to perform their assigned tasks in the face of imminent danger. It simply provides that in such cases the employer may not "discriminate" against the employees involved. An employer "discriminates" against the employee only when he treats that employee less favorably than he treats others similarly situated.

2

The second aspect of the Act's legislative history upon which the petitioner relies is the rejection by Congress of provisions contained in both the Daniels and the Williams bills that would have given Labor Department officials, in imminent-danger situations, the power temporarily to shut down all or part of an employer's plant. These provisions aroused considerable opposition in both Houses of Congress. The hostility engendered in the House of Representatives led Representative Daniels to delete his version of the provision in proposing amendments to his original bill. The Steiger bill that ultimately passed the House gave the Labor Department no such authority. The Williams bill, as approved by the Senate, did contain an administrative shutdown provision, but the Conference Committee rejected this aspect of the Senate bill.

The petitioner infers from these events a congressional will hostile to the regulation in question here. The regulation, the petitioner argues, provides employees with the very authority to shut down an employer's plant that was expressly denied a more expert and objective United States Department of Labor.

As we read the pertinent legislative history, however, the petitioner misconceives the thrust of Congress' concern. Those in Congress who prevented passage of the administrative shutdown provisions in the Daniels and Williams bills were opposed to the unilateral authority those provisions gave to federal officials, without any judicial safeguards, drastically to impair the operation of an employer's business. Congressional opponents also feared that the provisions might jeopardize the Government's otherwise neutral role in labor-management relations.

Neither of these congressional concerns is implicated by the regulation before us. The regulation accords no authority to Government officials. It simply permits private employees of a private employer to avoid workplace conditions that they believe pose grave dangers to their own safety. The employees have no power under the regulation to order their employer to correct the hazardous condition or to clear the dangerous workplace of others. Moreover, any employee who acts in reliance on the regulation runs the risk of discharge or reprimand in the event a court subsequently finds that he acted unreasonably or in bad faith. The regulation, therefore, does not remotely resemble the legislation that Congress rejected.

C

For these reasons we conclude that 29 CFR § 1977.12(b)(2) was promulgated by the Secretary in the valid exercise of his authority under the Act. Accordingly, the judgment of the Court of Appeals is affirmed.

4. Workers' Compensation

North Carolina Workers' Compensation Act, N.C. Gen. Stat. chap. 97, art. 1

§ 97-2. Definitions.

When used in this Article, unless the context otherwise requires:

(6) Injury. - "Injury and personal injury" shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident. With respect to back injuries, however, where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident. Injury shall include breakage or damage to eyeglasses, hearing aids, dentures, or other prosthetic devices which function as part of the body; provided, however, that eyeglasses and hearing aids will not be

replaced, repaired, or otherwise compensated for unless injury to them is incidental to a compensable injury.

§ 97-3. Presumption that all employers and employees have come under provisions of Article.

From and after January 1, 1975, every employer and employee, as hereinbefore defined and except as herein stated, shall be presumed to have accepted the provisions of this Article respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of his employment and shall be bound thereby.

§ 97-5. Presumption as to contract of service.

Every contract of service between any employer and employee covered by this Article, written or implied, now in operation or made or implied prior to July 1, 1929, shall, after that date, be presumed to continue, subject to the provisions of this Article; and every such contract made subsequent to that date shall be presumed to have been made subject to the provisions of this Article.

§ 97-10.1. Other rights and remedies against employer excluded.

If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.

§ 97-10.2. Rights under Article not affected by liability of third party; rights and remedies against third parties.

(a) The right to compensation and other benefits under this Article for disability, disfigurement, or death shall not be affected by the fact that the injury or death was caused under circumstances creating a liability in some person other than the employer to pay damages therefor, such person hereinafter being referred to as the "third party." The respective rights and interests of the employee-beneficiary under this Article, the employer, and the employer's insurance carrier, if any, in respect of the common-law cause of action against such third party and the damages recovered shall be as set forth in this section.

McGrady v. Olsten Corp., 583 S.E.2d 371 (N.C. Ct. App. 2003)

LEVINSON, Judge.

Defendants (Olsten Corporation and ITT Specialty Risk Services, Inc.) appeal from a divided opinion of the Industrial Commission, awarding plaintiff (Alice McGrady) medical benefits and temporary total disability. We affirm.

The factual background of this appeal is summarized as follows: Plaintiff was fifty years old at the time of the hearing and had an eighth grade education. In 1994, she completed the course required for certification as a certified nursing assistant (CNA), and was employed by defendant as a CNA. As a CNA, plaintiff provided in-home care for patients requiring assistance with daily living. In July, 1999, plaintiff's only client was Ms. Withers, an elderly woman with limited physical abilities. Plaintiff assisted Ms. Withers with bathing, dressing, personal care, housekeeping, and meal preparation. In addition, plaintiff drove Ms. Withers to various places in the community and did her grocery shopping. Ms. Withers enjoyed fresh fruit, which plaintiff obtained for her from the local farmers market or at a grocery store.

Plaintiff's regular hours were from 6:00 a.m. until 3:30 p.m. On 26 July 1999 plaintiff arrived at her usual time and assisted Ms. Withers with breakfast. During breakfast, Ms. Withers asked plaintiff to take her dog "Footsie" out to the yard. Plaintiff testified she "usually took her out … sometimes twice a day." While plaintiff was outside with Footsie, she noticed that Ms. Withers' pear tree had borne a pear. She had previously obtained fruit from Ms. Withers' peach tree without incident and decided to retrieve the pear for her and Ms. Withers to share. Plaintiff began to climb the tree; however, she soon realized that the pear was too high up for her to shake it out of the tree, so she started back down. As plaintiff was climbing back to the ground, she fell. Plaintiff was taken by ambulance to a hospital, where physicians determined that she had broken her back, suffering "50 percent compression fracture" of her spine, and resulting in "quite a bit of damage to the vertebral body." She was initially treated with pain medication and bed rest, until further examination revealed that plaintiff had both an "acute compression fracture" and a "burst fracture" of the spine. Accordingly, plaintiff's treating physician performed surgery on her vertebrae and implanted steel rods in her back. Despite the surgery, plaintiff continued to experience pain, and her physician testified at the hearing that it was unlikely that plaintiff could ever return to work, "even light duty." He also testified that plaintiff's injuries were caused by the fall from Ms. Withers' pear tree.

On 9 September 1999, plaintiff filed a claim for workers' compensation, which was denied by defendants on the basis that her injuries were not causally connected to her employment. A hearing was conducted before Deputy Commissioner Wanda Taylor on 17 April 2000, and on 5 October 2000 the deputy commissioner issued an opinion denying plaintiff's claim for workers' compensation. The opinion concluded that, although plaintiff's accident had proximately caused her injuries, the fall itself "was not an activity which a person so employed might reasonably do in employment such as plaintiff's." Plaintiff appealed to the Full Commission, which conducted a review of the record on 7 January 2002. On 18 April 2002, the Industrial Commission issued an opinion reversing the deputy commissioner and awarding plaintiff medical compensation and temporary total disability. The opinion concluded that plaintiff's attempt to get a pear from Ms. Withers' pear tree either was "within plaintiff's work duties" or was not a serious deviation from her job duties, and thus that plaintiff's injuries were compensable. One commissioner dissented on the basis that "climbing a pear tree was not a contemplated action of plaintiff's employment" and thus that there was "no causal relationship between plaintiff's injuries and … her employment as an in-home caregiver." From this opinion and award, defendants appealed.

Standard of Review

"The standard of appellate review of an opinion and award of the Industrial Commission in a workers' compensation case is whether there is any competent evidence in the record to support the Commission's findings of fact and whether these findings support the Commission's conclusions of law." Further, the Industrial Commission's findings of fact "are conclusive on appeal if supported by any competent evidence." "Thus, on appeal, this Court 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" "Even where there is competent evidence to the contrary, we must defer to the findings of the Commission where supported by any competent evidence. The Commission's findings of fact may only be set aside when 'there is a complete lack of competent evidence to support them.'" The Commission's conclusions of law, however, are reviewed *de novo*.

Defendants argue on appeal that the Industrial Commission erred by finding that plaintiff suffered a compensable injury. Under N.C.G.S. § 97-2(6) (2001) a compensable injury "means only injury by accident arising out of and in the course of the employment." In the present case, there is no dispute that plaintiff's injuries were caused by an accident. However, defendants contend that plaintiff's injury did not arise "out of and in the course of" her employment.

"Whether an injury arises out of and in the course of a claimant's employment is a mixed question of fact and law, and our review is thus limited to whether the findings and conclusions are supported by the evidence." "The phrase 'arising out of' refers to the requirement that there be some causal connection between the injury and claimant's employment. 'In the course of' refers to the time and place constraints on the injury; the injury must occur during the period of employment at a place where an employee's duties are calculated to take him." Thus, "where the evidence shows that the injury occurred during the hours of employment, at the place of employment, and while the claimant was actually in the performance of the duties of the employment, the injury is in the course of the employment." "In other words, to be compensable, the injury must spring from the employment or have its origin therein." The burden of proof is upon the claimant who "must establish both the 'arising out of' and 'in the course of' requirements to be entitled to compensation." Moreover:

> while the 'arising out of' and 'in the course of' elements are distinct tests, they are interrelated and cannot be applied entirely independently. Both are part of a single test of work-connection. Because the terms of the Act should be liberally construed in favor of compensation, deficiencies in one factor are sometimes allowed to be made up by strength in the other.

In the instant case, the Industrial Commission's findings of fact included, in relevant part, the following:

> In August 1994, plaintiff became employed with defendant-employer as an in-home caregiver. As a caregiver, plaintiff had a variety of job duties relating to the care of clients. Plaintiff also was required to make meals for clients for breakfast, lunch and dinner as well as snacks, perform household chores such as cleaning and laundering, as well as transporting the client and grocery shopping if requested.
>
> While working for defendant-employer plaintiff was assigned as a caregiver in the home of Ms. Nancy Withers.
>
> On July 26, 1999, after assisting Ms. Withers out of bed and preparing her breakfast, plaintiff took Ms. Withers' dog outside and, while outside in the yard, plaintiff decided to pick a pear from the pear tree for herself and Ms. Withers. Plaintiff climbed into the tree to retrieve a pear and, as she was coming down, she fell from the tree.
>
> Plaintiff regularly served fruit to Ms. Withers as a part of her job.
>
> As an employee for defendant-employer, plaintiff was to provide services pursuant to a plan of care which authorized plaintiff to fix meals for Ms. Withers and to go grocery shopping.
>
> Plaintiff's activities in obtaining and preparing food for Ms. Withers were in the course and scope of her employment with defendant-employer. The taking of the pear was thereby consistent with plaintiff's duties to acquire and prepare food for Ms. Withers.

Because defendants do not assign as error any of the Industrial Commission's findings of fact, they are "conclusively established on appeal."

We next determine whether the Industrial Commission correctly applied the law to these facts when it reached the following conclusion: "On July 26, 1999, plaintiff sustained a compensable injury by accident arising out of and in the course of her employment with defendant-employer when she fell from a pear tree while picking a pear for the consumption of her employer's patient."

Defendants argue that plaintiff's injury is not compensable. They contend that, because plaintiff was not authorized to climb a tree in order to obtain a pear for Ms. Withers, plaintiff's injury did not result from "a risk which might have been contemplated by a reasonable person familiar with the whole situation as incidental to the service when he entered the employment." *Bartlett v. Duke University,* 284 N.C. 230 (1973) (denying compensation to claimant who aspirated food while dining out during a business trip). Defendants frame the issue of compensability primarily in terms of whether plaintiff was authorized to obtain a pear by climbing a tree, which defendants term "the critical issue in this case."

However, a review of relevant appellate law indicates that a plaintiff's entitlement to workers' compensation generally is not defeated by his negligence, or by evidence that at the time of injury the plaintiff was engaged in a foolish, even forbidden, activity:

> The Workers' Compensation Act is a compromise. Nothing in it supports the notion that it was enacted just for the protection of careful, prudent employees, or that employees that do not stick strictly to their business are beyond its protection. It is not required that the employment be the sole proximate cause of the injury, it being enough that 'any reasonable relationship to the employment exists, or employment is a contributory cause.'

Bare v. Wayne Poultry Co., 70 N.C.App. 88 (1984)(plaintiff suffers compensable injury "participating in horseplay" with deboning knife). *See also, e.g.,* the following cases allowing compensation: *Hoyle v. Isenhour Brick and Tile Co.,* 306 N.C. 248 (1982) (compensation not barred by actions that violate employer's rules unless undertaken in "disobedience of a direct and specific order by a then present superior"); *Watkins v. City of Wilmington,* 290 N.C. 276 (1976) (injury compensable if "competent proof exists that the employee understood, or had reasonable grounds to believe that the act resulting in injury was incidental to his employment") (citation omitted); *Stubblefield v. Construction Co.,* 277 N.C. 444 (1970) (plaintiff suffered fatal accident while idly knocking dust and debris from conveyor rollers, actions which "had no relation to his duties"); *Choate v. Sara Lee Products,* 133 N.C.App. 14 (1999) (plaintiff injured in parking lot after she left production line in violation of company rules); *Spratt v. Duke Power Co.,* 65 N.C.App. 457 (1983) (claimant injured while running to vending machine in violation of company rules); *Patterson v. Gaston Co.,* 62 N.C.App. 544 (1983) ("negligence does not necessarily bar the award of compensation"). As explained by this Court:

> An appellate court is justified in upholding a compensation award if the accident is 'fairly traceable to the employment as a contributing cause' or if 'any reasonable relationship to employment exists.' Compensability of a claim basically turns upon whether or not the employee was acting for the benefit of his employer 'to any appreciable extent' when the accident occurred. *In close cases, the benefit of the doubt concerning this issue should be given to the employee* in accordance with the established policy of liberal construction and application of the Workers' Compensation Act.

We conclude that the Industrial Commission's findings of fact easily establish that plaintiff's accident arose "in the course of" her employment. We further conclude that these findings of fact sufficiently support its conclusion that plaintiff's injury arose "out of" her employment. We note that the Commission's findings specifically state that plaintiff (1) "was required to make meals as well as snacks"; (2) "regularly served fruit to Ms. Withers as a part of her job"; (3) "took Ms. Withers' dog outside and decided to pick a pear for herself *and Ms. Withers*"; and (4) that plaintiff's "activities in obtaining food for Ms. Withers were in the course and scope of her employment with defendant-employer."

Defendants' arguments are not without force. However, bearing in mind that we are bound by the Industrial Commission's findings of fact, we are constrained to conclude that plaintiff suffered a compensable injury.

Deem v. Treadway & Sons Painting & Wallcovering, Inc., 543 S.E.2d 209 (N.C. Ct. App. 2001)

HUNTER, Judge.

Robert Deem ("plaintiff") appeals the trial court's grant of defendants' motions to dismiss pursuant to Rules 12(b)(1) and 12(b)(6). We agree with the trial court that the North Carolina Industrial Commission ("Industrial Commission") has exclusive jurisdiction over plaintiff's claims. Thus, we affirm.

The facts pertinent to this case are as follows: On 26 July 1993, plaintiff was an employee of defendant Treadaway & Sons Painting ("Treadaway Painting") when he fell off a ladder and suffered a compensable injury. With the assistance of an attorney, plaintiff filed a workers' compensation claim with the Industrial Commission against his employer, Treadaway Painting and its workers' compensation carrier, defendant Montgomery Mutual Insurance Company ("Montgomery Mutual"). Montgomery Mutual hired an independent adjusting company, defendant R.E. Pratt & Co. ("Pratt"), to handle plaintiff's workers' compensation claim. Defendant Goad was Pratt's adjuster assigned to plaintiff's claim.

Plaintiff returned to work in November 1994 as a paint foreman. Later, his condition worsened and he was taken out of work on 3 January 1996. About the same time, Montgomery Mutual and Pratt hired defendant Concentra Managed Care ("Concentra") "to provide vocational rehabilitation counseling for the Plaintiff." Defendants Smith, Wertz and Seltzer were employees of Concentra. On 20 February 1996, plaintiff was released to work by his attending physician, however the release was based upon a number of restrictions. When Concentra notified Treadaway Painting that plaintiff could return to work with restrictions, Concentra was informed that plaintiff's job was no longer vacant. However, Treadaway Painting offered the job of laborer to plaintiff, which plaintiff accepted.

On 11 July 1997 plaintiff, through counsel, entered into an "Agreement of Final Settlement and Release" with Treadaway Painting, Montgomery Mutual and Pratt.

> Pursuant to this agreement, the plaintiff and his attorney Seth N. Bernanke agreed to release and discharge all claims available under the North Carolina Worker's Compensation Act relating to this injury in exchange for payment of $100,000. On July 23, 1997 the Industrial Commission entered an order approving the compromise settlement agreement reached by the plaintiff and Treadaway, Montgomery Mutual and R.E. Pratt & Co. in the amount of $100,000.

Notwithstanding the former release and settlement agreement, on 31 December 1998, plaintiff filed this suit against Treadaway Painting, Montgomery Mutual, Pratt, Goad, Concentra and Concentra's three employees, alleging that defendants committed fraud, bad faith, unfair and deceptive trade practices, intentional infliction of emotional distress and civil conspiracy *arising out of the handling of his workers' compensation claim.*

In response to plaintiff's complaint, each defendant filed a motion to dismiss pursuant to Rule 12(b)(1), specifically stating that North Carolina's general courts of justice are without subject matter jurisdiction due to the Industrial Commission having exclusive jurisdiction, and; pursuant to Rule 12(b)(6), specifically stating that the plaintiff had failed to state a claim for which relief may be granted. The trial court agreed with defendants and granted each of their motions to dismiss based upon both Rules 12(b)(1) and (6). On appeal, plaintiff brings forward three assignments of error, all dealing with the trial court's grant of each defendant's motion to dismiss. Finding the record before us clear and case law plain, we affirm the trial court's rulings.

In *Johnson v. First Union Corp.*, plaintiffs Johnson and Smith each "filed claims with the North Carolina Industrial Commission seeking workers' compensation benefits for repetitive motion disorders they allegedly suffered in the course of their employment. However, both subsequently had their claims rejected." Like the plaintiff in this case, plaintiffs Johnson and Smith later filed suit in superior court against their employer, its workers' compensation carrier, the adjusting company and the rehabilitation provider along with one of its employees, alleging: fraud, bad faith, refusal to pay or settle a valid claim, unfair and deceptive trade practices, intentional infliction of emotional distress and civil conspiracy. Although the trial court dismissed plaintiffs' case stating that plaintiffs had failed to state a claim upon which relief may be granted pursuant to Rule 12(b)(6), on appeal defendants argued—and this Court agreed—that the claims should have been dismissed pursuant to Rule 12(b)(1) because the Industrial Commission had exclusive jurisdiction.

In enacting the North Carolina Workers' Compensation Act ("the Act"), our General Assembly set clear boundaries for how an employee injured on the job must seek remedy. Additionally, although the Legislature has amended parts of the Act over time, the main thrust of the Act and its purpose have remained the same:

> … to provide compensation for an employee in this State who has suffered an injury by accident which arose out of and in the course of his employment, the compensation to be paid by the employer, in accordance with the provisions of the act, without regard to whether the accident and resulting injury was caused by the negligence of the employer, as theretofore defined by the law of this State.

We note here that, North Carolina is a contributory negligence state. Thus, to gain any remedy before the Act was enacted, an employee injured on the job would be subject to proving not only that the employer was negligent but that she herself was not negligent at all. Instead, under the Act:

> The right of the employee to compensation, and the liability of the employer therefore, are founded upon mutual concessions, as provided in the Act, *by which each surrenders rights and waives remedies which he theretofore had under the law of this State.*

Thus, although there is a trade-off of rights, our Supreme Court has held that "the act establishes a sound public policy, and is just to both employer and employee."

Nevertheless, plaintiff at bar argues that it matters not that his claims originally arose out of his compensable injury. Instead, he argues that the "intentional conduct" of defendants fails to come under the exclusivity provisions of the Act because that conduct did not arise out of and in the course of plaintiff's employment relationship. Again, finding *Johnson* on point, we disagree.

From both his complaint and his brief to this Court, we can clearly glean that *plaintiff's cause of action arises out of* his belief that "defendants engaged in fraudulent, illegal, and improper conduct designed at forcing plaintiff back into the job market at a made up job so that the defendants could artificially cut off *plaintiff's right to benefits under the Workers' Compensation Act*." (Emphasis added.) Therefore, plaintiff's complaint is nothing more than an allegation that defendants did not appropriately handle his workers' compensation claim, and thus he was injured because he did not receive his entitled benefit. This is the exact argument of the *Johnson* plaintiffs and, in that case, this Court held that "the North Carolina Workers' Compensation Act gives the North Carolina Industrial Commission exclusive jurisdiction over workers' compensation claims *and all related matters, including issues such as those raised in the case at bar*." Noting that the *Johnson* plaintiffs also alleged the defendant committed intentional torts against them (including unfair and deceptive trade practices), we hold in the case at bar that plaintiff's claims are ancillary to his original compensable injury and thus, are absolutely covered under the Act and this collateral attack is improper.

However, plaintiff further argues that his current claims should be allowed in the general court of justice because they are claims of "intentional conduct." Thus, plaintiff contends that as such, the "actions fall within the North Carolina Supreme Court's exception of intentional conduct from the exclusivity rule" as set out in *Woodson v. Rowland*. Again, we disagree.

It is well established that the "substantially certain" standard set out in *Woodson* creates an exception to the exclusivity provision of the Act. However, it is also well established that the exception is extremely narrow in that plaintiff's "forecast of evidence" must show the "employer intentionally engaged in the misconduct complained of knowing it was substantially certain to cause serious injury or death to the employee and the employee was injured or killed by that misconduct." Since plaintiff does not contend, neither is there evidence of record to support a finding that defendants' actions were *"substantially certain to cause serious injury or death"* to plaintiff, plaintiff's claims do not rise to the level of a *Woodson* claim. Thus, the trial court's dismissal of plaintiff's claims for lack of subject matter jurisdiction is affirmed, as the Industrial Commission has sole jurisdiction over all the issues raised. We specifically note that the Industrial Commission has the exclusive jurisdiction over workers' compensation agreements and employee claims of fraud, misrepresentation, undue influence, mutual mistake, intentional infliction of emotional distress, and unfair and deceptive trade practices with respect to those agreements. Our Supreme Court has long held that:

> "If a plaintiff desires to attack a workers' compensation agreement for fraud, misrepresentation, undue influence, or mutual mistake, and has evidence to support such an attack, he may make application in due time for a further hearing for that purpose. In such event, the Industrial Commission shall hear the evidence offered by the parties, find the facts with respect thereto, and upon such findings determine whether the agreement was erroneously executed due to fraud, misrepresentation, undue influence or mutual mistake. If such error is found, the Commission may set aside the agreement, and determine whether a further award is justified and, if so, the amount thereof."

Thus, plaintiff's sole remedy in this case was to petition the Industrial Commission to set aside his agreement with Treadaway Painting. We recognize plaintiff is contending that this remedy is insufficient. However, we believe our General Assembly is the correct body to consider changes to our current workers' compensation remedies.

Having held that the trial court properly dismissed plaintiff's claims for lack of subject matter jurisdiction, we need not address the issue of whether plaintiff's claims were properly dismissed pursuant to N.C. Gen.Stat. § 1-1A, Rule 12(b)(6).

Chapter 8: Terminating Employment

1. Claims for Wrongful Termination

1.1 Employment-at-Will

Skagerberg v. Blandin Paper Co., 266 N.W. 872 (Minn. 1936)

JULIUS J. OLSON, JUSTICE

Plaintiff is a consulting engineer, a specialist in the field of heating, ventilating, and air conditioning. As such he had developed a clientele bringing him a weekly income of approximately $200.

Defendant operates a paper manufacturing plant at Grand Rapids, this state. It had employed plaintiff in his professional capacity in 1926 and again in 1930. He was paid at the rate of $200 per week while so employed. Defendant was planning extensive enlargements of its plant, the estimated expense being about $1,000,000. Ordinarily a consulting engineer's fees for doing the necessary planning and supervision of the contemplated improvements would involve from $35,000 to $50,000. During plaintiff's employment in 1930 there was some discussion between the parties with respect of plaintiff's employment to take this work in hand. At that time, too, he was negotiating with the executive officers of Purdue University relative to taking a position as associate professor in its department of engineering, particularly that branch thereof relating to heating, ventilating, and air conditioning.

The Purdue position carried a salary of $3,300 per year and required only nine months' work in the way of instructions. This would leave plaintiff free to continue his practice as a consulting engineer during a period of three months of each calendar year. He was also privileged, if he entered that position, to continue his practice as a consulting engineer at all times insofar as his professional work at the university permitted him so to do. In addition thereto, he was privileged to contribute to engineering magazines and other publications. All income from such outside engagements was to be his in addition to the stated salary. Plaintiff considered this opportunity as one especially attractive to him. Defendant had full knowledge of all the foregoing facts.

On October 13, 1930, plaintiff, having received a telegram from Purdue University offering him the position and requiring immediate acceptance or rejection thereof, at once called an officer of defendant over the long-distance telephone informing him of the offer and the necessity on his part of making immediate response thereto. Defendant's officer agreed that if plaintiff would reject the Purdue offer and also agree to purchase the home of defendant's power superintendent it would give plaintiff permanent employment at a salary of $600 per month. Relying thereon, plaintiff rejected the Purdue offer and immediately thereafter moved to Grand Rapids and there entered upon the performance of his duties under this arrangement. He later entered into a contract for the purchase of the superintendent's home. Appropriate to note is the fact that these negotiations were entirely oral and over the long-distance telephone, plaintiff being at Minneapolis and defendant's officer at Grand Rapids. The only writing between the parties is a letter written on October 14, 1930, reading thus:

> Blandin Paper Co. "Grand Rapids, Minn."Attention: Mr. C.K. Andrews "Gentlemen:
>
> In accordance with our conversation yesterday when our agreement was settled regarding my position with your company, I have wired Purdue rejecting their offer. Under the circumstances it was impossible for us to get together on a written agreement; I had to wire Purdue at once. However, I am making this move on the assumption that there will be no difficulty in working out our agreement when I get up to Grand Rapids.

> Propositions like the one Purdue made are very rare and I am turning it down since I feel that the opportunities with you for applying my past experience are very attractive, the essential consideration being, however, that the job will be a permanent one.
>
> According to the understanding we have, I am to take over Mr. Kull's duties as Power Superintendent and serve also as Mechanical Engineer for your plant, supervising the mechanical construction and maintenance work and other mechanical technical matters. Mr. Kull is to remain for long enough period, about six months, to permit me to get my work organized and get acquainted with the details of his work. If the proposed new construction work is started within that time it may develop that Mr. Kull may remain until that is completed after which he will leave and I take over his duties. As an accommodation to him when he leaves town I am to purchase his house.
>
> My salary is to be six hundred dollars ($600.00) per month and you are to pay my moving expenses to Grand Rapids.
>
> Very truly yours, "RS/m R. Skagerberg.

Plaintiff rendered the services for which he was thus engaged "dutifully, faithfully and to the complete satisfaction of the defendant and was paid the agreed salary, except as to a voluntary reduction, up to September 1, 1932," when, so the complaint alleges, he was "wrongfully, unlawfully and wilfully" discharged from further employment, although "ready, willing and able to perform." By reason of the alleged breach of contract he claims to have suffered general damages in the amount of $25,000, and for this he prays judgment.

From what has been stated it is clear that the issue raised by the demurrer is simply this: Do the allegations set forth in the complaint show anything more than employment of plaintiff by defendant subject to termination at the will of either party?

The words "permanent employment" have a well established meaning in the law:

> In case the parties to a contract of service expressly agree that the employment shall be 'permanent' the law implies, not that the engagement shall be continuous or for any definite period, but that the term being indefinite the hiring is merely at will.

The difficult question presented is whether the allegations set forth in the complaint bring this case within an exception to the rule stated. We find in 18 R.C.L. p. 510, the following statement:

> Under some circumstances, however, 'permanent' employment will be held to contemplate a continuous engagement to endure as long as the employer shall be engaged in business and have work for the employe to do and the latter shall perform the service satisfactorily. This seems to be the established rule in case the employe purchases the employment with a valuable consideration outside the services which he renders from day to day.

And in 35 A.L.R. 1434, it is said:

> It has been held that where an employe has given a good consideration in addition to his services, an agreement to hire him permanently should, in the absence of other terms or circumstances to the contrary, continue so long as the employe is able and willing to do his work satisfactorily.

Plaintiff cites and relies upon *Carnig v. Carr*, 167 Mass. 544; *Roxana Petroleum Co. v. Rice*, 109 Okla. 161; *Pierce v. Tennessee C. I. R. Co.* 173 U.S. 1, and other cases of similar import. A brief discussion of the cited cases upon which plaintiff relies may be helpful.

In *Carnig v. Carr*, plaintiff had been engaged in business for himself as an enameler. Defendant was a business competitor. Being such, and for his own advantage, defendant persuaded plaintiff to give up his business and sell his stock in trade to him. As consideration, in part at least, for entering into this arrangement, defendant agreed to employ plaintiff permanently at a stated salary, his work for defendant being the same as that in which plaintiff had been engaged. It is clear that what defendant sought and accomplished was to get rid of his competitor in business upon a promise on his part to give plaintiff permanent employment. The resulting situation amounted to the same thing in substance and effect as if plaintiff had purchased his job. Under such circumstances there can be no doubt that the exception to the general rule was properly invoked and applied and furnishes an illustration thereof.

In *Pierce v. Tennessee C. I. R. Co.*, plaintiff had received an injury while employed by defendant. To settle the difficulty defendant promised employment to plaintiff at certain stated wages and was also to furnish certain supplies as long as his disability to do full work continued by reason of his injury. In consideration for these promises plaintiff released the company from all liability for damages on account of the injuries which caused his disability. Here, too, it is clear that plaintiff purchased from defendant his employment.

In *Roxana Petroleum Co. v. Rice*, plaintiffs Rice and Lyons were attorneys and rendered professional services for defendant over a period of time. They had other clients who paid them large annual retainers, one of these being the Pierce Oil Company, from which client they received an annual retainer of $17,500. The attorneys were prevailed upon by defendant to sever their connections with other clients and were promised and paid an annual retainer of $15,000, later increased to $20,000. Some time thereafter the petroleum company claimed that the expense bills were unsatisfactory. A controversy arose, and to settle same a compromise agreement was made. "In this compromise agreement a new employment contract was made. The general offices of the company had been moved to St. Louis. Plaintiffs were to continue their services in representing defendant in 40 or 50 lawsuits that were then pending in the courts of Oklahoma and Texas, and they were to continue in the services of the company in these two states as long as the defendant operated therein and as long as the services of the plaintiffs were satisfactory, and pay them reasonable fees for legal as well as other services. Later on new difficulties arose respecting the new contract. The court in distinguishing this form of contract from the ordinary contract of permanent employment came to the conclusion that because plaintiffs had compromised their claims against the company, changed their position in relation to their general practice, incurred expenses in maintaining an office for the special services of defendant, that thereby there was a permanent contract of employment. The court said:

> We are of the opinion that from the facts and circumstances attending the making of the contract of employment in the instant case it was the intention of the parties that the employment was to continue as long as the defendant was in business in Oklahoma and Texas, and the plaintiffs were not subject to discharge without cause.

With regard to that part of the new agreement which provided that plaintiffs were to be paid as long as their services were "satisfactory" to defendant, the facts were such as to justify the court in holding that defendant's claimed dissatisfaction was not genuine but rather and only pretended. The court quoted with approval the following statement from *Electric Lighting Co. v. Elder Bros.*:

> But the dissatisfaction must be in good faith and with the performance of the contract. A plea of dissatisfaction with the work agreed to be satisfactorily completed must allege the facts from which the dissatisfaction arises. He must be in good faith dissatisfied. He cannot avoid liability by merely alleging that he is dissatisfied. The dissatisfaction must not be capricious nor mercenary nor result from a design to be dissatisfied. It must exist as a fact. It must be actual, not feigned; real, not merely a pretext to escape liability.

That the court did not intend to go beyond the general rule pertaining to such form of contract is clearly shown by the subsequent opinion rendered in *Dunn v. Birmingham S. R. Co.*, where plaintiff was hired as defendant's exclusive agent for the sale of its products in Tulsa, no time limit as to term of service having been provided for in the agreement. Five months later defendant, without notice to plaintiff, began selling its products to other retailers in Tulsa. Judgment for plaintiff in nominal damages only was sustained on appeal.

This court has had occasion to pass upon similar questions in various cases. Thus in *Horn v. Western Land Assn.*, plaintiff had been appointed as attorney for defendant "at a salary of $1,000 per year, payable quarterly," and was so informed in writing. Plaintiff wrote a letter "accepting the appointment upon the terms offered." The court determined that this constituted a contract as to which neither party, without the other's consent, could lawfully rescind without cause during the year.

In *Bolles v. Sachs*, two written agreements were involved, neither showing upon its face mutuality of obligation or other consideration. The court held that the two instruments could be considered together so as to show that one was given in consideration for the other. As thus construed the contract amounted to one of employment providing in substance that plaintiff was to render services for defendant as long as he might elect to serve. The employer breached the contract and sued for damages. The court held that the employe, never having fixed by his election the period of service, could not recover substantial damages, the obligation violated being too uncertain to furnish a basis for assessment of substantial damages.

In *Smith v. St. Paul D. R. Co.*, plaintiff had been injured in the line of his employment. In settlement of the injury he was promised employment. In respect of the validity of such contract the court said:

> The consideration for defendant's agreement to employ was paid by the release of plaintiff's claim for damages quite as much and as effectually as if plaintiff had actually paid cash. By releasing his claim for damages, the plaintiff paid in advance for the privilege or option of working for the defendant; and, having done this, he had the right to have it remain optional with him how long he would continue to work for the company, while it remained obligatory upon the latter to furnish the opportunity so long as he chose to work, and was able to properly perform the same. The plaintiff had parted with value for the optional contract, and there was owing to him a reciprocal duty and obligation on the part of the company.

In *McMullan v. Dickinson Co.*, the first syllabus paragraph of the second opinion reads:

> Plaintiff and defendant, a corporation, entered into an agreement by the terms of which the latter employed the former as assistant manager upon a stated yearly salary, payable in monthly instalments, said employment to continue so long as the business of the corporation should be continued, provided plaintiff properly and efficiently discharged his duties, and only so long as he should own and hold in his own name 50 shares of capital stock, fully paid up, in defendant corporation. *Held*, that the period of employment was for such time as plaintiff continued to own and hold the stock shares, not exceeding the period during which the corporate business was being transacted, and was fixed with sufficient definiteness; and, further, that there was no lack of mutuality of consideration.

In *Newhall v. Journal Printing Co.*, action was brought upon a written contract. Plaintiff's assignor, in consideration of $135 paid to defendant, was by the latter given the exclusive right to sell its publications within certain specified territory. Provision was made in the contract that either party thereto might terminate the same upon 30 days' written notice to the other. Upon the expiration of the 30-day period from the date of service of such notice "all the rights of said second party *plaintiff* under said contract shall cease, except the right of reimbursement as hereinafter provided; provided, however, that said first party *defendant* shall not terminate this contract, except for the dishonesty, incompetence, negligence, inattention, or irresponsibility of said second party." The court held upon plaintiff's action to recover damages for its breach that the parties intended (and the contract clearly expressed such intention) that defendant could not terminate the contract "except for the dishonesty, incompetence, negligence, inattention, or irresponsibility" by the other party thereto.

From the cases discussed, and the discussion is limited to but a few of the many available, the rules of law applicable to the facts in the instant case do not seem to be in doubt, nor do we understand that counsel for either side criticize the rules of law laid down in these cases. Division or difference of opinion arises entirely by reason of the difficulty in application of these rules to the facts pleaded.

Plaintiff maintains that four different items of consideration entered into the contract relied upon, in addition to the promised service to be rendered, namely: (1) The rejection of the Purdue offer; (2) the agreement to purchase the superintendent's house; (3) that plaintiff gave up an established business; and (4) that defendant saved the commission that it otherwise would have to pay engineers on new construction work.

Plaintiff obviously could not accept both the Purdue and the defendant's offer. It was for him to take one or the other. He could not possibly serve both masters.

A man capable of earning $600 per month necessarily must be possessed of both learning and experience in his particular line of endeavor. The fact that he was able to command such salary at the time of entering into defendant's service is convincing proof that there must be more than one person or enterprise seeking his talents and services. If plaintiff had elected to go to Purdue and, after having been there employed the same length of time as he was by defendant, was then discharged, does it follow that he could successfully sue Purdue University upon the same theory that he is here making a basis for liability against defendant? We have found no case fitting into plaintiff's claim in this regard.

What has been said in respect of the Purdue opportunity applies with equal force to the third point raised by plaintiff. His capacity as a specialist in his line of endeavor had built up for him a lucrative practice. That practice he could not take with him when he entered defendant's employment. Is not this exactly what every person having any line of employment must do when he seeks and obtains another? If plaintiff had been engaged in the practice of the law and as such had established a clientele bringing the same income and had later taken on a contract to act for a corporate enterprise at a fixed salary of $600 per month upon the same basis as here, do his counsel think, in virtue of the well established rules of applicable law, that he would have a lifetime job? Would not counsel have insisted upon a more definite agreement than that relied upon here?

Plaintiff's claims in this regard are ably discussed and disposed of in *Minter v. Tootle, Campbell Dry Goods Co.* In that case plaintiff was employed by defendant for a term which plaintiff supposed to be permanent. About two years thereafter he was discharged and brought this action to recover his expenses and unpaid salary. There the employe in order to enter into defendant's employment gave up his other employment. This was the basis for his theory of the case. The court said:

> The reported cases which deal with contracts of employment in commercial business, where no other consideration than a promise to perform the service passes from the employe to the employer, are almost unanimous in applying the general rule that the words permanent, lasting, constant, or steady, applied to the term of employment do not constitute a contract of employment for life, or for any definite period, and such contracts fall under the rule 'that an indefinite hiring at so much per day, or per month, or per year, is a hiring at will and may be terminated by either party at any time, and no action can be sustained in such case for a wrongful discharge.' The general rule that the assurance of permanent employment will be construed as meaning an indefinite, as distinguished from a special, or merely temporary employment, is a common sense inference founded upon common knowledge of the customs and usages of business. The effort of plaintiff to show an additional consideration passing from him to defendant was abortive since it shows that he merely abandoned other activities and interests to enter into the service of defendant — a thing almost every desirable servant does upon entering a new service, but which, of course, cannot be regarded as constituting any additional consideration to the master.

With regard to purchase of the superintendent's house, note should be made that in plaintiff's letter written the day following the alleged making of the contract he said:

> According to the understanding we have I am to take over Mr. Kull's duties as Power Superintendent and serve also as Mechanical Engineer for your plant, supervising the mechanical construction and maintenance work and other mechanical technical matters. Mr. Kull is to remain for long

> enough period, about six months, to permit me to get my work organized and get acquainted with the details of his work. If the proposed new construction work is started within that time it may develop that Mr. Kull may remain until that is completed after which he will leave and I take over his duties.
>
> As an accommodation to him when he leaves town I am to purchase his house.

It is difficult to find anything in this language indicating a consideration for, going to, or in any way benefiting defendant to induce it to enter into such contract. Plaintiff's own statement is that "as an accommodation to Kull when he leaves town I am to purchase his house." How this could be of any material interest to or concern of defendant in view of plaintiff's own letter and stipulation is not apparent. Nowhere in the complaint is there any allegation that the purchase of the house from the superintendent in any way benefited defendant or damaged plaintiff. A man in plaintiff's position would necessarily be interested in acquiring a place of abode upon leaving Minneapolis for Grand Rapids. In the very nature of his requirements he entered into the purchase for his own use and accommodation rather than for any benefit to or advantage of defendant. Nowhere is there any suggestion that defendant was to furnish him with a place of abode or do anything whatever in respect of finding or providing such.

Pugh v. See's Candies, Inc., 116 Cal.App.3d 311 (1981)

GRODIN, J.

After 32 years of employment with See's Candies, Inc., in which he worked his way up the corporate ladder from dishwasher to vice president in charge of production and member of the board of directors, Wayne Pugh was fired. Asserting that he had been fired in breach of contract and for reasons which offend public policy he sued his former employer seeking compensatory and punitive damages for wrongful termination, and joined as a defendant a labor organization which, he alleged, had conspired in or induced the wrongful conduct. The case went to trial before a jury, and upon conclusion of the plaintiff's case-in-chief the trial court granted defendants' motions for nonsuit, and this appeal followed.

SUMMARY OF THE EVIDENCE

The defendant employer is in the business of manufacturing fresh candy at its plants in Los Angeles and South San Francisco and marketing the candy through its own retail outlets. The South San Francisco plant is operated under the name See's Candies, Inc., a wholly owned subsidiary corporation of See's Candy Shops, Inc., which operates the Los Angeles plant as well. The stock of See's Candy Shops, Inc., was held by members of the See family until 1972, when it was sold to Blue Chip Stamps Corporation. For convenience, the designation "See's" will be used to refer to both companies.

Pugh began working for See's at its Bay Area plant (then in San Francisco) in January 1941 washing pots and pans. From there he was promoted to candy maker, and held that position until the early part of 1942, when he entered the Air Corps. Upon his discharge in 1946 he returned to See's and his former position. After a year he was promoted to the position of production manager in charge of personnel, ordering raw materials, and supervising the production of candy. When, in 1950, See's moved into a larger plant in San Francisco, Pugh had responsibility for laying out the design of the plant, taking bids, and assisting in the construction. While working at this plant, Pugh sought to increase his value to the company by taking three years of night classes in plant layout, economics, and business law. When See's moved its San Francisco plant to its present location in South San Francisco in 1957, Pugh was given responsibilities for the new location similar to those which he undertook in 1950. By this time See's business and its number of production employees had increased substantially, and a new position of assistant production manager was created under Pugh's supervision.

In 1971 Pugh was again promoted, this time as vice president in charge of production and was placed upon the board of directors of See's northern California subsidiary, "in recognition of his accomplishments." In 1972 he received a gold watch from See's "in appreciation of 31 years of loyal service."

In May 1973 Pugh travelled with Charles Huggins, then president of See's, and their respective families to Europe on a business trip to visit candy manufacturers and to inspect new equipment. Mr. Huggins returned in early June to attend a board of director's meeting while Pugh and his family remained in Europe on a planned vacation.

Upon Pugh's return from Europe on Sunday, June 25, 1973, he received a message directing him to fly to Los Angeles the next day and meet with Mr. Huggins.

Pugh went to Los Angeles expecting to be told of another promotion. The preceding Christmas season had been the most successful in See's history, the Valentine's Day holiday of 1973 set a new sales record for See's, and the March 1973 edition of See's Newsletter, containing two pictures of Pugh, carried congratulations on the increased production.

Instead, upon Pugh's arrival at Mr. Huggin's office, the latter said, "Wayne, come in and sit down. We might as well get right to the point. I have decided your services are no longer required by See's Candies. Read this and sign it." Huggins handed him a letter confirming his termination and directing him to remove that day "only personal papers and possessions from your office," but "absolutely no records, formulas or other material"; and to turn in and account for "all keys, credit cards, et cetera." The letter advised that Pugh would receive unpaid salary, bonuses and accrued vacation through that date, and the full amount of his profit sharing account, but "No severance pay will be granted." Finally, Pugh was directed "not to visit or contact Production Department employees while they are on the job."

The letter contained no reason for Pugh's termination. When Pugh asked Huggins for a reason, he was told only that he should "look deep within himself" to find the answer, that "Things were said by people in the trade that have come back to us." Pugh's termination was subsequently announced to the industry in a letter which, again, stated no reasons.

When Pugh first went to work for See's, Ed Peck, then president and general manager, frequently told him: "if you are loyal to See's and do a good job, your future is secure." Laurance See, who became president of the company in 1951 and served in that capacity until his death in 1969, had a practice of not terminating administrative personnel except for good cause, and this practice was carried on by his brother, Charles B. See, who succeeded Laurance as president.

During the entire period of his employment, there had been no formal or written criticism of Pugh's work. raised at the annual meetings which preceded each holiday season, and he was never denied a raise or bonus. He received no notice that there was a problem which needed correction, nor any warning that any disciplinary action was being contemplated.

Pugh's theory as to why he was terminated relates to a contract which See's at that time had with the defendant union. Prior to 1971, the union represented employees of See's as well as employees of certain other candy manufacturers in a multiemployer bargaining unit, and there existed a collective bargaining agreement between the union and an employer association representing those manufacturers. In addition, there existed for many years prior to 1971 a supplemental agreement between the union and See's which contained provisions applicable to See's only.

In 1968 the supplemental agreement contained a new rate classification which permitted See's to pay its seasonal employees at a lower rate. At a company meeting prior to the 1968 negotiations, Pugh had objected to the proposed new seasonal classification on the grounds that it might make it more difficult to recruit seasonal workers, and create unrest among See's regular seasonal workers who had worked previously for other manufacturers at higher rates. Huggins overruled Pugh's objection and (unknown to Pugh) recommended his termination for "lack of cooperation" as to which Pugh's objection formed "part of the reason." His recommendation was not accepted.

The 1968 association and supplemental agreements expired in 1971. Thereafter See's negotiated with the union separately, and not as a part of any employer association.

The 1971 agreement expired in 1973. In April of that year, Huggins asked Pugh to be part of the negotiating team for the new union contract. Pugh responded that he would like to, but he was bothered by the possibility that See's had a "sweetheart contract" with the union. In response, someone banged on the table and said, " 'You don't know what the hell you are talking about.'" Pugh said, "Well, I think I know what I am talking about. I don't know whether you have a sweetheart contract, but I am telling you if you do, I don't want to be involved because they are immoral, illegal and not in the best interests of my employees." At the trial, Pugh explained that to him a "sweetheart contract" was "a contract whereby one employer would get an unfair competitive advantage over a competitor by getting a lower wage rate, would be one version of it." He also felt, he testified, that "if they in fact had a sweetheart contract that it wouldn't be fair to my female employees to be getting less money than someone would get working in the same industry under the same manager."

The union's alleged participation in Pugh's termination was in the form of a statement attributed to Mr. Button (the individual who succeeded Pugh as production manager) at a negotiating meeting between the company and the union in June 1973. According to one witness, Mr. Button stated at the commencement of the meeting, "Now we've taken care of Mr. Pugh. What are you going to do for us."

DISCUSSION

A. Historical Background.

The law of the employment relationship has been, and perhaps still is, in the process of continuing evolution. The old law of master and servant, which held sway through the 18th century and to some extent beyond, viewed the relationship as primarily one of status rather than of contract. While agreement gave rise to the relationship and might establish certain of its terms, it was "custom and public policy, not the will of the parties, which defined the implicit framework of mutual rights and obligations."

The essence of the relationship as so defined drew its contours from the model of the household — in which, typically, the servant worked, the master had general authority to discipline the servant, and it was the servant's duty to obey. At the same time, the master had certain responsibilities for the servant's general welfare. The relationship was thus in a sense paternalistic. And it was not terminable at will; rather, there existed a presumption (in the absence of contrary agreement) that employment was for a period of one year.

With the industrial revolution in the 19th century the law of master and servant underwent a gradual remodeling, primarily at the hands of the judiciary. Primary emphasis came to be placed, through contract doctrine, upon the freedom of the parties to define their own relationship. "The emphasis shifted from obligation to freedom of choice." The terms of the contract were to be sought in voluntary agreement, express or implied, the employee being presumed to have assented to the rules and working conditions established by the employer.

In light of the generally superior bargaining power of the employer, "the employment contract became by the end of the nineteenth century a very special sort of contract — in large part a device for guaranteeing to management unilateral power to make rules and exercise discretion." And management's unilateral power extended, generally, to the term of the relationship as well. The new emphasis brought with it a gradual weakening of the traditional presumption that a general hiring (i.e., one without a specific term) was for a year, and its replacement by the converse presumption that "a general or indefinite hiring is *prima facie* a hiring at will." (Wood, A Treatise on the Law of Master and Servant (1877) § 134, fn. 49.)[34] In California, this presumption is reflected in Labor Code section 2922, which provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month."

The recognized inequality in bargaining power between employer and individual employee undergirded the rise of the labor unions and the institutionalization of collective bargaining.[35] And through collective bargaining, unions have placed limitations on the employer's unilateral right of termination. Under most union contracts, employees can only be dismissed for "just cause," and disputes over what constitutes cause for dismissal are typically decided by arbitrators chosen by the parties. Collective bargaining agreements, however, cover only a small fraction of the nation's work force, and employees who either do not or (as in the case of managerial employees such as Mr. Pugh) cannot form unions are left without that protection.

34. (n.3 in opinion) See Blumrosen, *Workers' Rights Against Employers and Unions: Justice Francis — A Judge For Our Season* (1970) 24 Rutgers L.Rev. 480, 481. It has been observed that what is sometimes called "Wood's rule" finds dubious support in the authorities upon which the treatise relies. (Note, *Implied Contract Rights to Job Security* (1974) 26 Stan.L.Rev. 335, 341.)

35. (n.4 in opinion) Congress, in adopting the National Labor Relations Act in 1935 found "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association." 29 U.S.C. § 151.

In recent years, there have been established by statute a variety of limitations upon the employer's power of dismissal. Employers are precluded, for example, from terminating employees for a variety of reasons, including union membership or activities, race, sex, age or political affiliation. Legislatures in this country have so far refrained, however, from adopting statutes, such as those which exist in most other industrialized countries, which would provide more generalized protection to employees against unjust dismissal. And while public employees may enjoy job security through civil service rules the legal principles which give rise to these protections are not directly applicable to employees in private industry.

Even apart from statute or constitutional protection, however, the employer's right to terminate employees is not absolute. "The mere fact that a contract is terminable at will does not give the employer the absolute right to terminate it in all cases." Two relevant limiting principles have developed, one of them based upon public policy and the other upon traditional contract doctrine. The first limitation precludes dismissal "when an employer's discharge of an employee violates fundamental principles of public policy", the second when the discharge is contrary to the terms of the agreement, express or implied. Appellant relies upon both these principles in contesting his termination here.

C. Contract Limitations.

The presumption that an employment contract is intended to be terminable at will is subject, like any presumption, to contrary evidence. This may take the form of an agreement, express or implied, that the relationship will continue for some fixed period of time. Or, and of greater relevance here, it may take the form of an agreement that the employment relationship will continue indefinitely, pending the occurrence of some event such as the employer's dissatisfaction with the employee's services or the existence of some "cause" for termination. Sometimes this latter type of agreement is characterized as a contract for "permanent" employment, but that characterization may be misleading. In one of the earliest California cases on this subject, the Supreme Court interpreted a contract for permanent employment as meaning "that plaintiffs' employment was to continue indefinitely, and until one or the other of the parties wish, *for some good reason,* to sever the relation."

A contract which limits the power of the employer with respect to the reasons for termination is no less enforcible because it places no equivalent limits upon the power of the employee to quit his employment. "If the requirement of consideration is met, there is no additional requirement of equivalence in the values exchanged, or 'mutuality of obligation.'"

Moreover, while it has sometimes been said that a promise for continued employment subject to limitation upon the employer's power of termination must be supported by some "independent consideration," i.e., consideration other than the services to be rendered, such a rule is contrary to the general contract principle that courts should not inquire into the adequacy of consideration. "A single and undivided consideration may be bargained for and given as the agreed equivalent of one promise or of two promises or of many promises." Thus there is no analytical reason why an employee's promise to render services, or his actual rendition of services over time, may not support an employer's promise both to pay a particular wage (for example) and to refrain from arbitrary dismissal.

The most likely explanation for the "independent consideration" requirement is that it serves an evidentiary function: it is more probable that the parties intended a continuing relationship, with limitations upon the employer's dismissal authority, when the employee has provided some benefit to the employer, or suffers some detriment, beyond the usual rendition of service. This functional view of "independent consideration" in the employment context has acquired judicial recognition in other states, and has been accepted in several recent cases by the California courts.

Accordingly, "it is settled that contracts of employment in California are terminable only for good cause if *either* of two conditions exist: (1) the contract was supported by consideration independent of the services to be performed by the employee for his prospective employer; or (2) the parties agreed, expressly or impliedly, that the employee could be terminated only for good cause."

In determining whether there exists an implied-in-fact promise for some form of continued employment courts have considered a variety of factors in addition to the existence of independent consideration. These have included, for example, the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.

A related doctrinal development exists in the application to the employment relationship of the "implied-in-law covenant of good faith and fair dealing inherent in every contract." The California Supreme Court in *Tameny* took note of authorities in other jurisdictions which have found an employer's discharge of an at-will employee violative of that covenant, but considered it unnecessary to reach that issue in light of its holding that the pleading stated a cause of action on other grounds.

Recently one Court of Appeal has had occasion to confront the applicability of that doctrine more directly. In *Cleary v. American Airlines, Inc.*, an employee who had been dismissed for alleged theft after 18 years of allegedly satisfactory service brought suit claiming, among other things, that his dismissal was in violation of published company policy requiring a "fair, impartial and objective hearing" in such matters, and in breach of the covenant of good faith and fair dealing. Holding that the complaint stated a cause of action on these grounds, the court reasoned:

> Two factors are of paramount importance in reaching our result. One is the longevity of service by plaintiff — 18 years of apparently satisfactory performance. Termination of employment without legal cause after such a period of time offends the implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts.
>
> The second factor of considerable significance is the expressed policy of the employer set forth in the regulation referred to in the pleadings. This policy involves the adoption of specific procedures for adjudicating employee disputes such as this one. While the contents of the regulation are not before us, its existence compels the conclusion that this employer had recognized its responsibility to engage in good faith and fair dealing rather than in arbitrary conduct with respect to *all* of its employees.
>
> In the case at bench, we hold that the longevity of the employee's service, together with the expressed policy of the employer, operate as a form of estoppel, precluding any discharge of such an employee by the employer without good cause."

If "termination of employment without legal cause after 18 years of service offends the implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts," as the court said in the above-quoted portion of *Cleary,* then a fortiori that covenant would provide protection to Pugh, whose employment is nearly twice that duration. Indeed, it seems difficult to defend termination of such a long-time employee arbitrarily, i.e., without *some* legitimate reason, as compatible with either good faith or fair dealing.

In *Cleary* the court did not base its holding upon the covenant of good faith and fair dealing alone. Its decision rested also upon the employer's acceptance of responsibility for refraining from arbitrary conduct, as evidenced by its adoption of specific procedures for adjudicating employee grievances. While the court characterized the employer's conduct as constituting "recognition of its responsibility to engage in good faith and fair dealing", the result is equally explicable in traditional contract terms: the employer's conduct gave rise to an implied promise that it would not act arbitrarily in dealing with its employees.

Here, similarly, there were facts in evidence from which the jury could determine the existence of such an implied promise: the duration of appellant's employment, the commendations and promotions he received, the apparent lack of any direct criticism of his work, the assurances he was given, and the employer's acknowledged policies. While oblique language will not, standing alone, be sufficient to establish agreement, it is appropriate to consider the totality of the parties' relationship: Agreement may be "'shown by the acts and conduct of the parties, interpreted in the light of the subject matter and of the surrounding circumstances.'"

Since this litigation may proceed toward yet uncharted waters, we consider it appropriate to provide some guidance as to the questions which the trial court may confront on remand. We have held that appellant has demonstrated a prima facie case of wrongful termination in violation of his contract of employment. The burden of coming forward with evidence as to the reason for appellant's termination now shifts to the employer. Appellant may attack the employer's offered explanation, either on the ground that it is pretextual (and that the real reason is one prohibited by contract or public policy, or on the ground that it is insufficient to meet the employer's obligations under contract or applicable legal principles. Appellant bears, however, the ultimate burden of proving that he was terminated wrongfully.

By what standard that burden is to be measured will depend, in part, upon what conclusions the jury draws as to the nature of the contract between the parties. The terms "just cause" and "good cause," "as used in a variety of contexts have been found to be difficult to define with precision and to be largely relative in their connotation, depending upon the particular circumstances of each case." Essentially, they connote "a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power." Care must be taken, however, not to interfere with the legitimate exercise of managerial discretion.[36] "Good cause" in this context is quite different from the standard applicable in determining the propriety of an employee's termination under a contract for a specified term. And where, as here, the employee occupies a sensitive managerial or confidential position, the employer must of necessity be allowed substantial scope for the exercise of subjective judgment.

36. (n. 26 in opinion) Labor arbitrators have generated a large body of decisions interpreting and applying such terms as "just cause", and some of their work may be useful. It must be remembered, however, that arbitrators are selected by the parties and on the basis, partly, of the confidence which the parties have in their knowledge and judgment concerning labor relations matters. For courts to apply the same standards may prove overly intrusive in some cases.

1.2 Contractual Claims

Enterprise Wire Co., 46 LA 359 (1966)

Arbitrator: Carroll R. Daugherty

Test Applicable for Learning Whether Employer Had Just and Proper Cause for Disciplining an Employee

Few if any union-management agreements contain a definition of "just cause." Nevertheless, over the years the opinions of arbitrators in unnumerable discipline cases have developed a sort of "common law" definition thereof. This definition consists of a set of guide lines or criteria that are to be applied to the facts of any one case, and said criteria are set forth below in the form of questions.

A "no" answer to any one or more of the following questions normally signifies that just and proper cause did not exist. In other words, such "no" means that the employer's disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable, or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his judgment for that of the employer.

The answers to the questions in any particular case are to be found in the evidence presented to the arbitrator at the hearing thereon. Frequently, of course, the facts are such that the guide lines cannot be applied with precision. Moreover, occasionally, in some particular case an arbitrator may find one or more "no" answers so weak and the other, "yes" answers so strong that he may properly, without any "political" or spineless intent to "split the difference" between the opposing positions of the parties, find that the correct decision is to "chastize" both the company and the disciplined employee by decreasing but not nullifying the degree of discipline imposed by the company—e.g., by reinstating a discharged employee without back pay.

It should be clearly understood also that the criteria set forth below are to be applied to the employer's conduct in making his disciplinary decision before same has been processed through the grievance procedure to arbitration. Any question as to whether the employer has properly fulfilled the contractual requirements of said procedure is entirely separate from the question of whether he fulfilled the "common law" requirements of just cause before the discipline was "grieved."

Sometimes although very rarely, a union-management agreement contains a provision limiting the scope of the arbitrator's inquiry into the question of just cause. For example, one such provision seen by this arbitrator says that "the only question the arbitrator is to determine shall be whether the employee is or is not guilty of the act or acts resulting in his discharge." Under the latter contractual statement an arbitrator might well have to confine his attention to Question No. 5 below-or at most to Questions Nos. 3, 4, and 5. But absent any such restriction in an agreement, a consideration of the evidence on all seven Questions (and their accompanying Notes) is not only proper but necessary.

The Questions

1. Did the company give to the employee forewarning or foreknowledge of the possible or probably disciplinary consequences of the employee's conduct?

Note 1: Said forewarning or foreknowledge may properly have been given orally by management or in writing through the medium of typed or printed sheets or books of shop rules and of penalties for violation thereof.

Note 2: There must have been actual oral or written communication of the rules and penalties to the employee.

Note 3: A finding of lack of such communication does not in all cases require a "no" answer to Question No. 1. This is because certain offenses such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the company or of fellow employees are so serious that any employee in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable.

Note 4: Absent any contractual prohibition or restriction, the company has the right unilaterally to promulgate reasonable rules and give reasonable orders; and same need not have been negotiated with the union.

2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?

Note: If an employee believes that said rule or order is unreasonable, he must nevertheless obey same (in which case he may file a grievance thereover) unless he sincerely feels that to obey the rule or order would seriously and immediately jeopardize his personal safety and/or integrity. Given a firm finding to the latter effect, the employee may properly be said to have had justification for his disobedience.

3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

Note 1: This is the employee's "day in court" principle. An employee has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior.

Note 2: The company's investigation must normally be made before its disciplinary decision is made. If the company falls to do so, its failure may not normally be excused on the ground that the employee will get his day in court through the grievance procedure after the exaction of discipline. By that time there has usually been too much hardening of positions. In a very real sense the company is obligated to conduct itself like a trial court.

Note 3: There may of course be circumstances under which management must react immediately to the employee's behavior. In such cases the normally proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b) if the employee is found innocent after the investigation he will be restored to his job with lull pay for time lost.

Note 4: The company's investigation should include an inquiry into possible justification for the employee's alleged rule violation.

4. Was the company's investigation conducted fairly and objectively?

Note 1: At said investigation the management official may be both "prosecutor" and "judge," but he may not also be a witness against the employee.

Note 2: It is essential for some higher, detached management official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his attitude and conduct.

Note 3: In some disputes between an employee and a management person there are not witnesses to an incident other than the two immediate participants. In such cases it is particularly important that the management "judge" question the management participant rigorously and thoroughly, just as an actual third party would.

5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

Note 1: It is not required that the evidence be conclusive or "beyond all reasonable doubt." But the evidence must be truly substantial and not flimsy.

Note 2: The management "judge" should actively search out witnesses and evidence, not just passively take what participants or "volunteer" witnesses tell him.

Note 3: When the testimony of opposing witnesses at the arbitration hearing is irreconcilably in conflict, an arbitrator seldom has any means for resolving the contradictions. His task is then to determine whether the management "judge" originally had reasonable grounds for believing the evidence presented to him by his own people.

6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

Note 1: A "no" answer to this question requires a finding of discrimination and warrants negation or modification of the discipline imposed.

Note 2: If the company has been lax in enforcing its rules and order, and decides henceforth to apply them rigorously, the company may avoid a finding of discrimination by telling all employees beforehand of its intent to enforce hereafter all rules as written.

7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

Note 1: A trivial proven offense does not merit harsh discipline unless the employee has properly been found guilty of the same or other offenses a number of times in the past. (There is no rule as to what number of previous offenses constitutes a "good," a "fair," or a "bad" record. Reasonable judgment thereon must be used.)

Note 2: An employee's record of previous offenses may never be used to discover whether he was guilty of the immediate or latest one. The only proper use of his record is to help determine the severity of discipline once he has properly been found guilty of the immediate offense.

Note 3: Given the same proven offense for two or more employees, their respective records provide the only proper basis for "discriminating," among them in the administration of discipline for said offense. Thus, if employee A's record is significantly better than those of employees B, C, and D, the company may properly give A a lighter punishment than it gives the others for the same offense; and this does not constitute true discrimination.

Note 4: Suppose that the record of the arbitration hearing establishes firm "Yes" answers to all the first six questions. Suppose further that the proven offense of the accused employee was a serious one, such as drunkenness on the job; but the employee's record had been previously unblemished over a long continuos period of employment with the company. Should the company be held arbitrary and unreasonable if it decided to discharge such an employee? The answer depends of course on all the circumstances. But, as one of the country's oldest arbitration agencies, the National Railroad Adjustment Board, has pointed out repeatedly in innumerable decisions on discharge cases, leniency is the prerogative of the employer rather than of the arbitrator; and the latter is not supposed to substitute his judgment in this area for that of the company unless there is compelling evidence that the company abused its discretion. This is the rule, even though an arbitrator, if he had been the original "trial judge," might have imposed a lesser penalty. Actually the arbitrator may be said in an important sense to act as an appellate tribunal whose function is to discover whether the decision of the trial tribunal (the employer) was within the bounds of reasonableness above set forth. In general, the penalty of dismissal for a really serious first offense does not in itself warrant a finding of company unreasonableness.

Woolley v. Hoffmann-La Roche, Inc., 99 N.J. 284 (1985)

WILENTZ, C.J.

I.

The issue before us is whether certain terms in a company's employment manual may contractually bind the company. We hold that absent a clear and prominent disclaimer, an implied promise contained in an employment manual that an employee will be fired only for cause may be enforceable against an employer even when the employment is for an indefinite term and would otherwise be terminable at will.

II.

Plaintiff, Richard Woolley, was hired by defendant, Hoffmann-La Roche, Inc., in October 1969, as an Engineering Section Head in defendant's Central Engineering Department at Nutley. There was no written employment contract between plaintiff and defendant. Plaintiff began work in mid-November 1969. Some time in December, plaintiff received and read the personnel manual on which his claims are based.

In 1976, plaintiff was promoted, and in January 1977 he was promoted again, this latter time to Group Leader for the Civil Engineering, the Piping Design, the Plant Layout, and the Standards and Systems Sections. In March 1978, plaintiff was directed to write a report to his supervisors about piping problems in one of defendant's buildings in Nutley. This report was written and submitted to plaintiff's immediate supervisor on April 5, 1978. On May 3, 1978, stating that the General Manager of defendant's Corporate Engineering Department had lost confidence in him, plaintiff's supervisors requested his resignation. Following this, by letter dated May 22, 1978, plaintiff was formally asked for his resignation, to be effective July 15, 1978.

Plaintiff refused to resign. Two weeks later defendant again requested plaintiff's resignation, and told him he would be fired if he did not resign. Plaintiff again declined, and he was fired in July.

Plaintiff filed a complaint alleging breach of contract, intentional infliction of emotional distress, and defamation, but subsequently consented to the dismissal of the latter two claims. The gist of plaintiff's breach of contract claim is that the express and implied promises in defendant's employment manual created a contract under which he could not be fired at will, but rather only for cause, and then only after the procedures outlined in the manual were followed. Plaintiff contends that he was not dismissed for good cause, and that his firing was a breach of contract.

Defendant's motion for summary judgment was granted by the trial court, which held that the employment manual was not contractually binding on defendant, thus allowing defendant to terminate plaintiff's employment at will.

III.

Hoffmann-La Roche contends that the formation of the type of contract claimed by plaintiff to exist - Hoffmann-La Roche calls it a permanent employment contract for life - is subject to special contractual requirements: the intent of the parties to create such an undertaking must be clear and definite; in addition to an explicit provision setting forth its duration, the agreement must specifically cover the essential terms of employment - the duties, responsibilities, and compensation of the employee, and the proof of these terms must be clear and convincing; the undertaking must be supported by consideration in addition to the employee's continued work. Woolley claims that the requirements for the formation of such a contract have been met here and that they do not extend as far as Hoffmann-La Roche claims. Further, Woolley argues that this is not a "permanent contract for life," but rather an employment contract of indefinite duration that may be terminated only for good cause and in accordance with the procedure set forth in the personnel policy manual. Both parties agree that the employment contract is one of indefinite duration; Hoffmann-La Roche contends that in New Jersey, when an employment contract is of indefinite duration, the inescapable legal conclusion is that it is an employment at will; Woolley claims that even such a contract - of indefinite duration - may contain provisions requiring that termination be only for cause.

The trial court held that in the absence of a "most convincing" demonstration that "it was the intent of the parties to enter into such long-range commitments clearly, specifically and definitely expressed", supported by consideration over and above the employee's rendition of services, the employment is at will. Finding that the personnel policy manual did not contain any such clear and definite expression and, further, that there was no such additional consideration, the court granted summary judgment in favor of defendant, sustaining its right to fire plaintiff with or without cause.

The Appellate Division, viewing plaintiff's claim as one for a "permanent or lifetime employment," found that the company's policy manual did not specifically set forth the term, work, hours or duties of the employment and "appeared to be a unilateral expression of company policies and procedures not bargained for by the parties," this last reference being similar to the notion, relied on by the trial court, that additional consideration was required. Based on that view, it held that the "promulgation and circulation of the personnel policy manual by defendant did not give plaintiff any enforceable contractual rights." In so doing it noted the "objections to a lifetime employment contract that make it contrary to public policy, *i.e.,* lack of definiteness, unequal burden of performance, etc.". While it did not purport to establish any special contractual rule concerning company personnel policy manuals, its analysis suggests they would ordinarily not lead to contractual consequences except for such provisions as those "involving severance pay," which "deal with a specific term of a contract. Its parameters are clearly set forth. The conditions and factors involved are definite and easily ascertained."

We are thus faced with the question of whether this is the kind of employment contract - a "long-range commitment" - that must be construed as one of indefinite duration and therefore at will unless the stringent requirements of *Savarese v. Pyrene Mfg. Co.,* 9 N.J. 595 (1952) are met, or whether ordinary contractual doctrine applies. In either case, the question is whether Hoffmann-La Roche retained the right to fire with or without cause or whether, as Woolley claims, his employment could be terminated only for cause. We believe another question, not explicitly treated below, is involved: should the legal effect of the dissemination of a personnel policy manual by a company with a substantial number of employees be determined solely and strictly by traditional contract doctrine? Is that analysis adequate for the realities of such a workplace?

IV.

As originally conceived in the late 1800's, the law was that an employment contract for an indefinite term was presumed to be terminable at will; an employee with an at-will contract could be fired for any reason (or no reason) whatsoever, be it good cause, no cause, or even morally wrong cause. Pursuant to that rule, in New Jersey employers were free to terminate an at-will employment relationship with or without cause.

The at-will rule has come under severe criticism from commentators who argue that the economic justifications for the development of the rule have changed dramatically and no longer support its harshness. The Legislature here, as in most states, has limited the at-will rule to the extent that it conflicts with the policies of our various civil rights laws so that, for instance, a firing cannot be sustained in New Jersey if it is based on the employee's race, color, religion, sex, national origin, or age.

This Court has clearly announced its unwillingness to continue to adhere to rules regularly leading to the conclusion that an employer can fire an employee-at-will, with or without cause, for any reason whatsoever. Our holding in *Pierce v. Ortho Pharmaceutical Corp.*, while necessarily limited to the specific issue of that case (whether employer can fire employee-at-will when discharge is contrary to a clear mandate of public policy), implied a significant questioning of that rule in general.

> Commentators have questioned the compatibility of the traditional at will doctrine with the realities of modern economics and employment practices. The common law rule has been modified by the enactment of labor relations legislation. The National Labor Relations Act and other labor legislation illustrate the governmental policy of preventing employers from using the right of discharge as a means of oppression.

> Consistent with this policy, many states have recognized the need to protect employees who are not parties to a collective bargaining agreement or other contract from abusive practices by the employer.
>
> This Court has long recognized the capacity of the common law to develop and adapt to current needs. The interests of employees, employers, and the public lead to the conclusion that the common law of New Jersey should limit the right of an employer to fire an employee at will.
>
> In recognizing a cause of action to provide a remedy for employees who are wrongfully discharged, we must balance the interests of the employee, the employer, and the public. Employees have an interest in knowing they will not be discharged for exercising their legal rights. Employers have an interest in knowing that they can run their businesses as they see fit as long as their conduct is consistent with public policy. The public has an interest in employment stability and in discouraging frivolous lawsuits by dissatisfied employees.

The spirit of this language foreshadows a different approach to these questions. No longer is there the unquestioned deference to the interests of the employer and the almost invariable dismissal of the contentions of the employee. Instead, as Justice Pollock so effectively demonstrated, this Court was no longer willing to decide these questions without examining the underlying interests involved, both the employer's and the employees', as well as the public interest, and the extent to which our deference to one or the other served or disserved the needs of society as presently understood.

> In the last century, the common law developed in a laissez-faire climate that encouraged industrial growth and approved the right of an employer to control his own business, including the right to fire without cause an employee at will. The twentieth century has witnessed significant changes in socioeconomic values that have led to reassessment of the common law rule. Businesses have evolved from small and medium size firms to gigantic corporations in which ownership is separate from management. Formerly there was a clear delineation between employers, who frequently were owners of their own businesses, and employees. The employer in the old sense has been replaced by a superior in the corporate hierarchy who is himself an employee. We are a nation of employees. Growth in the number of employees has been accompanied by increasing recognition of the need for stability in labor relations.

The thrust of the thought is unmistakable. There is an interest to be served in addition to "freedom" of contract, an interest shared by practically all. And while "stability in labor relations" is the only specifically identified public policy objective, the reference to the "laissez-faire climate" and "the right to fire without cause an employee at will" as part of the "last century" suggests that any application of the employee-at-will rule (not just its application in conflict with "a clear mandate of public policy") must be tested by its legitimacy today and not by its acceptance yesterday.

Given this approach, the issue is not whether the rules applicable to individual lifetime or indefinite long-term employment contracts should be changed, but rather whether a correct understanding of the "underlying interests involved," in the relationship between the employer and its workforce calls for compliance by the employer with certain rudimentary agreements voluntarily extended to the employees.

V.

The rule of *Savarese*, which the trial court and the Appellate Division transported to this case, was derived in a very different context from that here. The case involved an unusual transaction not likely to recur (promise by company officer, made to induce employee to play baseball with company team, for lifetime employment even if employee became disabled as a result of playing baseball). Here, instead, we have the knowing distribution of an apparently carefully thought-out policy manual intended to cover all employees of a large employer. The courts below, however, despite this completely different situation, identified the claimed implied promise not to fire except for cause as purporting to establish an *individual* contract for lifetime or long-term employment for a particular employee. On that basis, they concluded that the stringent rule of *Savarese* was triggered.

As correctly read by the trial court and the Appellate Division, *Savarese* required that a long-term employment arrangement *such as was involved in that case* must be held to be an employment at will unless two distinct requirements are satisfied: there must be clear and convincing proof of a precise agreement, setting forth all of the terms of the employment, including, in addition to the duration thereof, the duties and responsibilities of both employee and employer; and the long-term undertaking by the employer must be supported by consideration from the employee in addition to his continued work. This reluctance to impose employment contracts other than at-will on employers is found in our cases both before and after. It should be noted, however, that each of these involved a particular contract between one employee and the employer, and its interpretation; none involved the question of the impact of a contract put forth by the employer as applicable to all employees, similar to the policy manual in this case.

What is before us in this case is not a special contract with a particular employee, but a general agreement covering all employees. There is no reason to treat such a document with hostility.

The trial court viewed the manual as an attempt by Hoffmann-La Roche to avoid a collective bargaining agreement. Implicit is the thought that while the employer viewed a collective bargaining agreement as an intrusion on management prerogatives, it recognized, in addition to the advantages of an employment manual to both sides, that unless this kind of company manual were given to the workforce, collective bargaining, and the agreements that result from collective bargaining, would more likely take place.

A policy manual that provides for job security grants an important, fundamental protection for workers. If such a commitment is indeed made, obviously an employer should be required to honor it. When such a document, purporting to give job security, is distributed by the employer to a workforce, substantial injustice may result if that promise is broken.

We do not believe that Hoffmann-La Roche was attempting to renege on its promise when it fired Woolley. On the contrary, the record strongly suggests that even though it believed its manual did not create any contractually binding agreements, Hoffmann-La Roche nevertheless almost invariably honored it. In effect, it gave employees more than it believed the law required. Its position taken before us is one of principle: while contending it treated Woolley fairly, it maintains it had no legal obligation to do so.

VI.

Given the facts before us and the common law of contracts interpreted in the light of sound policy applicable to this modern setting, we conclude that the termination clauses of this company's Personnel Policy Manual, including the procedure required before termination occurs, could be found to be contractually enforceable. Furthermore, we conclude that when an employer of a substantial number of employees circulates a manual that, when fairly read, provides that certain benefits are an incident of the employment (including, especially, job security provisions), the judiciary, instead of "grudgingly" conceding the enforceability of those provisions, should construe them in accordance with the reasonable expectations of the employees.

The employer's contention here is that the distribution of the manual was simply an expression of the company's "philosophy" and therefore free of any possible contractual consequences. The former employee claims it could reasonably be read as an explicit statement of company policies intended to be followed by the company in the same manner as if they were expressed in an agreement signed by both employer and employees. From the analysis that follows we conclude that a jury, properly instructed, could find, in strict contract terms, that the manual constituted an offer; put differently, it could find that this portion of the manual (concerning job security) set forth terms and conditions of employment.

In determining the manual's meaning and effect, we must consider the probable context in which it was disseminated and the environment surrounding its continued existence. The manual, though apparently not distributed to all employees ("in general, distribution will be provided to supervisory personnel"), covers all of them. Its terms are of such importance to all employees that in the absence of contradicting evidence, it would seem clear that it was intended by Hoffmann-La Roche that all employees be advised of the benefits it confers.

We take judicial notice of the fact that Hoffmann-La Roche is a substantial company with many employees in New Jersey. The record permits the conclusion that the policy manual represents the most reliable statement of the terms of their employment. At oral argument counsel conceded that it is rare for any employee, except one on the medical staff, to have a special contract. Without minimizing the importance of its specific provisions, the context of the manual's preparation and distribution is, to us, the most persuasive proof that it would be almost inevitable for an employee to regard it as a binding commitment, legally enforceable, concerning the terms and conditions of his employment. Having been employed, like hundreds of his co-employees, without any individual employment contract, by an employer whose good reputation made it so attractive, the employee is given this one document that purports to set forth the terms and conditions of his employment, a document obviously carefully prepared by the company with all of the appearances of corporate legitimacy that one could imagine. If there were any doubt about it (and there would be none in the mind of most employees), the name of the manual dispels it, for it is nothing short of the official *policy* of the company, it is the Personnel *Policy* Manual. As every employee knows, when superiors tell you "it's company policy," they mean business.

The mere fact of the manual's distribution suggests its importance. Its changeability - the uncontroverted ability of management to change its terms - is argued as supporting its non-binding quality, but one might as easily conclude that, given its importance, the employer wanted to keep it up to date, especially to make certain, given this employer's good reputation in labor relations, that the benefits conferred were sufficiently competitive with those available from other employers, including benefits found in collective bargaining agreements. The record suggests that the changes actually made almost always favored the employees.

Given that background, then, unless the language contained in the manual were such that no one could reasonably have thought it was intended to create legally binding obligations, the termination provisions of the policy manual would have to be regarded as an obligation undertaken by the employer. It will not do now for the company to say it did not mean the things it said in its manual to be binding. Our courts will not allow an employer to offer attractive inducements and benefits to the workforce and then withdraw them when it chooses, no matter how sincere its belief that they are not enforceable.

Whatever else the manual may deal with (as noted above, we do not have the entire manual before us), one of its major provisions deals with the single most important objective of the workforce: job security. The reasons for giving such provisions binding force are particularly persuasive. Wages, promotions, conditions of work, hours of work, all of those take second place to job security, for without that all other benefits are vulnerable.

> We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for *all* of their income is something new in the world. *For our generation, the substance of life is in another man's hands.*

Job security is the assurance that one's livelihood, one's family's future, will not be destroyed arbitrarily; it can be cut off only "for good cause," fairly determined. Hoffmann-La Roche's commitment here was to what working men and women regard as their most basic advance. It was a commitment that gave workers protection against arbitrary termination.

Many of these workers undoubtedly know little about contracts, and many probably would be unable to analyze the language and terms of the manual. Whatever Hoffmann-La Roche may have intended, that which was read by its employees was a promise not to fire them except for cause.

Under all of these circumstances, therefore, it would be most unrealistic to construe this manual and determine its enforceability as if it were the same as a lifetime contract with but one employee designed to induce him to play on the company's baseball team.

VIII.

Defendant expresses some concern that our interpretation will encourage lawsuits by disgruntled employees. As we view it, however, if the employer has in fact agreed to provide job security, plaintiffs in lawsuits to enforce that agreement should not be regarded as disgruntled employees, but rather as employees pursuing what is rightfully theirs. The solution is not deprivation of the employees' claim, but enforcement of the employer's agreement. The defendant further contends that its future plans and proposed projects are premised on continuance of the at-will employment status of its workforce. We find this argument unpersuasive. There are many companies whose employees have job security who are quite able to plan their future and implement those plans. If, however, the at-will employment status of the workforce was so important, the employer should not have circulated a document so likely to lead employees into believing they had job security.

XI.

Our opinion need not make employers reluctant to prepare and distribute company policy manuals. Such manuals can be very helpful tools in labor relations, helpful both to employer and employees, and we would regret it if the consequence of this decision were that the constructive aspects of these manuals were in any way diminished. We do not believe that they will, or at least we certainly do not believe that that constructive aspect *should* be diminished as a result of this opinion.

All that this opinion requires of an employer is that it be fair. It would be unfair to allow an employer to distribute a policy manual that makes the workforce believe that certain promises have been made and then to allow the employer to renege on those promises. What is sought here is basic honesty: if the employer, for whatever reason, does not want the manual to be capable of being construed by the court as a binding contract, there are simple ways to attain that goal. All that need be done is the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the manual; that regardless of what the manual says or provides, the employer promises nothing and remains free to change wages and all other working conditions without having to consult anyone and without anyone's agreement; and that the employer continues to have the absolute power to fire anyone with or without good cause.

Salt v. Applied Analytical, Inc., 412 S.E.2d 97 (N.C. Ct. App. 1991)

COZORT, Judge.

Plaintiff employee brought an action for breach of employment contract and for wrongful discharge allegedly based on breach of implied covenant of good faith and fair dealing. The trial court granted summary judgment for defendant employer. We affirm.

The depositions and other materials in the record demonstrate that, in 1985, plaintiff was employed at Burroughs Wellcome Company in Greenville, North Carolina, as a chemist testing pharmaceutical products. She held 11½ years of seniority, earned $22,000 a year, and received many company benefits. An employee of the defendant, Applied Analytical, Inc. ("AAI"), approached plaintiff about taking a chemist's position with AAI at a salary of $17,500-$18,500 per year. She declined the initial offers, but following negotiations, plaintiff accepted a position with defendant. One of the main topics discussed during the negotiations was plaintiff's need for job security. She informed defendant that if the job with AAI turned out to be unsatisfactory for either party, she would be unable to return to her job at Burroughs Wellcome, or any other pharmaceutical company, because she did not hold a four-year degree in chemistry. In response, the general manager at AAI discussed career growth with plaintiff and talked of plaintiff's future with the company in general terms. The letter from AAI's general manager confirming defendant's offer of employment stated:

> This letter is to confirm in writing my verbal offer to you of a Chemist position at Applied Analytical Industries, with an initial annual salary of $17,500.00.
>
> All of us at AAI are impressed with your qualifications and believe you can make significant contributions to our company. We hope you will accept our offer and believe you will find the position challenging and rewarding. As I indicated today during our telephone conversation, I believe the position which we are offering you will allow opportunities for your continued career growth in new areas involving method development for

> pharmaceutical dosage forms and bioanalytical assays for drugs in biological fluids.
>
> We would appreciate a response to our offer by April 8, 1985.

Plaintiff accepted defendant's offer and moved to Wilmington, North Carolina, where she began working for defendant in August 1985. In January, 1986, defendant granted plaintiff early tenure in the company, increased her salary by $2,000.00, and made her eligible for profit-sharing and a bonus. Plaintiff received positive evaluations from AAI supervisors after six months of employment, and again after one year with the company. On 14 November 1986, AAI's president, Frederick Sancilio, called plaintiff into his office and presented her with a letter of termination. The letter stated plaintiff was being discharged for low productivity and for bothering other employees. Plaintiff adamantly protested the grounds for termination, reluctantly signed the letter, packed her personal belongings, and left the same day.

We consider first whether the trial court properly granted summary judgment on plaintiff's breach of contract claim.

It is clear in North Carolina that, in the absence of an employment contract for a definite period, both employer and employee are generaly free to terminate their association at any time and without any reason. This Court has held, however, that in some circumstances employee manuals setting forth reasons and procedures for termination may become part of the employment contract even where an express contract is nonexistent.

Plaintiff argues initially that defendant's personnel manual constituted part of her employment contract. She contends the contract was breached because defendant failed to follow the disciplinary procedure outlined in the manual. In her deposition, plaintiff testified she was given a copy of AAI's personnel manual on or about her first day of work at the company. Each employee, including plaintiff, was required to sign a statement verifying the receipt of the manual. Employees were also required to sign periodic verifications acknowledging they had read revisions to the manual. According to the defendant's manual, employees were classified as either "probationary" or "tenured." An employee would be classified as probationary for the first six months of satisfactory performance. The employee then is classified as a tenured employee.

The manual made no specific reference to "employment at-will." The section of the manual describing disciplinary procedures provided: "The Company reserves the right, with or without guideline notification to: Terminate an employee at any time. Suspend from work any employee or return to probationary status from tenured status any employee." These rights were reserved for a "severe violation" of standards or rules by a "permanent" or "tenured" employee. The handbook's illustrations of "severe violations" included, but were not limited to: "blatant safety rule violations which endanger the health and safety of the employee and/or his fellow workers, falsification of Company records or data, misappropriation or misuse of Corporate assets, soliciting or engaging in outside activities of any kind or for any purposes on Company property at any time." For non-severe violations committed by a "tenured" employee, the manual provided for a verbal warning upon the first violation and written notices for the second and third violations. A tenured employee would be terminated after a fourth non-severe violation. Plaintiff contends she never received a verbal or written notice prior to termination, in violation of the prescribed disciplinary procedure.

It is clear that "unilaterally promulgated employment manuals or policies do not become part of the employment contract unless expressly included in it." In *Rosby v. General Baptist State Convention*, this Court found no breach of contract by an employer when the employer's personnel policies were not incorporated into the oral contract for employment. The plaintiff received the employment manual when he was hired, and was told it would be his "work bible." The manual included a salary scale, conditions of employment, expected conduct of employer and the employee, and procedures to be followed for disciplinary actions. The *Rosby* court stated:

> While we are sensitive to the "strong equitable and social policy reasons militating against allowing employers to promulgate for their employees potentially misleading personnel manuals while reserving the right to deviate from them at their own caprice", we find that in the case *sub judice,* the material contained within the manual was neither inflexible nor all-inclusive on the issue of termination procedures. The manual, although presented as plaintiff's "work bible" when he was hired, was not expressly included within his terminable-at-will contract.

In contrast, in *Trought v. Richardson*, this Court held that plaintiff stated a claim for breach of contract based on her allegation that the employer's policy manual was part of her employment contract. There the plaintiff was required to sign a statement indicating she had read the defendant's policy manual which provided she could be discharged "for cause" only and which stated that certain procedures must be followed in order for her to be discharged. The plaintiff alleged she was discharged without cause and without the benefit of the personnel manual procedures. The Court concluded that "on hearing on a Rule 12(b)(6) motion the plaintiff has sufficiently alleged that the policy manual was a part of her employment contract which was breached by her discharge to survive her motion."

In *Harris v. Duke Power Co.*, the North Carolina Supreme Court limited the rule in *Trought* to those specific facts. The plaintiff in *Harris* contended that his employment manual was part of his contract for employment with defendant and that he was entitled to recover for breach of contract when he was discharged in violation of the manual's provisions. The Court distinguished *Trought,* finding that Harris had not been told that he could be discharged only "for cause." The Court also noted that the employment manual in *Harris* provided rules of conduct which were directed specifically toward management and not targeted at employees.

It is clear from the evidence below that the handbook given plaintiff by defendant cannot be considered part of her original contract. As a result, plaintiff's breach of contract claim based on this theory must fail.

Plaintiff next argues that the employment handbook was an independent unilateral contract made by defendant to her. She argues she is entitled to recover for defendant's breach of that unilateral contract. We disagree. North Carolina has recognized a unilateral contract theory with respect to certain benefits relating to employment. However, in *Rucker v. First Union Nat'l Bank*, the Court declared, "We decline to apply a unilateral contract analysis to the issue of wrongful discharge. To apply a unilateral contract analysis to the situation before us would, in effect, require us to abandon the 'at-will' doctrine which is the law in this State. This we cannot do." We find *Rucker* to be dispositive in this case.

Plaintiff next alleges she contributed additional consideration which would remove the contract from the scope of the employment at-will doctrine. In *Sides v. Duke University*, this Court carved out a significant exception from the employment at-will rule. There the plaintiff did not have an employment contract and thus was employed at-will. The plaintiff's complaint alleged that she was assured by Duke she could be discharged only for "incompetence," and these assurances induced her to move from Michigan to accept a job in Durham. The Court stated:

> Generally, employment contracts that attempt to provide for permanent employment, or "employment for life," are terminable at will by either party. Where the employee gives some special consideration in addition to his services, such as relinquishing a claim for personal injuries against the employer, *removing his residence from one place to another in order to accept employment,* or assisting in breaking a strike, such a contract may be enforced.

The Court then determined:

> The additional consideration that the complaint alleges, her move from Michigan, was sufficient, we believe, to remove plaintiff's employment contract from the terminable-at-will rule and allow her to state a claim for breach of contract since it is also alleged that her discharge was for a reason other than the unsatisfactory performance of her duties.

We find the facts below distinguishable from *Sides.* In *Sides,* the defendant assured the plaintiff "both at her job interview and again when the job was offered to her that nurse anesthetists at the hospital could only be discharged for incompetence." In the case at bar, the plaintiff cannot point to any specific assurances given to her which compare to the assurances given to the plaintiff in *Sides* that she would not be discharged except for "incompetence." The assurances upon which plaintiff here bases her breach of contract theory do not contain any specific terms or conditions, as in *Sides.* Plaintiff's deposition reveals:

> Q. When you had your discussions with the general manager, did you tell him that you would not take the job unless you understood that you had a permanent position there?
>
> A. Not in those particular words, but—
>
> Q. What did you tell him?

> A. —I feel like we established the fact that if I were leaving my job at Burroughs Wellcome then I was going into a job—well, he told me he felt like I could have some career growth there, that there were things that they wanted me to do in the future as far as their microbiology lab and at the time it didn't exist but they wanted me to help them with the microbiology lab.
>
> And, we just talked about things that were far into the future that I couldn't just go to work there and just do.
>
> And, he felt like I had a chance for some real career growth there and, you know, that it was for a permanent job.

Furthermore, a reading of defendant's letter confirming plaintiff's employment indicates no assurances concerning the duration of plaintiff's employment or relating to the discharge policies of the company. The letter's reference to "continued career growth" does not suffice. Plaintiff can show no more than an offer of employment for an undetermined time. The trial court's entry of summary judgment on plaintiff's breach of contract claim was properly granted.

Plaintiff asserts a claim against defendant for breach of implied covenant of good faith and fair dealing implicit in her employment contract. Plaintiff contends that defendant breached its implied covenant of good faith and fair dealing by discharging plaintiff in violation of defendant's personnel policy, by breaching defendant's assurance of permanent employment and by communicating to third parties false reasons for discharging plaintiff. We conclude the trial court properly granted summary judgment on this claim.

In *Coman v. Thomas Mfg. Co., Inc.*, the North Carolina Supreme Court created an exception to the employment at-will doctrine by authorizing a tort claim for wrongful discharge for an at-will employee whose discharge is in violation of a public policy. The Court specifically approved language from *Sides v. Duke University*. The Court, quoting *Sides,* stated:

> While there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent.

The Court defined public policy as being "the principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." *Coman* therefore provides an exception to the employment at-will doctrine for employees who have been wrongfully discharged for an unlawful reason or for a reason which offends the public good.

In dicta, the Court, discussed the issue of firing an employee in bad faith:

> This Court has never held that an employee at will could be discharged in bad faith. To the contrary, in *Haskins v. Royster*, this Court recognized the principle that a master could not discharge his servant in bad faith. Thereafter, this Court stated the issue to be whether an agreement to give the plaintiff a regular permanent job was anything more than an indefinite general hiring terminable in *good faith* at the will of either party.

The Court also said, "Bad faith conduct should not be tolerated in employment relations, just as it is not accepted in other commercial relationships." The plaintiff here does not contend that she has a cause of action because her termination contravened any public policy. Instead, she argues that *Coman* created a cause of action based solely on "a breach of the implied covenant of good faith and fair dealing." She contends the bad faith of the defendant is proven by defendant's disregarding its promise of a permanent job and by giving false reasons—poor performance—for her discharge. We do not find this evidence sufficient to sustain a tort claim for wrongful discharge.

In *McLaughlin v. Barclays American Corp.*, this Court discussed whether the plaintiff there had sufficiently alleged a claim based on bad faith discharge. The plaintiff alleged that he had been fired because he struck a subordinate on the face with his hand while defending himself from an attack by the subordinate. This Court said:

> Along with the compelling public-policy concerns in those cases, moreover, the holdings in *Sides* and *Coman* are consistent with the principle that our courts do not give their imprimatur to employers who discharge employees in bad faith. We cannot say, however, that defendants' actions amounted to bad faith. *Sides,* in language quoted with approval by our Supreme Court, noted the employer's right to terminate an at-will contract for "no reason, or for an arbitrary or irrational reason." The conduct of defendants in this case, in its worst light indifferent and

> illogical, does not demonstrate the kind of bad faith that prompted our courts to recognize causes of action in *Sides* and *Coman.*

The question presented here is whether *Sides, Coman,* and *McLaughlin,* read together, create a separate tort action based exclusively on discharge in bad faith, where no contravention of public policy is alleged or proven. We hold that there is no independent tort action for wrongful discharge of an at-will employee based solely on allegations of discharge in bad faith. As many have pointed out, the discussion of "bad faith" in *Coman* was pure dicta completely unnecessary to the Court's decision. Both *Coman* and *Sides* involved violations of public policy. Our research has not discovered a single case from a North Carolina court which has allowed a claim of wrongful discharge based solely on the theory of bad faith.

The federal courts sitting in North Carolina and applying North Carolina law to this issue are split on whether to allow bad faith discharge claims independent of public policy violations. One federal court in the Eastern District has specifically rejected the idea of permitting such a claim. In *English v. General Elec. Co.*, the court refused to allow a plaintiff to maintain a bad faith discharge claim in the absence of an egregious public policy violation. The court reasoned:

> Despite plaintiff's assertion that North Carolina recognizes a cause of action for bad faith discharge, the court finds that the present position of the North Carolina courts is more limited. Currently, the judicially-created exception to the general rule that employees are terminable at will extends only to cases where the discharge violates some well established public policy.
>
> Clearly, the *Coman* and *McLaughlin* decisions contain language which could arguably lead to the adoption of a good faith requirement for discharge in future cases. However, *Coman* and *McLaughlin* are grounded solely on the premise that North Carolina has created a public policy exception to the employment at-will doctrine, and any suggestion in those cases that there is a broader prohibition against discharges in bad faith is purely dicta. Although plaintiff argues that North Carolina courts would now recognize an exception to the employment at-will doctrine for bad faith discharges, the North Carolina Supreme Court in commenting on the effect of *Coman* stated that the employment at-will doctrine has "been *narrowly* eroded by statutory and public policy limitations on its scope."

Courts in the Middle District, however, have held that a bad faith exception to employment at will exists under certain circumstances. In *Iturbe v. Wandel & Goltermann Technologies, Inc.*, the court upheld a plaintiff's claim for wrongful discharge based on two theories. First, the court allowed plaintiff's claim that she was wrongfully discharged in violation of the public policy against sex and ethnic discrimination. Second, the court ruled plaintiff had stated a claim of wrongful discharge based on bad faith where the defendant failed to follow personnel manual procedures when it discharged plaintiff.

To support its bad faith holding, the court in *Iturbe* discussed two cases cited in *Coman* which illustrated other jurisdictions' willingness to accept a bad faith exception to the employment at-will doctrine. Both cases allowed for a bad faith exception to employment at will where employees were fired in violation of written policy manuals. The court in *Iturbe* found the plaintiff had stated an action where it was alleged that plaintiff's employers "had a written procedure for layoffs in which job performance was the primary factor in determining which employees would be laid off and seniority was a determining factor in cases where job performance was considered to be equal." The court denied the defendant's motion to dismiss for failure to state a cause of action, concluding the plaintiff "has stated a claim that her termination was in violation of this written procedure. This is the type of bad faith discharge claim that the court believes the *Coman* and *McLaughlin* cases recognized."

We believe the opinion in the *English* case from the Eastern District is a more accurate analysis of North Carolina law. Moreover, assuming arguendo that our Supreme Court intended, as the Middle District Court in *Iturbe* believes, to create a separate wrongful discharge claim grounded solely on bad faith with no claim based on public policy violations, the plaintiff in the case at bar still cannot survive defendant's summary judgment motion. A footnote in *Iturbe* gives the rationale for the Court's decision: "Since the court today only rules on the sufficiency of plaintiff's complaint, the court accepts as true plaintiff's allegations that the written procedure existed and that it *somehow governed her employment relation with defendants, or her termination*." As we stated earlier, plaintiff's employment relationship with defendant AAI was not "governed" by the policy manual given to her; the manual was not made an express part of her contract or made otherwise applicable to her. Therefore, even if we were to follow *Iturbe's* analysis of *Coman* and *McLaughlin,* plaintiff still has no cause of action because her termination was not governed by the employment manual. Plaintiff's allegations of bad faith, consisting of charges that defendant breached its assurance of permanent employment and that defendant communicated false reasons for firing plaintiff, simply have not been recognized as sufficient to sustain a cause of action for wrongful discharge.

To summarize, plaintiff has failed to prove a claim for breach of contract because (1) the employment manual upon which her contract claim was based was not a part of her employment contract; (2) unilaterally promulgated employment manuals do not affect the at-will nature of employment in North Carolina; and (3) plaintiff's additional consideration, moving from Greenville to Wilmington, was not in exchange for assurances of discharge only for fault. As to the tort claim alleging wrongful discharge, North Carolina law does not allow claims of bad faith discharge in the absence of public policy violations. Assuming arguendo that such a claim is valid, plaintiff's evidence failed to prove that she has a claim for bad faith discharge.

Kurtzman v. Applied Analytical Industries, Inc., 493 S.E.2d 420 (N.C. 1997)

WHICHARD, Justice.

Defendant, Applied Analytical Industries, Inc., is based in Wilmington, North Carolina, and assists clients in securing FDA approval of pharmaceutical products. Plaintiff has worked in the pharmaceutical industry for over twenty years and was employed as national sales manager of E.M. Separations Technology in Rhode Island immediately prior to his employment with defendant. Defendant contacted plaintiff in October 1991 and began recruiting him for a position as director of sales in Wilmington. In January 1992 defendant offered plaintiff the position, and the parties negotiated the terms of employment until plaintiff accepted defendant's offer on 6 March 1992.

Evidence at trial tended to show that during negotiations, plaintiff inquired into the security of his proposed position with defendant. Defendant's agents attempted to assure plaintiff by statements that included the following: "If you do your job, you'll have a job"; "This is a long-term growth opportunity for you"; "This is a secure position"; and "We're offering you a career position." Plaintiff began his employment with defendant on 30 March 1992. He immediately moved to Wilmington, and following the sale of his home in Massachusetts, his wife and daughter joined him there. Defendant terminated plaintiff's employment on 2 November 1992.

Plaintiff argues that the combination of the additional consideration of moving his residence and defendant's specific assurances of continued employment removed the employment relationship from the traditional at-will presumption and created an employment contract under which he could not be terminated absent cause. This asserted exception is gleaned principally from *Sides v. Duke Univ.*. Plaintiff argues that the exception is well established in North Carolina's jurisprudence and that the judgment in his favor thus should be affirmed. We disagree.

North Carolina is an employment-at-will state. This Court has repeatedly held that in the absence of a contractual agreement between an employer and an employee establishing a definite term of employment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party. There are limited exceptions. First, as stated above, parties can remove the at-will presumption by specifying a definite period of employment contractually. Second, federal and state statutes have created exceptions prohibiting employers from discharging employees based on impermissible considerations such as the employee's age, race, sex, religion, national origin, or disability, or in retaliation for filing certain claims against the employer. Finally, this Court has recognized a public-policy exception to the employment-at-will rule.

Plaintiff does not rely upon any of these exceptions. He instead invokes an asserted exception earlier described by the Court of Appeals as follows:

> Generally, employment contracts that attempt to provide for permanent employment, or "employment for life," are terminable at will by either party. Where the employee gives some special consideration in addition to his services, such as relinquishing a claim for personal injuries against

> the employer, *removing his residence from one place to another in order to accept employment,* or assisting in breaking a strike, such a contract may be enforced.

The Court of Appeals relied upon this "moving residence" exception as additional support for its holding in *Sides v. Duke University*. There, the plaintiff, a nurse anesthetist who had moved from Michigan to North Carolina to accept employment at Duke University Medical Center, sued the Medical Center based on the termination of her employment. After concluding that the plaintiff had stated a claim that fell within a public-policy exception to the at-will doctrine, the court considered a "moving residence" exception, stating:

> The additional consideration that the complaint alleges, her move from Michigan, was sufficient, we believe, to remove plaintiff's employment contract from the terminable-at-will rule and allow her to state a claim for breach of contract since it is also alleged that her discharge was for a reason other than the unsatisfactory performance of her duties.

Here, plaintiff wishes to rely on this asserted "moving residence" exception to state a claim for relief. He does not contend that defendant's assurances of continued employment were sufficient, standing alone, to create an employment contract for a definite term. Under well-settled law, they are not. This Court has held that a contract for "a regular permanent job" is not sufficiently definite to remove the employment relationship from the at-will presumption. Further, the assurance plaintiff here primarily relies upon, "If you do your job, you'll have a job," is not sufficient to make this indefinite hiring terminable only for cause.

Nor does plaintiff contend that a statutory or public-policy exception to the at-will doctrine applies. Rather, he argues that the combination of defendant's assurances, such as, "If you do your job, you'll have a job," and plaintiff's move from Massachusetts to North Carolina to accept the offer of employment, created a contract under which plaintiff could be discharged only for cause. The question thus is whether this Court should recognize a "moving residence" exception to the general rule of employment at will.

Plaintiff's contention that this exception is well established in our jurisprudence is incorrect. This Court has not heretofore expressly passed upon it. While *Malever,* on which defendant relies, is somewhat pertinent, we do not consider it dispositive. The Court's focus there was on whether the employer's use of the term "permanent" in reference to the employment sufficed to remove the case from the employment-at-will doctrine, not on whether the employee's relocation constituted additional consideration that accomplished such removal. Further, the Court noted that the employee's relocation appeared motivated primarily by family rather than employment considerations. In *Harris v. Duke Power Co.*, we cited application of the "moving residence" exception in *Sides* as part of a background discussion of exceptions to the general rule of employment at will. We neither specifically approved nor disapproved such an exception, however, and any language in *Harris* that may be viewed as suggesting the contrary is disapproved.

The employment-at-will doctrine has prevailed in this state for a century. The narrow exceptions to it have been grounded in considerations of public policy designed either to prohibit status-based discrimination or to insure the integrity of the judicial process or the enforcement of the law. The facts here do not present policy concerns of this nature. Rather, they are representative of negotiations and circumstances characteristically associated with traditional at-will employment situations.

Further, as we recognized in *Coman,* "adoption of the at-will rule by the courts greatly facilitated the development of the American economy at the end of the nineteenth century." A century later, the rule remains an incentive to economic development, and any significant erosion of it could serve as a disincentive. Additional exceptions thus demand careful consideration and should be adopted only with substantial justification grounded in compelling considerations of public policy.

We perceive no such justification here. The society to which the employment-at-will doctrine currently applies is a highly mobile one in which relocation to accept new employment is common. To remove an employment relationship from the at-will presumption upon an employee's change of residence, coupled with vague assurances of continued employment, would substantially erode the rule and bring considerable instability to an otherwise largely clear area of the law. We thus hold that plaintiff-employee's change of residence in the wake of defendant-employer's statements here does not constitute additional consideration making what is otherwise an at-will employment relationship one that can be terminated by the employer only for cause.

We do not, as the dissenting opinion suggests, hold that the establishment of "a definite term of service" is the sole means of contractually removing the at-will presumption. We simply follow settled law which holds that the employer's assurances of continued employment do not remove an employment relationship from the at-will presumption, and now hold that the asserted additional consideration of the employee's relocation of residence to accept the employment likewise does not alter this status. Because we do not recognize the exception plaintiff seeks, we need not consider, as does the dissent, whether the evidence sufficed to support a verdict for plaintiff under the asserted exception.

FRYE, Justice, dissenting.

Although our cases have in the past made reference to the existence of an "additional consideration" exception to the doctrine of employment at will, and our Court of Appeals has more fully described the exception based on moving residence, as the majority notes, this Court has never expressly passed upon the precise issue presented by the facts of this case. This Court granted defendant's petition for discretionary review in this case to decide, first, whether North Carolina recognizes an exception to the rule of employment at will based on: (1) an employer's making statements that can be construed as assurances that the employee will be discharged only for deficient performance, and (2) an employee's providing "additional consideration" by moving his residence to accept employment in response to those assurances. I believe a more precise statement of this question is whether an enforceable contract exists between employer and employee, so as to remove the presumption that the employment is terminable at will, where the employer makes specific assurances and the prospective employee gives additional consideration in reliance on those assurances.

The majority correctly states that North Carolina follows the doctrine of employment at will. However, employment at will is not, nor should it be, an ironclad mandate which prevents employers and employees from negotiating the terms of the employment relationship to their mutual satisfaction. The general rule of employment at will is more accurately construed as a rebuttable presumption which can be overcome by the words and conduct of the parties, allowing a jury to find that the parties in fact reached certain agreements within a contract of employment. I read the majority's decision as holding that representations made by an employer to a prospective employee and supported by additional consideration are insufficient as a matter of law to create an enforceable contract unless the employer specifies a definite term of service. Because this holding contradicts established principles of contract law, I must respectfully dissent.

The case often cited as the earliest adoption of North Carolina's employment-at-will rule, *Edwards v. Seaboard & R.R. Co.*, 121 N.C. 490 (1897), in fact recognized the contractual nature of the employment relationship. The facts in *Edwards* required the Court to discern the intent of the parties as to the term of employment. The Court held that the contract was not specific as to the term of service, and therefore, "it does not seem unreasonable that the parties intended that the service should be performed for a price that should aggregate the gross sum annually, *leaving the parties to sever their relations at will,* for their own convenience."

In reviewing the origins of employment at will, this Court has noted that American courts moved toward the doctrine after "the industrial revolution and the development of freedom of contract." Nothing else appearing, freedom of contract arguably presumes the freedom of either party to terminate the employment relationship at will. However, an inflexible adherence to this presumption cannot stand in the face of evidence of contrary intent on the part of the contracting parties. As stated by the majority, "parties can remove the at-will presumption by specifying a definite period of employment contractually." Likewise, where an employer agrees to restrict his right to discharge an employee in exchange for additional consideration provided by the employee, the courts must recognize that a contract has been formed which removes the presumption of employment at will.

In applying this analysis, the essential inquiry is whether the necessary elements of an enforceable contract were present. "A contract is an agreement, upon a sufficient consideration, to do or not to do a particular thing." Cases in which an employee relocates merely as an incident of accepting new employment will not rebut the presumption of employment at will. However, an agreement and consideration are both present where the employer has induced the employee to move his residence based on specific assurances that he will not be discharged except for deficient performance. This approach, which relies on contract principles, does not establish a "general exception" to employment at will in all cases involving a relocation.

The second issue presented by defendant-appellant in this case is whether, if North Carolina recognizes such an exception to the rule of employment at will, the record in this case supports the application of the exception and is sufficient to sustain the verdict returned in favor of plaintiff. Again, I believe a more precise question is whether plaintiff presented sufficient evidence to support a jury's finding that an enforceable contract existed so as to rebut the presumption of employment at will. The majority states that the assurance primarily relied upon by plaintiff "is not sufficient to make this indefinite hiring terminable only for cause" and holds that the Court of Appeals erred in affirming the trial court, which denied defendant's motion for judgment notwithstanding the verdict. I disagree.

The test for determining whether a motion for judgment notwithstanding the verdict should have been granted is the same as that which is applied when determining whether a motion for a directed verdict could have been properly granted. "A directed verdict is proper only if it appears that the nonmovant failed to show a right to recover upon *any* view of the facts which the evidence reasonably tends to establish." Further, all of the evidence must be considered in the light most favorable to the nonmoving party, here the plaintiff, giving plaintiff the benefit of every reasonable inference to be drawn therefrom and resolving all conflicts, contradictions, and inconsistencies in plaintiff's favor.

In this case the jury was presented, and answered, the following crucial questions:

> Before plaintiff, Kurtzman, accepted a position of employment with defendant, AAI, did AAI make specific assurances to him that he would be discharged from employment with AAI only for deficient performance?
>
> ANSWER: Yes
>
> Did the defendant, AAI, breach the employment contract by terminating the plaintiff, Kurtzman, without just cause?
>
> ANSWER: Yes

The proper question for this Court, therefore, is whether there was evidence, viewed in the light most favorable to plaintiff as the nonmoving party, from which the jury could find that defendant made specific assurances to plaintiff that he would be discharged only for deficient performance and that defendant breached the employment contract by terminating plaintiff without just cause.

There was testimony in this case that during the course of negotiation for employment, plaintiff made known his concern about job security and received certain assurances from defendant. Plaintiff, who at that time held a secure position, was concerned about the security of the position for which he was being recruited. Defendant assured plaintiff that it was a "career position." When plaintiff specifically inquired about a written contract, defendant responded that he did not need a contract "if he was any good" and that as long as he did his job, he would have a job. From these statements a jury could reasonably conclude that defendant promised plaintiff he would not be discharged unless his performance was deficient. In reliance on these assurances, and in acceptance of defendant's promise, plaintiff resigned from his job and moved his residence in order to accept employment with defendant. A jury could reasonably find that this action by plaintiff constituted sufficient additional consideration to support the employment contract.

All the evidence considered by the jury, viewed in the light most favorable to plaintiff, could reasonably support plaintiff's contention that defendant made specific assurances that plaintiff would not be discharged unless his performance was deficient and that the contract was supported by additional consideration apart from plaintiff's services. Therefore, I believe that the trial judge properly denied defendant's motion for a directed verdict and for judgment notwithstanding the verdict and that the Court of Appeals correctly affirmed the trial court.

1.3 Tort Claims

Wilson v. Monarch Paper, 939 F.2d 1138 (5th Cir. 1991)

E. GRADY JOLLY, Circuit Judge:

I

In 1970, at age 48, Richard E. Wilson was hired by Monarch Paper Company. Monarch is an incorporated division of Unisource Corporation, and Unisource is an incorporated group of Alco Standard Corporation. Wilson served as manager of the Corpus Christi division until November 1, 1977, when he was moved to the corporate staff in Houston to serve as "Corporate Director of Physical Distribution." During that time, he routinely received merit raises and performance bonuses. In 1980, Wilson received the additional title of "Vice President." In 1981, Wilson was given the additional title of "Assistant to John Blankenship," Monarch's President at the time.

While he was Director of Physical Distribution, Wilson received most of his assignments from Blankenship. Blankenship always seemed pleased with Wilson's performance and Wilson was never reprimanded or counseled about his performance. Blankenship provided Wilson with objective performance criteria at the beginning of each year, and Wilson's bonuses at the end of the year were based on his good performance under that objective criteria. In 1981, Wilson was placed in charge of the completion of an office warehouse building in Dallas, the largest construction project Monarch had ever undertaken. Wilson successfully completed that project within budget.

In 1981, Wilson saw a portion of Monarch's long-range plans that indicated that Monarch was presently advancing younger persons in all levels of Monarch management. Tom Davis, who was hired as Employee Relations Manager of Monarch in 1979, testified that from the time he started to work at Monarch, he heard repeated references by the division managers (including Larry Clark, who later became the Executive Vice President of Monarch) to the age of employees on the corporate staff, including Wilson.

In October 1981, Blankenship became Chairman of Monarch and Unisource brought in a new, 42-year-old president from outside the company, Hamilton Bisbee. An announcement was made that Larry Clark would be assuming expanded responsibilities in physical distribution. According to the defendants, one of Blankenship's final acts as President was to direct Clark (who was in his mid-forties at the time) to assume expanded responsibility for both the operational and physical distribution aspects of Monarch.

When Bisbee arrived at Monarch in November 1981, Wilson was still deeply involved in the Dallas construction project. Richard Gozon, who was 43 years old and the President of Unisource, outlined Blankenship's new responsibilities as Chairman of the company and requested that Blankenship, Bisbee, Wilson, and John Hartley of Unisource "continue to work very closely together on the completion of the Dallas project." Bisbee, however, refused to speak to Wilson or to "interface" with him. This "silent treatment" was apparently tactical; Bisbee later told another Monarch employee, Bill Shehan, "if I ever stop talking to you, you're dead." Shehan also testified that at a meeting in Philadelphia at about the time Bisbee became President of Monarch, Gozon told Bisbee, "I'm not telling you that you have to fire Dick Wilson. I'm telling you that he cannot make any more money."

As soon as the Dallas building project was completed, Bisbee and Gozon intensified an effort designed to get rid of Wilson. On March 8, 1982, Gozon asked for Bisbee's recommendations on how to remove Wilson from the Monarch organization. On March 9, 1982, Bisbee responded with his recommendation that Wilson be terminated, and that any salary continuance to Wilson be discontinued should Wilson elect to pursue an adversarial role toward Monarch. Gozon then asked the Unisource Employee Relations Manager, John Snelgrove, to meet with Wilson with the goal of attempting to convince Wilson to quit.

During the same time frame, Bisbee was preparing a long-range plan for Monarch, in which he made numerous references to age and expressed his desire to bring in "new blood" and to develop a "young team." This long-range plan was transmitted to Gozon, who expressed no dissatisfaction with the goals Bisbee had set out in the plan. In the meantime, Bisbee and Clark began dismantling Wilson's job by removing his responsibilities and assigning them to other employees. Clark was also seen entering Wilson's office after hours and removing files.

Blankenship was diagnosed with cancer in February 1982. In March 1982, Wilson was hospitalized for orthopedic surgery. Immediately after Blankenship's death in June 1982, Bisbee and Snelgrove gave Wilson three options: (1) he could take a sales job in Corpus Christi at half his pay; (2) he could be terminated with three months' severance pay; or (3) he could accept a job as warehouse supervisor in the Houston warehouse at the same salary but with a reduction in benefits. The benefits included participation in the management bonus plan, and the loss of the use of a company car, a company club membership, and a company expense account.

Wilson accepted the warehouse position. Wilson believed that he was being offered the position of Warehouse Manager, the only vacant position in the Houston warehouse at the time. When Wilson reported for duty at the warehouse on August 16, 1982, however, he was placed instead in the position of an entry level supervisor, a position that required no more than one year's experience in the paper business. Wilson, with his thirty years of experience in the paper business and a college degree, was vastly overqualified and overpaid for that position.

Soon after he went to the warehouse, Wilson was subjected to harassment and verbal abuse by his supervisor, Operations Manager and Acting Warehouse Manager Paul Bradley (who had previously been subordinate to Wilson). Bradley referred to Wilson as "old man" and admitted posting a sign in the warehouse that said "Wilson is old." In Bradley's absence, Wilson was placed under the supervision of a man in his twenties. Finally, Wilson was further demeaned when he was placed in charge of housekeeping but was not given any employees to assist him in the housekeeping duties. Wilson, the former vice-president and assistant to the president, was thus reduced finally to sweeping the floors and cleaning up the employees' cafeteria, duties which occupied 75 percent of his working time.

In the late fall of 1982, Wilson began suffering from respiratory problems caused by the dusty conditions in the warehouse and stress from the unrelenting harassment by his employer. On January 6, 1983, Wilson left work to see a doctor about his respiratory problems. He was advised to stay out of a dusty environment and was later advised that he had a clinically significant allergy to dust. Shortly after January 6, 1983, Wilson consulted a psychiatrist who diagnosed him as suffering from reactive depression, possibly suicidal, because of on-the-job stress. The psychiatrist also advised that Wilson should stay away from work indefinitely.

Wilson filed an age discrimination charge with the EEOC in January 1983. Although he continued being treated by a psychiatrist, his condition deteriorated to the point that in March 1983, he was involuntarily hospitalized with a psychotic manic episode. Prior to the difficulties with his employer, Wilson had no history of emotional illness.

Wilson's emotional illness was severe and long-lasting. He was diagnosed with manic-depressive illness or bipolar disorder. After his first hospitalization for a manic episode, in which he was locked in a padded cell and heavily sedated, he fell into a deep depression. The depression was unremitting for over two years and necessitated an additional hospital stay in which he was given electroconvulsive therapy (shock treatments). It was not until 1987 that Wilson's illness began remission, thus allowing him to carry on a semblance of a normal life.

II

Wilson filed suit against the defendants, alleging age discrimination and various state law tort and contract claims. The case was tried before a jury on Wilson's claims that the defendants (1) reassigned him because of his age; (2) intentionally inflicted emotional distress; and (3) terminated his long-term disability benefits in retaliation for filing charges of age discrimination under the Age Discrimination in Employment Act (ADEA).

The district court denied the defendants' motions for directed verdict. The jury returned a special verdict in favor of Wilson on his age discrimination claim, awarding him $156,000 in damages, plus an equal amount in liquidated damages. The jury also found in favor of Wilson on his claim for intentional infliction of emotional distress, awarding him past damages of $622,359.15, future damages of $225,000, and punitive damages of $2,250,000. The jury found in favor of the defendants on Wilson's retaliation claim. The district court denied the defendants' motions for judgment NOV, new trial, or, alternatively, a remittitur. The defendants appeal.

III

Monarch raises three issues, each attacking the district court's exercise of discretion in sending the case to the jury and entering judgment on its verdict. First, Monarch argues that the district court erred in denying its motions for directed verdict, JNOV, and new trial on Wilson's claim for intentional infliction of emotional distress. Second, Monarch argues that the district court erred in denying its similar motions on Wilson's age discrimination claim. Finally, Monarch argues that the district court erred in denying its motions for directed verdict, JNOV, new trial, and remittitur with respect to the amount of back pay awarded on the age discrimination claim. With respect to the emotional distress claim, neither the quantum of actual damages or the award of punitive damages are appealed.

The court's discussion of the age discrimination claim is omitted here.

The standard of review for motions for directed verdict and for JNOV *is* that

> the Court should consider all of the evidence — not just that evidence which supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury.

A

To prevail on a claim for intentional infliction of emotional distress, Texas law requires that the following four elements be established:

1. that the defendant acted intentionally or recklessly;

2. that the conduct was ‘extreme and outrageous’;
3. that the actions of the defendant caused the plaintiff emotional distress; and
4. that the emotional distress suffered by the plaintiff was severe.

The sole issue before us is whether Monarch’s conduct was “extreme and outrageous.”

(1)

“Extreme and outrageous conduct” is an amorphous phrase that escapes precise definition.

> Liability for outrageous conduct has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which a recitation of the facts to an average member of the community would lead him to exclaim, “Outrageous.”

The Restatement also provides for some limits on jury verdicts by stating that liability “does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. There is no occasion for the law to intervene in every case where someone’s feelings are hurt.” Rest. (Second) of Torts § 46.

The facts of a given claim of outrageous conduct must be analyzed in context, and ours is the employment setting. We are cognizant that “the work culture in some situations may contemplate a degree of teasing and taunting that in other circumstances might be considered cruel and outrageous.” We further recognize that properly to manage its business, every employer must on occasion review, criticize, demote, transfer, and discipline employees. We also acknowledge that it is not unusual for an employer, instead of directly discharging an employee, to create unpleasant and onerous work conditions designed to force an employee to quit, i.e., “constructively” to discharge the employee. In short, although this sort of conduct often rises to the level of illegality, except in the *most* unusual cases it is not the sort of conduct, as deplorable as it may sometimes be, that constitutes “extreme and outrageous” conduct.

(2)

Our recent decision in *Dean v. Ford Motor Credit Co.* is instructive in determining what types of conduct in the employment setting will constitute sufficiently outrageous conduct so as to legally support a jury's verdict. In *Dean,* the plaintiff presented evidence that (1) when she expressed interest in transferring to a higher paying position in the collection department, she was told that "women don't usually go into that department"; (2) she was denied a transfer to the collection department, and a lesser qualified man was selected; (3) the defendant's attitude toward the plaintiff changed after she complained about alleged discriminatory treatment; (4) management began to transfer her from desk to desk within the administrative department; (5) a coworker testified she believed management was trying to "set the plaintiff up"; (6) she was called upon to do more work than the other clerks "and subjected to unfair harassment"; and (7) management used "special" annual reviews (that only the plaintiff received) to downgrade her performance. Far more significant to the claim for intentional infliction of emotional distress, however, (8) the plaintiff proved that a supervisor, who had access to the employer's checks, intentionally placed checks in the plaintiff's purse in order to make it appear that she was a thief, or to put her in fear of criminal charges for theft. We expressly held that the "check incidents" were "precisely what took this case beyond the realm of an ordinary employment dispute and into the realm of an outrageous one." We concluded that without the "check incidents" the employer's conduct "would not have been outrageous."

Wilson argues that Monarch's conduct is sufficiently outrageous to meet the *Dean* standard; in the alternative, he argues that Monarch's actions are certainly more outrageous than the conduct in *Bushell v. Dean*, which is a recent pronouncement by the Texas courts on the subject. Monarch contends that Wilson's evidence of outrageous conduct, that is, his reassignment to a job he did not like, his strained relationship with the company president, and isolated references to his age, is the same evidence that he used to prove his age discrimination claim. According to Monarch, unless all federal court discrimination lawsuits are to be accompanied by pendent state law claims for emotional distress, this court must make it clear that ordinary employment disputes cannot support an emotional distress claim. We agree with Monarch that more is required to prove intentional infliction of emotional distress than the usual ADEA claim.

(3)

In *Dean,* we found that the “check incidents” took the case beyond an ordinary discrimination case and supported the claim of infliction of emotional distress. Wilson contends that Monarch’s conduct was equally outrageous as the “check incidents” in *Dean.* Generally, Wilson argues that an average member of the community would exclaim “Outrageous!” upon hearing that a 60-year-old man, with 30 years of experience in his industry, was subjected to a year-long campaign of harassment and abuse because his company wanted to force him out of his job as part of its expressed written goal of getting rid of older employees and moving younger people into management. More precisely, Wilson argues that substantial evidence of outrageous conduct supports the jury’s verdict, including: (1) his duties in physical distribution were assigned to a younger person; (2) Bisbee deliberately refused to speak to him in the hallways of Monarch in order to harass him; (3) certain portions of Monarch’s long-range plans expressed a desire to move younger persons into sales and management positions; (4) Bisbee wanted to replace Wilson with a younger person; (5) other managers within Monarch would not work with Wilson, and he did not receive his work directly from Bisbee; (6) he was not offered a fully guaranteed salary to transfer to Corpus Christi; (7) he was assigned to Monarch’s Houston warehouse as a supervisor, which was “demeaning”; (8) Paul Bradley, the Warehouse Manager, and other Monarch managers, referred to Wilson as old; (9) Bradley prepared a sign stating “Wilson is old” and, subsequently, “Wilson is a Goldbrick”; and (10) Monarch filed a counterclaim against Wilson in this action. We are not in full agreement.

Most of Monarch’s conduct is similar in degree to conduct in *Dean* that failed to reach the level of outrageousness. We hold that all of this conduct, except as explicated below, is within the “realm of an ordinary employment dispute,” and, in the context of the employment milieu, is not so extreme and outrageous as to be properly addressed outside of Wilson’s ADEA claim.

(4)

Wilson argues, however, that what takes this case out of the realm of an ordinary employment dispute is the degrading and humiliating way that he was stripped of his duties and demoted from an executive manager to an entry level warehouse supervisor with menial and demeaning duties. We agree. Wilson, a college graduate with thirty years experience in the paper field, had been a long-time executive at Monarch. His title was Corporate Director of Physical Distribution, with the added title of Vice-President and Assistant to the President. He had been responsible for the largest project in the company's history, and had completed the project on time and under budget. Yet, when transferred to the warehouse, Wilson's primary duty became housekeeping chores around the warehouse's shipping and receiving area. Because Monarch did not give Wilson any employees to supervise or assist him, Wilson was frequently required to sweep the warehouse. In addition, Wilson also was reduced to cleaning up after the employees in the warehouse cafeteria after their lunch hour. Wilson spent 75 percent of his time performing these menial, janitorial duties.

Monarch argues that assigning an executive with a college education and thirty years experience to janitorial duties is not extreme and outrageous conduct. The jury did not agree and neither do we. We find it difficult to conceive a workplace scenario more painful and embarrassing than an executive, indeed a vice-president and the assistant to the president, being subjected before his fellow employees to the most menial janitorial services and duties of cleaning up after entry level employees: the steep downhill push to total humiliation was complete. The evidence, considered as a whole, will fully support the view, which the jury apparently held, that Monarch, unwilling to fire Wilson outright, *intentionally and systematically* set out to humiliate him in the hopes that he would quit.[37] A reasonable jury could have found that this employer conduct was intentional and mean spirited, so severe that it resulted in institutional confinement and treatment for someone with no history of mental problems. Finally, the evidence supports the conclusion that this conduct was, indeed, so outrageous that civilized society should not tolerate it.

37. (n. 5 in opinion) Nevertheless, we are not unaware of the irony in this case: if Monarch had chosen only to fire Wilson outright, leaving him without a salary, a job, insurance, etc., it would not be liable for intentional infliction of emotional distress. There is some suggestion in the record, however, that Monarch was unwilling to fire Wilson outright because it had no grounds and perhaps feared a lawsuit. Although Monarch was willing to accept Wilson's resignation, Wilson was unwilling to resign. Once he was unwilling to resign, the evidence supports the inference that Monarch's efforts intensified to force his resignation.

Garner v. Rentenbach, 515 S.E.2d 438 (N.C. 1999)

FRYE, Justice.

The issue in this case is whether the termination of plaintiff's employment based on a positive reading of a drug test constitutes a wrongful discharge because the drug test was not performed consistently with a state statute. We conclude that, on the facts of this case, it does not.

Plaintiff, Zannie Garner, was hired by defendant, Rentenbach Constructors Inc., as a carpenter on 30 June 1993. The parties do not dispute that plaintiff was an at-will employee. In June 1994, defendant implemented a substance-abuse policy requiring employees to submit to random drug testing. Plaintiff received a copy of defendant's "Drug-Free Workplace Policy" and acknowledged its requirements in writing. On 26 July 1994, plaintiff was asked to give a urine sample for screening, and he agreed to do so. Third-party defendant, Allied Clinical Laboratories (Allied), performed the testing of plaintiff's urine specimen at its Chattanooga, Tennessee, laboratory. The urine sample attributed to plaintiff tested positive for the presence of cannabinoids (marijuana), and the results were reported to defendant by Allied. On 8 August 1994, plaintiff's employment was terminated. Plaintiff denies having used illegal drugs.

Plaintiff filed this action on 7 August 1995 alleging, *inter alia,* that his discharge from employment based on positive drug-screening results was wrongful because defendant violated N.C.G.S. § 95-232 by failing to have the testing performed by an "approved laboratory," as defined by N.C.G.S. § 95-231(1). Defendant filed an answer denying any wrongdoing and asserting a third-party complaint against Allied. Defendant contends that it relied on Allied's assurances that it was qualified and equipped to perform forensic urine drug testing and on Allied's report concerning the presence of cannabinoids in plaintiff's urine sample. Allied filed an answer denying liability.

In January 1997, defendant and Allied filed separate motions for summary judgment. Among the evidence considered by the trial court in ruling on the summary judgment motions were excerpts from a transcript of proceedings in plaintiff's unemployment benefits claim held before the Employment Security Commission on 31 October 1994. Uncontroverted evidence indicated that at the time plaintiff's urine sample was tested, Allied's Chattanooga laboratory had a general laboratory accreditation from the College of American Pathologists, which included general screening toxicology, but it was not accredited for forensic urine drug testing. Nor was the laboratory certified by the United States Department of Health and Human Services, National Institute on Drug Abuse (NIDA), for forensic urine drug testing. The trial court also considered an affidavit of Wayne Amann, safety director for defendant, in which he stated that prior to using Allied to perform drug testing, he inquired and was assured by Allied that it was qualified and equipped to perform drug testing of Rentenbach employees and that its laboratories were "`NIDA' certified."

The trial court granted defendant's motion for summary judgment, dismissing plaintiff's claim of wrongful discharge. Allied's motion for summary judgment was denied. Plaintiff appealed. The Court of Appeals reversed the trial court's grant of summary judgment and remanded for trial. Discretionary review was allowed by this Court on 8 October 1998.

Recently, in *Kurtzman v. Applied Analytical Indus.*, this Court reaffirmed the well-established principle that North Carolina is an employment-at-will state.

> This Court has repeatedly held that in the absence of a contractual agreement between an employer and an employee establishing a definite term of employment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party. There are limited exceptions. First, parties can remove the at-will presumption by specifying a definite period of employment contractually. Second, federal and state statutes have created exceptions prohibiting employers from discharging employees based on impermissible considerations such as the employee's age, race, sex, religion, national origin, or disability, or in retaliation for filing certain claims against the employer. Finally, this Court has recognized a public-policy exception to the employment-at-will rule.

Our Court of Appeals first recognized a public-policy exception to the employment-at-will doctrine in *Sides v. Duke Univ.* The plaintiff in *Sides* was a nurse who alleged that she was discharged in retaliation for her refusal to commit perjury in a medical malpractice case against her employer. The Court of Appeals recognized the compelling public interest at stake and held that "notwithstanding that an employment is at will, no employer has the right to discharge an employee and deprive him of his livelihood without civil liability because he refuses to testify untruthfully or incompletely in a court case."

This Court adopted a public-policy exception to employment at will in *Coman v. Thomas Mfg. Co.* In *Coman,* the plaintiff, a long-distance truck driver, alleged that his employer required him to drive in excess of the hours allowed by federal Department of Transportation regulations and ordered him to falsify his logs to show compliance with the regulations. The plaintiff refused to do so, and his pay was reduced by fifty percent, which amounted to a constructive discharge. The defendant's conduct violated not only the federal regulations, but also the public policy of North Carolina because the federal regulations had been adopted in the state administrative code and because "actions committed against the safety of the traveling public" are contrary to the established public policy of the State. This Court held that the plaintiff stated a cause of action for wrongful discharge, expressly adopting the following language from *Sides*:

> While there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent.

Three years later, in *Amos v. Oakdale Knitting Co.*, we were presented with a case in which three employees were told to work for reduced pay, below the statutory minimum wage, or they would be fired. Recognizing that payment of the minimum wage is the public policy of North Carolina, we held that the defendant-employer violated the public policy by firing the plaintiff-employees for refusing to work for less than the statutory minimum wage.

Plaintiff in this case contends that the statutory requirement that employee drug testing be performed by an approved laboratory is an express declaration of policy by the General Assembly and that any employee drug testing performed inconsistently with the Controlled Substance Examination Regulation violates public policy.

By enacting the Controlled Substance Examination Regulation, “the General Assembly finds that individuals should be protected from unreliable and inadequate examinations and screening for controlled substances. The purpose of this Article is to establish procedural and other requirements for the administration of controlled substance examinations.” N.C.G.S. § 95-230 (1993). Under North Carolina law, an employer or prospective employer “who requests or requires an examinee to submit to a controlled substance examination shall comply with the procedural requirements” of the Controlled Substance Examination Regulation. Among the procedural requirements in effect at the relevant time for this case was that an employer or prospective employer “shall use only approved laboratories for screening and confirmation of samples.” An “approved laboratory” is “a clinical chemistry laboratory which performs controlled substances testing and which has demonstrated satisfactory performance in the forensic urine drug testing programs of the United States Department of Health and Human Services or the College of American Pathologists for the type of tests and controlled substances being evaluated.”

We agree that N.C.G.S. § 95-230 is an expression of the public policy of North Carolina. However, we do not agree with plaintiff that because defendant violated N.C.G.S. § 95-232 by failing to use an approved laboratory, the public policy exception to the employment-at-will doctrine is automatically triggered, giving rise to a claim for wrongful discharge.

Under the rationale of *Sides, Coman,* and *Amos,* something more than a mere statutory violation is required to sustain a claim of wrongful discharge under the public-policy exception. An employer wrongfully discharges an at-will employee if the termination is done for “an *unlawful reason* or *purpose* that contravenes public policy.” As stated in *Amos,* the public-policy exception was “designed to vindicate the rights of employees fired *for reasons* offensive to the public policy of this State.” This language contemplates a degree of intent or wilfulness on the part of the employer. In order to support a claim for wrongful discharge of an at-will employee, the termination itself must be motivated by an unlawful reason or purpose that is against public policy.

The forecast of evidence in the instant case, when viewed in the light most favorable to plaintiff as the nonmoving party, shows that defendant violated the Controlled Substance Examination Regulation by failing to utilize an approved laboratory to conduct plaintiff's drug testing. Such conduct may indeed subject an employer to liability under the civil penalty provisions of the Controlled Substance Examination Regulation. However, plaintiff in this case has failed to forecast any evidence that at the time of plaintiff's testing defendant knew, or even suspected, that Allied's laboratory in Chattanooga did not qualify as an approved laboratory under N.C.G.S. § 95-231(1). Plaintiff also has not forecast any evidence suggesting that his discharge was for an unlawful reason or for a purpose that contravenes public policy. In this case, defendant's allegedly unlawful conduct was the failure to comply with a regulatory statute governing employee drug-testing procedures. In contrast, defendant's *reason* for terminating plaintiff's employment was permissible. Under the doctrine of employment at will, an employer who may fire an employee for any reason or no reason at all may certainly terminate an employee for suspected drug use as part of an effort to maintain a drug-free workplace.

We do not condone defendant's failure to comply with the Controlled Substance Examination Regulation. Nor do we suggest that employers may take lightly the mandate and purpose of the law as set forth in N.C.G.S. § 95-230. However, on the evidence in the record in this case, plaintiff fails to sustain his claim for wrongful discharge upon defendant's motion for summary judgment. Accordingly, we hold that the Court of Appeals erred by reversing the trial court's grant of summary judgment in favor of defendant.

Hansen v. American Online, 96 P. 3d 950 (Utah 2004)

NEHRING, Justice:

Luke Hansen, Jason Melling, and Paul Carlson appeal the trial court's summary determination that the "public policy" exception to Utah's at-will employment doctrine did not apply to the circumstances surrounding the termination of their employment by America Online. We affirm.

BACKGROUND

Messrs. Hansen, Melling and Carlson, whom for convenience we will refer to as "the employees," were employed by America Online ("AOL") at its call center in Ogden, Utah. The Ogden call center is located in a strip mall. AOL leased, and reserved for its exclusive use, up to 350 parking stalls from the strip mall's larger public parking lot.

AOL's company policy prohibited employees at the Ogden Call Center from carrying or possessing a firearm of any type at the call center or in its exclusive parking lot. Printed notice of the policy was displayed in the entrance lobby to the Ogden Call Center. The employees admitted that they each had seen this policy displayed and knew the terms of AOL's Workplace Violence Prevention Policy at the time they brought firearms onto the AOL parking lot.

On September 14, 2000, the three employees, all of whom were off-duty at the time, met in the lot where their cars were parked. Each had a firearm in his car, and they planned to go target shooting at a local gun range. An AOL security camera recorded Messrs. Melling and Carlson transferring their guns to Mr. Hansen's car in the parking lot. Four days later, AOL discharged the employees. Although each employee was an at-will employee and could be terminated without cause, AOL acknowledged that the men were discharged because they violated AOL's Workplace Violence Prevention Policy.

The employees then filed a lawsuit alleging wrongful termination. They alleged that, the AOL Workplace Violence Prevention Policy notwithstanding, AOL was liable for their wrongful discharge because their possession of firearms on the AOL parking lot was protected by a clear and substantial public policy. Both the employees and AOL filed motions for summary judgment. The trial court issued a memorandum decision denying the employees' motion and granting AOL's motion. The employees appeal. We affirm.

ANALYSIS

Utah's employment law presumes that all employment relationships entered into for an indefinite period of time are at-will, where the employer or the employee may terminate the employment for any reason (or no reason) except where prohibited by law. The presumption of validity given to an employer's decision to discharge an employee may be overcome by demonstrating that

> (1) there is an implied or express agreement that the employment may be terminated only for cause or upon satisfaction of some agreed-upon condition; (2) a statute or regulation restricts the right of an employer to terminate an employee under certain conditions; or (3) the termination of employment constitutes a violation of a clear and substantial public policy.

An employee's discharge for a reason that contravenes a clear and substantial public policy gives rise to a cause of action in tort.

The general rule that the employer-employee relationship is presumed to be at-will is fully integrated into our common law. By contrast, the public policy exception is a relatively recent offspring of the at-will doctrine. Remarking on the immature developmental state of our public policy exception jurisprudence, we have stated:

> While the term "clear and substantial" adds little by way of specific guidance, a more precise definition of the term must await the time when this Court has had sufficient experience with a number of cases so that we can deduce from our experience more precise standards that give specific content to the term "public policy."

Owing to the stability and predictability afforded employers and employees by the at-will rule, we have been justifiably wary of brushing broad public policy landscapes on the canvas of these cases, electing instead to limit the horizon of these cases by their facts. We have, however, outlined four categories of public policies eligible for consideration under the exception. These are:

> (i) refusing to commit an illegal or wrongful act, such as refusing to violate the antitrust laws; (ii) performing a public obligation, such as accepting jury duty; (iii) exercising a legal right or privilege, such as filing a workers' compensation claim; or (iv) reporting to a public authority criminal activity of the employer.

The third category of conduct, exercising a legal right or privilege, poses analytical challenges different from, and generally greater than, the others. An employer owes a duty to an employee, independent of any duty imposed by the contract of employment, not to exploit the employment relationship by demanding that an employee choose between continued employment and violating a law or failing to perform a public obligation of clear and substantial public import. The employer's legal duty emanates from the recognition that the extortionate use of termination to coerce an employee to commit unlawful acts or avoid public obligations serves no legitimate economic objective and corrodes civil society.

By contrast, an employer's insistence that an employee relinquish a legal right or privilege, even a right or privilege which carries strong public policy credentials, will not expose the employee to possible criminal penalties or other legal sanctions. In most cases, such demands by an employer will not thrust the employee between conflicting imperatives of wage earning and responsible citizenship. The analysis of whether the public policy exception applies to a particular legal right or privilege will frequently require a balancing of competing legitimate interests: the interests of the employer to regulate the workplace environment to promote productivity, security, and similar lawful business objectives, and the interests of the employees to maximize access to their statutory and constitutional rights within the workplace. When an employee, like the employees here, seeks protection within the exercise of a legal right or privilege category of the public policy exception, both the employer and the employee may appeal to public policy in aid of their cause.

"Public policy" is the label we attach to those shared expectations and standards of conduct which have acquired both widespread and deeply held allegiance among the citizenry generally. Public policy emanates from, and is shaped by, many forces, including, for example, religious doctrines, political ideologies, scientific discoveries, demographic shifts, and the ever-expanding pace and power of communication. We confer the elevated status of a public policy on a right that we have deemed essential to our way of life, the architecture of the institutions of government, or the distribution of governmental power. Our most fundamental and least ephemeral expressions of public policy are found in the Utah Constitution.

Accordingly, those who claim, like the employees in this case, that the right to keep and bear arms is a clear and substantial public policy can point to the right's impressive constitutional and statutory pedigree. Article I, section 6 of the Utah Constitution states: "The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms."

The legislature has exercised its article I, section 6 power to enact numerous statutes defining the scope of the lawful use and possession of firearms. One statutory provision among the corps of firearms laws offers more than ample evidence that, despite its muscular claim to be one of our state's clear and substantial public policies, the right of an employee to keep and bear arms cannot supplant the right of an employer to regulate the possession of firearms by employees within the workplace environment.

During its 2004 annual general session, the legislature enacted a chapter of the Utah Code known as the "Uniform Firearms Laws." Utah Code Ann. §§ 63-98-101, -102 (2004). This statute states:

> (1) The individual right to keep and bear arms being a constitutionally protected right under Article I, Section 6 of the Utah Constitution, the Legislature finds the need to provide uniform civil and criminal firearm laws throughout the state.
>
> (2) Except as specifically provided by state law, a local authority or state entity may not:

> (a) prohibit an individual from owning, possessing, purchasing, selling, transferring, transporting, or keeping a firearm at the individual's place of residence, property, business, or in any vehicle lawfully in the individual's possession or lawfully under the individual's control; or
>
> (b) require an individual to have a permit or license to purchase, own, possess, transport, or keep a firearm.

(3) In conjunction with Title 76, Chapter 10, Part 5, Weapons, this section is uniformly applicable throughout this state and in all its political subdivisions and municipalities.

(4) All authority to regulate firearms is reserved to the state except where the Legislature specifically delegates responsibility to local authorities or state entities.

(5) Unless specifically authorized by the Legislature by statute, a local authority or state entity may not enact, establish, or enforce any ordinance, regulation, rule, or policy pertaining to firearms that in any way inhibits or restricts the possession or use of firearms on either public or private property.

(6) As used in this section:

> (a) "firearm" has the same meaning as defined in Subsection 76-10-501(9); and
>
> (b) "local authority or state entity" includes public school districts, public schools, and state institutions of higher education.

(7) Nothing in this section restricts or expands private property rights.

The statute was sponsored by Senator Michael Waddoups. During the floor debate on the bill, Senator Waddoups stated that the bill's sole purpose was to preempt efforts by the University of Utah to restrict the possession of firearms on its campus, in defiance of what Senator Waddoups understood to be a clear legislative mandate to the contrary.

Senator Gregory Bell expressed concern over the bill's effect on private property rights. During the course of his remarks, Senator Bell criticized the bill as potentially prohibiting employers from restricting gun possession by employees and private citizens from regulating the presence of guns within their own homes. Other senators were wary of the possibility that the bill could be construed to limit owners of private businesses from restricting gun possession by business invitees. For example, Senator Dave Thomas expressed concern that the bill not prohibit Lagoon, a popular amusement park, from restricting the possession of firearms on its premises.

Senator Waddoups took the position that he did not intend that the bill would "in any way restrict private property rights." He added that he did not intend to preempt restrictions on firearms possession put in place by the Delta Center, the Salt Lake City arena which is home to the Utah Jazz.

Debate of the bill in the House of Representatives echoed the Senate's sensitivity to the bill's private property implications. Representative Stephen Urquhart was a particularly vigorous advocate of the preeminence of private property rights, stating that it was the intention of the bill that private property rights govern. Representative Urquhart remarked that the bill does not affect private property rights and that the statutory language agreed upon by the committee reflected its best efforts to convey that intent. That language states: "Nothing in this section restricts or expands private property rights."

This debate amply captures the tension between two familiar antagonists: the right to regulate one's own private property and the right to keep and bear arms. Our task is to determine whether the right to keep and bear arms in Utah is a public policy which is so clear and substantial as to supersede an employer's attempt to restrict weapons in the workplace by contract. We hold that it does not. We read the language of section 63-98-102(7) to indicate that the legislature has purposefully declined to give the right to keep and bear arms absolute preeminence over the right to regulate one's own private property.

The employees attempt to add heft to their argument that their right to possess firearms is sufficiently substantial to overcome the at-will doctrine with citations to anecdotal evidence that private and public security is better safeguarded by an armed citizenry. According to the employees, Utah's Constitution and statutes have so embraced this doctrine of peacekeeping that fundamental protections of private property must give way to it. The debates within our legislature suggest otherwise.

The legislative debates over section 63-98-102 suggest that to the extent Utah has a "clear and substantial" public policy relating to the possession of firearms, public policy does not implicate an employer's right to restrict firearms in a parking lot leased by the employer and to terminate an at-will employee for violating that prohibition. Thus, in keeping with our view that the public policy exception may be invoked only sparingly in circumstances where the cause of an employee's discharge implicates a public policy of such clarity and substance to impose on the employer a legal duty independent of contract rights inherent in the at-will doctrine, we affirm the judgment of the trial court.

We acknowledge that the legislature has enacted statutes which give practical effect to the mandate of article I, section 6. The employees argue that each of these statutes reflects the legislature's intent that the right to keep and bear arms should be considered a clear and substantial public policy.

However, we confront here the unique situation in which the very claim to the public policy exception sought by the employees has been taken up and debated by the legislature. We are not asked to measure the clarity and substance of a public policy exception candidate and compare it for the first time with the rights of an employer. The legislature in its role as the primary institutional source of public policy has done this work for us. The ambivalence of the outcome of its labors directs us to our determination that the employees may not use the public policy exception to overcome the at-will doctrine.

CONCLUSION

There remains an evolving discussion about the role of firearms in our society. While certain areas of that debate are more developed than others, the mature at-will employment law in the state of Utah rejects the idea that, in the face of a freely entered-into agreement to the contrary, an employee has the right to carry a firearm on his employer's premises.

1.4 Statutory Claims

Nelson v. Knight, 834 N.W.2d 64 (Iowa 2013)

MANSFIELD, Justice.

Can a male employer terminate a long-time female employee because the employer's wife, due to no fault of the employee, is concerned about the nature of the relationship between the employer and the employee? This is the question we are required to answer today. For the reasons stated herein, we ultimately conclude the conduct does not amount to unlawful sex discrimination in violation of the Iowa Civil Rights Act.

We emphasize the limits of our decision. The employee did not bring a sexual harassment or hostile work environment claim; we are not deciding how such a claim would have been resolved in this or any other case. Also, when an employer takes an adverse employment action against a person or persons because of a gender-specific characteristic, that can violate the civil rights laws. The record in this case, however, does not support such an allegation.

I. Facts and Procedural Background.

Because this case was decided on summary judgment, we set forth the facts in the light most favorable to the plaintiff, Melissa Nelson.

In 1999, Dr. Knight hired Nelson to work as a dental assistant in his dental office. At that time, Nelson had just received her community college degree and was twenty years old.

Over the next ten-and-a-half years, Nelson worked as a dental assistant for Dr. Knight. Dr. Knight admits that Nelson was a good dental assistant. Nelson in turn acknowledges that Dr. Knight generally treated her with respect, and she believed him to be a person of high integrity.

On several occasions during the last year and a half when Nelson worked in the office, Dr. Knight complained to Nelson that her clothing was too tight and revealing and "distracting." Dr. Knight at times asked Nelson to put on her lab coat. Dr. Knight later testified that he made these statements to Nelson because "I don't think it's good for me to see her wearing things that accentuate her body." Nelson denies that her clothing was tight or in any way inappropriate.

During the last six months or so of Nelson's employment, Dr. Knight and Nelson started texting each other on both work and personal matters outside the workplace. Both parties initiated texting. Neither objected to the other's texting. Both Dr. Knight and Nelson have children, and some of the texts involved updates on the kids' activities and other relatively innocuous matters. Nelson considered Dr. Knight to be a friend and father figure, and she denies that she ever flirted with him or sought an intimate or sexual relationship with him. At the same time, Nelson admits that a coworker was "jealous that we got along." At one point, Nelson texted Dr. Knight that "the only reason I stay is because of you."

Dr. Knight acknowledges he once told Nelson that if she saw his pants bulging, she would know her clothing was too revealing. On another occasion, Dr. Knight texted Nelson saying the shirt she had worn that day was too tight. After Nelson responded that she did not think he was being fair, Dr. Knight replied that it was a good thing Nelson did not wear tight pants too because then he would get it coming and going. Dr. Knight also recalls that after Nelson allegedly made a statement regarding infrequency in her sex life, he responded to her, "That's like having a Lamborghini in the garage and never driving it." Nelson recalls that Dr. Knight once texted her to ask how often she experienced an orgasm. Nelson did not answer the text. However, Nelson does not remember ever telling Dr. Knight not to text her or telling him that she was offended.

In late 2009, Dr. Knight took his children to Colorado for Christmas vacation. Dr. Knight's wife Jeanne, who was also an employee in the dental practice, stayed home. Jeanne Knight found out that her husband and Nelson were texting each other during that time. When Dr. Knight returned home, Jeanne Knight confronted her husband and demanded that he terminate Nelson's employment. Both of them consulted with the senior pastor of their church, who agreed with the decision.

Jeanne Knight insisted that her husband terminate Nelson because "she was a big threat to our marriage." According to her affidavit and her deposition testimony, she had several complaints about Nelson. These included Nelson's texting with Dr. Knight, Nelson's clothing, Nelson's alleged flirting with Dr. Knight, Nelson's alleged coldness at work toward her (Jeanne Knight), and Nelson's ongoing criticism of another dental assistant. She added that

> Nelson liked to hang around after work when it would be just her and Dr. Knight there. I thought it was strange that after being at work all day and away from her kids and husband that she would not be anxious to get home like the other women in the office.

At the end of the workday on January 4, 2010, Dr. Knight called Nelson into his office. He had arranged for another pastor from the church to be present as an observer. Dr. Knight, reading from a prepared statement, told Nelson he was firing her. The statement said, in part, that their relationship had become a detriment to Dr. Knight's family and that for the best interests of both Dr. Knight and his family and Nelson and her family, the two of them should not work together. Dr. Knight handed Nelson an envelope which contained one month's severance pay. Nelson started crying and said she loved her job.

Nelson's husband Steve phoned Dr. Knight after getting the news of his wife's firing. Dr. Knight initially refused to talk to Steve Nelson, but later called back and invited him to meet at the office later that same evening. Once again, the pastor was present. In the meeting, Dr. Knight told Steve Nelson that Melissa Nelson had not done anything wrong or inappropriate and that she was the best dental assistant he ever had. However, Dr. Knight said he was worried he was getting too personally attached to her. Dr. Knight told Steve Nelson that nothing was going on but that he feared he would try to have an affair with her down the road if he did not fire her.

Dr. Knight replaced Nelson with another female. Historically, all of his dental assistants have been women.

After timely filing a civil rights complaint and getting a "right to sue" letter from the Iowa Civil Rights Commission, Nelson brought this action against Dr. Knight on August 12, 2010. Nelson's one-count petition alleges that Dr. Knight discriminated against her on the basis of sex. Nelson does not contend that her employer committed sexual harassment. Her argument, rather, is that Dr. Knight terminated her because of her gender and would not have terminated her if she was male.

Dr. Knight moved for summary judgment. After briefing and oral argument, the district court sustained the motion. The court reasoned in part, "Ms. Nelson was fired not because of her gender but because she was a threat to the marriage of Dr. Knight." Nelson appeals.

III. Analysis.

Section 216.6(1)(*a*) of the Iowa Code makes it generally unlawful to discharge or otherwise discriminate against an employee because of the employee's sex. "When interpreting discrimination claims under Iowa Code chapter 216, we turn to federal law, including Title VII of the United States Civil Rights Act." Generally, an employer engages in unlawful sex discrimination when the employer takes adverse employment action against an employee and sex is a motivating factor in the employer's decision.

Nelson argues that her gender was a motivating factor in her termination because she would not have lost her job if she had been a man. Dr. Knight responds that Nelson was terminated not because of her sex — after all, he only employs women — but because of the nature of their relationship and the perceived threat to Dr. Knight's marriage. Yet Nelson rejoins that neither the relationship nor the alleged threat would have existed if she had not been a woman.

Several cases, including a decision of the United States Court of Appeals for the Eighth Circuit, have found that an employer does not engage in unlawful gender discrimination by discharging a female employee who is involved in a consensual relationship that has triggered personal jealousy. This is true even though the relationship and the resulting jealousy presumably would not have existed if the employee had been male.

Tenge v. Phillips Modern Ag Co., like the present case, centered on a personal relationship between the owner of a small business and a valued employee of the business that was seen by the owner's wife as a threat to their marriage. In that case, unlike here, the plaintiff had pinched the owner's rear. She admitted that the owner's wife "could have suspected the two had an intimate relationship." Further, the plaintiff acknowledged she wrote "notes of a sexual or intimate nature" to the owner and put them in a location where others could see them. In the end, the owner fired the plaintiff, stating that his wife was "'making me choose between my best employee or her and the kids.'"

Reviewing this series of events, the Eighth Circuit affirmed the summary judgment in favor of the defendants. The Eighth Circuit first noted the considerable body of authority that "'sexual favoritism,' where one employee was treated more favorably than members of the opposite sex because of a consensual relationship with the boss," does not violate Title VII. The court distilled that law as follows:

> The principle that emerges from the above cases is that absent claims of coercion or widespread sexual favoritism, where an employee engages in consensual sexual conduct with a supervisor and an employment decision is based on this conduct, Title VII is not implicated because any benefits of the relationship are due to the sexual conduct, rather than the gender, of the employee.

The Eighth Circuit believed these sexual favoritism precedents were relevant. The court's unstated reasoning was that if a specific instance of sexual *favoritism* does not constitute gender discrimination, treating an employee *unfavorably* because of such a relationship does not violate the law either.

Yet the court acknowledged that cases where the employee was treated less favorably would be "more directly analogous." The court then discussed a decision of the Eleventh Circuit where an employee had been terminated for being a perceived threat to the marriage of the owner's son. It also cited three federal district court cases, each of which had "concluded that terminating an employee based on the employee's consensual sexual conduct does not violate Title VII absent allegations that the conduct stemmed from unwelcome sexual advances or a hostile work environment."

After reviewing these precedents, the Eighth Circuit found the owner had not violated Title VII in terminating the employee at his wife's behest. As the court explained, "The ultimate basis for Tenge's dismissal was not her sex, it was Scott's desire to allay his wife's concerns over Tenge's admitted sexual behavior with him."

In our case, the district court quoted at length from *Tenge,* stating it found that decision "persuasive." However, Nelson argues there is a significant factual difference between the two cases. As the Eighth Circuit put it, "Tenge was terminated due to the consequences of her own admitted conduct with her employer, not because of her status as a woman." The Eighth Circuit added a caveat:

> The question is not before us of whether it would be sex discrimination if Tenge had been terminated because Lori the owner's wife perceived her as a threat to her marriage but there was no evidence that she had engaged in any sexually suggestive conduct.

Nelson contrasts that situation with her own, where she claims she "did not do anything to get herself fired except exist as a female."

So the question we must answer is the one left open in *Tenge* — whether an employee who has not engaged in flirtatious conduct may be lawfully terminated simply because the boss's spouse views the relationship between the boss and the employee as a threat to her marriage. Notwithstanding the Eighth Circuit's care to leave that question unanswered, it seems odd at first glance to have the question of whether the *employer* engaged in unlawful discrimination turn on the *employee's* conduct, assuming that such conduct (whatever it is) would not typically be a firing offense. Usually our legal focus is on the employer's motivation, not on whether the discharge in a broader sense is fair. Title VII and the Iowa Civil Rights Act are not general fairness laws, and an employer does not violate them by treating an employee unfairly so long as the employer does not engage in discrimination based upon the employee's protected status.

In some respects, the present case resembles *Platner.* There a business owner chose to terminate a female employee who worked on the same crew as the business owner's son, after the wife of the business owner's son became "extremely jealous" of her. The district court found that the son was "largely to blame for fueling the wife's jealousy," and that the plaintiff's conduct was "basically blameless and no different from that of the male employees." Nonetheless, the Eleventh Circuit found no unlawful discrimination had occurred:

> It is evident that Thomas, faced with a seemingly insoluble conflict within his family, felt he had to make a choice as to which employee to keep. He opted to place the burden of resolving the situation on Platner, to whom he was not related, and whose dismissal would not, as firing Steve obviously would, fracture his family and its relationships. It is thus clear that the ultimate basis for Platner's dismissal was not gender but simply favoritism for a close relative.

Significantly, although Dr. Knight discusses *Platner* at some length in his briefing, Nelson does not refer to the decision in her briefing or attempt to distinguish it.

Nelson does, however, have three responses to Dr. Knight's overall position. First, she does not necessarily agree with *Tenge.* She argues that *any* termination because of a supervisor's interest in an employee amounts to sex discrimination: "Plaintiff's sex is implicated by the very nature of the reason for termination." Second, she suggests that without some kind of employee misconduct requirement, Dr. Knight's position becomes simply a way of enforcing stereotypes and permitting pretexts: The employer can justify a series of adverse employment actions against persons of one gender by claiming, "My spouse was jealous." Third, she argues that if Dr. Knight would have been liable to Nelson for sexually harassing her, he should not be able to avoid liability for terminating her out of fear that he was *going to* harass her.

Nelson's arguments warrant serious consideration, but we ultimately think a distinction exists between (1) an isolated employment decision based on personal relations (assuming no coercion or quid pro quo), even if the relations would not have existed if the employee had been of the opposite gender, and (2) a decision based on gender itself. In the former case, the decision is driven entirely by individual feelings and emotions regarding a specific person. Such a decision is not gender-based, nor is it based on factors that might be a proxy for gender.

The civil rights laws seek to insure that employees are treated the same regardless of their sex or other protected status. Yet even taking Nelson's view of the facts, Dr. Knight's unfair decision to terminate Nelson (while paying her a rather ungenerous one month's severance) does not jeopardize that goal. As the *Platner* court observed, "'We do not believe that Title VII authorizes courts to declare unlawful every arbitrary and unfair employment decision.'"

Nelson's viewpoint would allow any termination decision related to a consensual relationship to be challenged as a discriminatory action because the employee could argue the relationship would not have existed but for her or his gender. This logic would contradict federal caselaw to the effect that adverse employment action stemming from a consensual workplace relationship (absent sexual harassment) is not actionable under Title VII.

Nelson raises a legitimate concern about a slippery slope. What if Jeanne Knight demanded that her spouse terminate the employment of *several* women? Of course, a pretext does not prevail in a discrimination case. If an employer repeatedly took adverse employment actions against persons of a particular gender, that would make it easier to infer that gender and not a relationship was a motivating factor. Here, however, it is not disputed that Jeanne Knight objected to this particular relationship as it had developed after Nelson had already been working at the office for over ten years.

It is likewise true that a decision based on a gender stereotype can amount to unlawful sex discrimination. If Nelson could show that she had been terminated because she did not conform to a particular stereotype, this might be a different case. But the record here does not support that conclusion. It is undisputed, rather, that Nelson was fired because Jeanne Knight, unfairly or not, viewed her as a threat to her marriage.[38]

The present case can be contrasted with another recent Eighth Circuit decision. In *Lewis v. Heartland Inns of America*, a female front desk employee at a hotel claimed she lost her job because she did not have the "Midwestern girl look." As the court explained, "The theory of Lewis's case is that the evidence shows Heartland enforced a de facto requirement that a female employee conform to gender stereotypes in order to work the A shift." In fact, the evidence showed that motel management later procured video equipment so they could observe the appearance of front desk applicants prior to hiring. The Eighth Circuit reversed the district court's grant of summary judgment to the employer and remanded for trial. However, the critical difference between *Lewis* and this case is that Nelson indisputably lost her job because Dr. Knight's spouse objected to the parties' *relationship.* In *Lewis,* by contrast, no relationship existed.

38. (n.5 in opinion) As we have noted above, Jeanne Knight said that she thought it was "strange that after being at work all day and away from her kids and husband that Nelson would not be anxious to get home like the other women in the office." Viewed in isolation, this statement could be an example of a gender-based stereotype. However, as with Jeanne Knight's other comments regarding Nelson, this statement was linked to a specific concern about Nelson's relationship with her husband. This statement immediately followed Jeanne Knight's claim that Nelson "liked to hang around after work when it would be just her and Dr. Knight there." Viewing the summary judgment record, we come to the same conclusion as the district court: There is no genuine issue of material fact that the reason for Nelson's firing was Jeanne Knight's demand that she be fired, which was based in turn upon Jeanne Knight's perception that the relationship between Dr. Knight and Nelson was a threat to the marriage.

Nelson also raises a serious point about sexual harassment. Given that sexual harassment is a violation of antidiscrimination law, Nelson argues that a firing by a boss to *avoid* committing sexual harassment should be treated similarly.[39] But sexual harassment violates our civil rights laws because of the "hostile work environment" or "abusive atmosphere" that it has created for persons of the victim's sex. On the other hand, an isolated decision to terminate an employee before such an environment arises, even if the reasons for termination are unjust, by definition does not bring about that atmosphere.[40]

39. (n.6 in opinion) Allegedly, Dr. Knight told Nelson's husband that he "feared that he would try to have an affair with her down the road if he did not fire her."

40. (n.7 in opinion) The record indicates that Dr. Knight made a number of inappropriate comments toward Nelson that are of a type often seen in sexual harassment cases. But as already noted, Nelson does not allege in this case that she was a victim of sexual harassment.

As a Michigan appellate court observed regarding a male employee's claim that he had been subjected to sex discrimination:

> We do not read the Michigan Civil Rights Act or CRA to prohibit conduct based on romantic jealousy. Interpreting the CRA's prohibition of discrimination based on sex to prohibit conduct based on romantic jealousy turns the CRA on its head. The CRA was enacted to prevent discrimination because of classifications specifically enumerated by the Legislature and to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases. It is beyond reason to conclude that plaintiff's status as the romantic competition to the woman Vajda sought to date places plaintiff within the class of individuals the Legislature sought to protect when it prohibited discrimination based on sex under the CRA.
>
> Plaintiff proceeded to trial on a theory of discrimination based on romantic jealousy. Plaintiff did not claim and the evidence did not establish that plaintiff was required to submit to sexually-based harassment as a condition of employment. Nor did the evidence presented at trial support a theory of gender-based discrimination. Plaintiff established, at most, that Vajda's alleged adverse treatment of plaintiff was based on plaintiff's relationship with Goshorn, not plaintiff's gender. Vajda may have had a romantic purpose in initially pursuing Goshorn and may, as the trial court surmised, have intended to eliminate plaintiff so that he could pursue Goshorn's affections. However, Vajda's alleged harassment was not conduct that is proscribed by the CRA because it was not gender-based. Indeed, if Vajda's motive was to win the affection of Goshorn, it would not matter if the person Vajda perceived to be standing in his way was male or female. As such, it is evident that plaintiff's gender was not the impetus for Vajda's alleged conduct, but rather was merely coincidental to that conduct.

IV. Conclusion.

As we have indicated above, the issue before us is not whether a jury could find that Dr. Knight treated Nelson badly. We are asked to decide only if a genuine fact issue exists as to whether Dr. Knight engaged in unlawful gender discrimination when he fired Nelson at the request of his wife. For the reasons previously discussed, we believe this conduct did not amount to unlawful discrimination, and therefore we affirm the judgment of the district court.

CADY, Chief Justice (concurring specially).

I concur in the majority opinion, but write separately to further explain the basis and rationale for the decision. Melissa Nelson set forth a claim for sex discrimination recognized by law, but the facts of the case did not establish the claim.

Our state and federal civil rights laws were enacted to eradicate various forms of discrimination from society. These laws prohibit employment discrimination based on numerous grounds, including discrimination "because of sex." The primary purpose of this law has been to ensure that similarly situated employees are not treated differently because their sex differs.

While the goal behind prohibiting sex discrimination in the workplace is fundamental to a complete society, the task of determining a more precise meaning of sex discrimination has largely been left for the courts. Discrimination is abhorrent to the powerful echoes of the principle of equality that still resonate today from the voices of our forefathers centuries ago, but the struggle to understand and change remains. Yet, as revealed by our history, the process provided by the courts can often be the best environment for those echoes to be heard with greater clarity, aided by the benefit of a greater understanding achieved over the passage of time. A sharper meaning of sex discrimination, however, can be elusive, not only due to constraints on understanding, but also because of the inherent difficulty of fully capturing the intent of the legislature within an environment dominated by the venerable doctrine of employment at will, which still receives broad support.

These challenges to defining sex discrimination in the workplace have, at times, created controversy and divisiveness, especially when decisions by courts are not fully explained or when court decisions are not fairly read and interpreted or accepted. The task has also been compounded because the statutory language handed down by the legislature for the courts to interpret and apply in each case could not be more general. This law declares nothing more than workplace discrimination “because of sex” is illegal. Additionally, although we often presume Title VII and the Iowa Civil Rights Act to have similar scope and meaning, federal courts often declare that Congress provided little legislative history and explanation to guide courts in interpreting the prohibition against discrimination based on “sex.”

In the end, of course, the inherent difficulty of defining sex discrimination is understandable because its meaning is often more obvious in principle than when it is applied to a particular factual circumstance. Yet, the accumulation of court cases continues to shape its meaning, all seeking to express the intention of the legislature and to fulfill the purpose of these statutes. Perhaps this approach was the intent of the legislature.

Since the enactment of this nation’s civil rights law in 1964, courts have generally interpreted “sex” discrimination in the workplace to mean employment discrimination as a result of a person’s gender status. Of the legislative history that is available for courts to use to determine legislative intent, it was mostly clear that gender, not sexual activity, was the sole focus of the legislation. Thus, courts have generally recognized that discrimination exists in the workplace when similarly situated employees are treated differently “because they differ with respect to sex.” More to the point, the differential proscribed by the law “must be a distinction based on a person’s sex, not on his or her sexual affiliations.” In other words, differential treatment based on an employee’s status as a woman constitutes sex discrimination, while differential treatment on account of conduct resulting from the sexual affiliations of an employee does not form the basis for a sex-discrimination claim.

This distinction serves as the foundation of this case and other such cases in which employees suffer adverse employment consequences because they are involved in opposite-sex personal relationships with their employer. The complexity of such cases is not necessarily tied to the complexity of the law as much as the complexity of human relationships and interactions with others. Nevertheless, the law does not escape some blame for the difficult nature of the issue in light of the countervailing employment-at-will doctrine, which permits employers to terminate employees for reasons personal to them, so long as the will of the employer is not discriminatory or otherwise against public policy. This law is our Iowa law. Thus, while the loss of a job is often devastating to an employee, and at times unfair, these considerations do not play a role under our employment-at-will doctrine, and our exceptions to this law, such as sex discrimination, are only based on the underlying discriminatory motivation of the decision maker. Of course, the unfairness is enhanced for employees when the termination results from a personal relationship with the employer because only the employee suffers the loss of a job, while the other participant in the relationship does not. This result can make acceptance of the law even more difficult.

What has emerged from this complex area of the law is the general legal principle that an adverse employment consequence experienced by an employee because of a voluntary, romantic relationship does not form the basis of a sex-discrimination suit. Moreover, this general rule is not confined to relationships involving sexual intimacy. The same rule is applied to consensual affiliations involving sexually suggestive conduct. When employees are terminated due to consensual, romantic or sexually suggestive relationships with their supervisors, courts generally conclude the reason does not amount to sex discrimination because the adverse employment consequence is based on sexual activity rather than gender.

While courts have been slow to examine the core reasoning for excluding consensual sexual affiliations between employees and employers from the protection of sex-discrimination laws, such an examination offers helpful insight. Close personal relationships between men and woman can often produce personal emotions and conduct that are unfamiliar to the workplace relationship targeted by the general prohibition against gender discrimination in the workplace. To be sure, a consensual personal relationship alters the workplace relationship and produces responses and consequences that laws protecting an employee's right to work in an employment environment free from gender discrimination were not intended to protect. This observation does not pass judgment on the conduct that defines a personal relationship between an employer and employee, but identifies the practical change in an employment relationship that occurs when a relationship extends beyond the workplace. It also recognizes that the law against workplace discrimination only seeks to protect a woman from discrimination based on her status as a woman in the workplace, not on her consensual sexual relationships or personal affiliations with her employer. The same protection, of course, applies to men. Under this common-sense rationale, a response by the employer to a consensual personal or romantic relationship that becomes a reason for termination is not based on the sex of the employee, but conduct arising from the relationship. No fault or blame for the relationship is considered, only the practical reality of its presence in the workplace as a potential ingredient of adverse employment consequences.

On the other hand, within the broad spectrum of cases that describe either conduct or gender status lies employer-employee relationships that, even though they are close, produce no suggestion of sexual activity or intimacy to support concluding the termination was grounded on conduct. As with so many legal issues, however, a gray area exists somewhere between these two groups of cases in which the law draws a line based on the individual facts and circumstances of each case.

In this case, Nelson has unmistakably stated a claim protected by our laws against sex discrimination She asserts that the sexual attraction her employer developed for her, which was the reason for her termination, was his creation and not the result of a personal relationship she maintained with him. Consequently, she maintained she did nothing for the law to now require her to assume responsibility for his attraction to her except exist in the workplace as a woman.

It is abundantly clear that a woman does not lose the protection of our laws prohibiting sex discrimination just because her employer becomes sexually attracted to her, and the employer's attraction then becomes the reason for terminating the woman once it, in some way, becomes a problem for the employer. If a woman is terminated based on stereotypes related to the characteristics of her gender, including attributes of attractiveness, the termination would amount to sex discrimination because the reason for termination would be motivated by the particular gender attribute at issue.

Similarly, implicit in our laws against sex discrimination is that both men and woman are responsible for their own sexual desires and responses to attributes of the sex of the other, and neither sex is responsible to monitor or control the desires of the other sex. Thus, just as an employer cannot fire an employee for not conforming to a sex stereotype embraced by the employer or their customers, an employer cannot legally fire an employee simply because the employer finds the employee too attractive or not attractive enough. .

Accordingly, Nelson has stated a claim supported by our law. Yet, legal claims must also be supported by facts. When placed under the scrutiny of this legal proposition, Nelson's claim fails because the facts failed to support her claim. The fact of the matter is Nelson was terminated because of the activities of her consensual personal relationship with her employer, not because of her gender. A review of the summary judgment record bears out this conclusion.

It is an undisputed fact in this case, viewing the evidence in a light most favorable to Nelson, that Nelson and Dr. Knight developed a consensual personal relationship. Similarly, it is undisputed that this relationship extended well beyond the workplace. Nelson and Dr. Knight communicated with each other outside the workplace on matters extraneous to the employment. Their relationship was personal and closer than the relationships Dr. Knight maintained with the other employees. Dr. Knight readily acknowledged he grew attracted to Nelson and was developing feelings of intimacy, and it is accepted for purposes of summary judgment that these feelings were more developed than those possessed by Nelson. Yet, during a frustrating moment involving a co-employee, Nelson confided in Dr. Knight that he was the reason she continued to work at the office. She also acknowledged she maintained a closer relationship with Dr. Knight than he maintained with the other employees in the office. Additionally, Nelson acknowledged that another employee in the office viewed her conduct towards Dr. Knight as flirting, although Nelson believed this employee felt she flirted with Dr. Knight because the employee was jealous of the close relationship she enjoyed with Dr. Knight.

The communication between Nelson and Dr. Knight included comments by Dr. Knight that were marked by sexual overtones. These communications have been explained by the majority. One evening after texting her about the tight shirt she wore to work that day, he followed up with another text message indicating it was good that her pants were also not too tight because he would "get it coming and going." Another time, in response to a comment regarding the relative infrequency of her sexual activity, Dr. Knight told Nelson, "That's like having a Lamborghini in the garage and not ever driving it." Dr. Knight also once texted Nelson to ask how often she experienced orgasms. While these comments would commonly be viewed as inappropriate in most any setting and, for sure, beyond the reasonable parameters of workplace interaction, they nevertheless were an undeniable part of the consensual personal relationship enjoyed by Nelson and Dr. Knight. The banter, at least, revealed a relationship that was much different than would reasonably be expected to exist between employers and employees in the workplace.

The personal relationship also lasted six months and did not end until Dr. Knight's wife discovered Nelson and Dr. Knight were texting each other while Dr. Knight was out of state on a vacation. Dr. Knight's wife examined phone records to discover the texting only because she had grown suspicious of the relationship between Nelson and her husband.

Mixed motives, of course, can support a sex-discrimination claim. Yet, the record contained no evidence to suggest a factor other than the relationship between Nelson and Dr. Knight was a motivation for the termination or that the relationship was a pretext for a discriminatory intent.

The absence of sexual intimacy in the relationship between Nelson and Dr. Knight, and the absence of sexually suggestive behavior on the part of Nelson, does factually distinguish this case from the line of cases that do not recognize a sex-discrimination claim based on a consensual, romantic relationship. Yet, this distinction does not shift this case into the line of gender-discrimination cases that protect women from discrimination based on their physical appearance. Even if Nelson was fired because Dr. Knight was physically attracted to her, the attraction and resulting threat to the Knights' marriage surfaced during and resulted from the personal relationship between Nelson and Dr. Knight, and there is no evidence in the summary judgment record tending to prove the relationship or Nelson's termination were instead consequences of a gender-based discriminatory animus. Ultimately, the question comes down to whether a reasonable fact finder could find that Dr. Knight's reasons for terminating Nelson were, even in light of the relationship, responses motivated by Nelson's status as a woman. Courts evaluate this evidence "in light of common experience as it bears on the critical question of discrimination."

True to our governing legal authorities, a sex-discrimination claim predicated on physical appearance accompanied by a consensual personal relationship between the employee and employer requires proof that the physical appearance of the plaintiff was a gender-based reason for the adverse employment action. An adverse employment action based on a personal relationship that existed here between Nelson and Dr. Knight — or its consequences — is not actionable discrimination based on sex under our statute.

In view of the undisputed fact of a personal relationship between Nelson and Dr. Knight, Nelson has failed to engender a fact question on her claim that Dr. Knight's decision to terminate her was motivated by her status as a woman. The relationship, even in the context of summary judgment, included enough activity and conduct to support a determination as a matter of law that Nelson was terminated as a response to the consensual personal relationship she maintained with Dr. Knight. In the context of the personal relationship, there was insufficient evidence tending to show that Nelson's status as a woman was also a motivating reason.

It is important to observe that a critical aspect of the entire analysis centers on the consensual and voluntary nature of the personal relationship. The law that navigates through the intersection between sex discrimination and personal workplace relationships to reach the destination of nondiscriminatory conduct requires willing participants to the relationship. Of course, a personal relationship between an employer and subordinate can give rise to subtle issues of power and control that may make the line between consensual and submissive relationships difficult to draw. This concern has been particularly observed in cases involving claims of sexual harassment, either hostile-environment claims or quid pro quo claims. Thus, the consensual aspect of a relationship is pivotal to the analysis of the claim of discrimination based on a personal relationship. In this case, it is undisputed the relationship was consensual. If it was not consensual, a turn in the analysis would occur. Yet, Nelson made no legal or factual claim that a relationship with Dr. Knight was submissive, objectionable, or harassing in any way, and there was no evidence in the record to hint the relationship was not jointly pursued. The role of consent is important to the responsibility of employees and employers of both sexes to monitor and control their conduct in the workplace.

While there is only a single standard for summary judgment, as a practical matter, it should be used sparingly in employment-discrimination cases. Ordinarily, employment discrimination cases generate genuine issues of material fact because they are "often fact intensive and dependent on nuance in the workplace." Yet, the claim of discrimination in this case was actually framed by Nelson without relying on inferences or conflicting evidence. In other words, Nelson did not argue that Dr. Knight's expressed reason for terminating her was actually a pretext for an underlying discriminatory intent to terminate her based on her status as a woman. Instead, Nelson used the same reasons to show the termination was discriminatory as Dr. Knight used to show the termination was not discriminatory. She never offered an explanation for how those reasons establish a discriminatory animus. Thus, the resolution of the case turns on context: Was Nelson's termination a response by Dr. Knight to a personal relationship or was it his response to Nelson's status as a woman? It is undisputed the relationship existed, and Nelson failed to generate a fact question on her claim that her termination was motivated by a stereotype involving her status as a woman.

While summary judgment must be granted with caution, courts are required to grant judgment for the movant when the legal standards have been met. In this case, there was insufficient evidence offered by Nelson in light of the undisputed evidence of a consensual personal relationship that would permit a reasonable fact finder to conclude by a preponderance of the evidence that Dr. Knight terminated Nelson based on her status as a woman. In the final analysis, this court has carefully considered the issue presented and has sought to understand its complexity with the seriousness and attention demanded of all cases. Research has failed to uncover any appellate court in the nation that has recognized sex discrimination under facts similar to those in this case, and it has failed to identify any state legislature that has defined sex discrimination to include adverse employment consequences from a consensual personal relationship. If, in fact, Congress or our legislature intended for adverse employment consequences from consensual personal relationships between employers and employees to be protected as sex discrimination, these legislative bodies can clarify or change the law to reflect such intent. In the meantime, our law and this court remains devoted to carrying out the important legislative goal of eradicating discrimination from society, but this case simply lacked the facts to establish discrimination. Without proof of sex discrimination, the employment-at-will doctrine followed in Iowa guides the outcome.

Yanowitz v. L'Oreal USA, Inc., 116 P.3d 1123 (Cal. 2005)

GEORGE, C.J.

Plaintiff Elysa J. Yanowitz was a regional sales manager employed by defendant L'Oreal USA, Inc. (L'Oreal), a prominent cosmetics and fragrance company. Yanowitz alleges that after she refused to carry out an order from a male supervisor to terminate the employment of a female sales associate who, in the supervisor's view, was not sufficiently sexually attractive or "hot," she was subjected to heightened scrutiny and increasingly hostile adverse treatment that undermined her relationship with the employees she supervised and caused severe emotional distress that led her to leave her position. In bringing this action against L'Oreal, Yanowitz contended, among other matters, that L'Oreal's actions toward her constituted unlawful retaliation in violation of the provisions of Government Code section 12940, subdivision (h), which forbids employers from retaliating against employees who have acted to protect the rights afforded by the California Fair Employment and Housing Act (FEHA) (Gov.Code, § 12900 et. seq).

Section 12940(h) makes it an unlawful employment practice for an employer "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." In this case, we are presented with an array of issues regarding the proper legal standards to apply in determining whether an allegedly retaliatory action by an employer is actionable under section 12940(h). First, we must decide whether an employee's refusal to follow a supervisor's order (to discharge a subordinate) that the employee reasonably believes to be discriminatory constitutes "protected activity" under the FEHA for which the employee may not properly be subjected to retaliation, when the employee objects to the supervisor's order but does not explicitly tell the supervisor or the employer that she (the employee) believes the order violates the FEHA or is otherwise discriminatory. Second, we must decide how the term "adverse employment action" — a term of art that generally is used as a shorthand description of the kind of adverse treatment imposed upon an employee that will support a cause of action under an employment discrimination statute — should be defined for purposes of a retaliation claim under the FEHA, and whether, in evaluating whether or not an employee was subjected to an adverse employment action under the appropriate standard, each individual sanction or punitive measure to which the employee was subjected must be evaluated separately or instead collectively through consideration of the totality of the circumstances. On a related point, we must decide whether a plaintiff may invoke the continuing violations doctrine to rely upon allegedly retaliatory acts that occurred outside the limitations period when such acts are related to acts that occur within the limitations period prescribed by the FEHA. Finally, in light of our conclusions on the foregoing issues, we must determine whether, under the circumstances disclosed by the record in this case, the Court of Appeal properly concluded that the trial court erred in granting summary judgment in favor of the employer.

For the reasons set forth below, we conclude that an employee's refusal to follow a supervisor's order that she reasonably believes to be discriminatory constitutes protected activity under the FEHA and that an employer may not retaliate against an employee on the basis of such conduct when the employer, in light of all the circumstances, knows that the employee believes the order to be discriminatory, even when the employee does not explicitly state to her supervisor or employer that she believes the order to be discriminatory.

I.

A

Yanowitz began her employment with the predecessor of L'Oreal as a sales representative in 1981 and was promoted to regional sales manager for Northern California and the Pacific Northwest in 1986. As regional sales manager, Yanowitz was responsible for managing L'Oreal's sales team and dealing with the department and specialty stores that sold L'Oreal's fragrances. From 1986 to 1996, Yanowitz's performance as a regional sales manager consistently was judged as "Above Expectation" and in some instances fell close to "Outstanding," the highest possible rating, although her reviews over this period also consistently contained some criticism of her "listening" and "communication" skills.

In early 1997, Yanowitz was named L'Oreal's regional sales manager of the year (for 1996). She received a Cartier watch and a congratulatory note from human resources manager Jane Sears praising her leadership, loyalty, motivation, and ability to inspire team spirit. Yanowitz's bonuses for the years 1996 and 1997 were the highest paid to any regional sales manager in her division.

Beginning in 1996, Yanowitz's immediate supervisor was Richard Roderick, the vice-president of sales for the designer fragrance division. Roderick reported directly to Jack Wiswall, the general manager of the designer fragrance division. Roderick and Wiswall worked out of New York, and Yanowitz was based in San Francisco.

In June 1997, Roderick wrote a memorandum to Yanowitz's personnel file in which he criticized Yanowitz's listening skills and characterized her attitude as "negative." He also noted that he had received complaints about Yanowitz's attitude from several retailers. In August 1997, Roderick wrote a memorandum to Sears, L'Oreal's human resources manager, in which he again criticized Yanowitz for her listening skills and her "negative" attitude, noting that several accounts also had complained about Yanowitz's attitude. Roderick stated in this memorandum that "Elysa does a terrific job as a regional manager, however, she must become a better listener and she must not put a gun to the heads of the retailers in order to get them to do what needs to be done."

In the fall of 1997, L'Oreal restructured the designer fragrance division, merging the division with the Ralph Lauren fragrance division. Although some regional sales managers were laid off after the restructuring, L'Oreal retained Yanowitz and increased her responsibilities. After the merger and restructuring, Yanowitz was assigned to supervise the personnel who formerly worked for the Ralph Lauren division, and to supervise the marketing of Ralph Lauren fragrances in her region.

Shortly after Yanowitz assumed responsibility for the Ralph Lauren sales force and marketing campaigns in the fall of 1997, Wiswall and Yanowitz toured the Ralph Lauren Polo installation at Macy's in the Valley Fair Shopping Center in San Jose. After the tour, Wiswall instructed Yanowitz to terminate the employment of a dark-skinned female sales associate because he did not find the woman to be sufficiently physically attractive. Wiswall expressed a preference for fair-skinned blondes and directed Yanowitz to "get me somebody hot," or words to that effect. On a return trip to the store, Wiswall discovered that the sales associate had not been dismissed. He reiterated to Yanowitz that he wanted the associate terminated and complained that Yanowitz had failed to do so. He passed "a young attractive blonde girl, very sexy," on his way out, turned to Yanowitz, and told her, "God damn it, get me one that looks like that." Yanowitz asked Wiswall for an adequate justification before she would terminate the associate. On several subsequent occasions, Wiswall asked Yanowitz whether the associate had been dismissed. On each occasion, Yanowitz asked Wiswall to provide adequate justification for dismissing the associate. In March 1998, in the midst of Yanowitz's conversations with Wiswall regarding the termination of the sales associate, Yanowitz learned that the sales associate in question was among the top sellers of men's fragrances in the Macy's West chain. Ultimately, Yanowitz refused to carry out Wiswall's order and did not terminate the sales associate. She never complained to her immediate supervisor or to the human resources department that Wiswall was pressuring her to fire the sales associate, however, nor did she explicitly tell Wiswall that she believed his order was discriminatory.

In April 1998, Roderick began soliciting negative information about Yanowitz from her subordinates. Roderick called Christine DeGracia, who reported to Yanowitz, and asked her about any "frustrations" she had with Yanowitz. When DeGracia said she had had some, Roderick asked her to hold her thoughts so that the matter could be discussed with human resources. Roderick and Sears then called back DeGracia to discuss those issues. When Roderick asked DeGracia whether any other persons were having problems with Yanowitz, DeGracia did not provide any names. Two weeks later, Roderick called DeGracia again and told her it was urgent that she help him persuade individuals to come forward with their problems concerning Yanowitz. In early June 1998, Roderick again asked DeGracia to notify him of negative incidents involving Yanowitz and other account executives.

On May 13, 1998, Roderick summoned Yanowitz to L'Oreal's home office in New York. Roderick opened the meeting by asking whether she thought she had been brought in to be terminated, then criticized Yanowitz for her "dictatorial" management style with regard to two account executives. He closed the meeting by saying, "It would be a shame to end an eighteen-year career this way." During May and June 1998, Roderick and Wiswall obtained Yanowitz's travel and expense reports and audited them.

On June 19, 1998, a representative for Macy's West, one of Yanowitz's accounts, wrote to Roderick to complain about the handling of a Polo Sport promotion, which Yanowitz's team was responsible for coordinating. In June 1998, Yanowitz met with Wiswall, Roderick, and various account executives and regional sales managers responsible for the Macy's account. Wiswall screamed at Yanowitz in front of her staff, told her he was "sick and tired of all the fuckups" on the Macy's account, and said that Yanowitz could not get it right. In July 1998, the Macy's account executive wrote to Roderick and again complained about the handling of a different promotion by Yanowitz's team.

On June 22, 1998, Yanowitz wrote Roderick, advising him that her Macy's West team was disturbed about certain issues. Wiswall, who had been sent a copy, wrote a note to Roderick on Yanowitz's memo: "Dick — She is writing everything! Are you!!!???" One week after Wiswall's note, Roderick prepared three memos to human resources documenting the meeting with Yanowitz on May 13, 1998, a conversation with DeGracia on June 4, 1998, and a visit to Yanowitz's market area in early June 1998. These memos were critical of Yanowitz; the memo discussing the May 13 meeting criticized her for being too assertive.

On July 16, 1998, Roderick prepared a more elaborate memorandum and delivered it to Yanowitz. The memorandum criticized Yanowitz's handling of a Polo Sport promotion, a Picasso promotion, coordination of advertising with others, handling of the Sacramento market, and the length and substance of a March 1998 business trip to Hawaii. Roderick closed, "I have yet to see evidence that you took the May 13 conversation seriously and made the necessary style modifications. Elysa, I am quite surprised that a person with so many years of experience and so many years with Cosmair could become so ineffective so quickly. Our business is changing daily and we all must learn to adapt to those changes or we will fail as individuals and as a company. Your changes must start immediately. I expect a reply to this memo within one week of receipt."

Yanowitz viewed the memorandum as an expression of intent to develop pretextual grounds and then terminate her. She suggested the parties meet to discuss a severance package, but also indicated she first wanted to prepare her written response to the July 16, 1998, memorandum.

Carol Giustino, Sears's replacement as human resources director, set up a meeting for July 22 and rejected Yanowitz's request that the meeting be postponed. Giustino also denied Yanowitz's request to have Yanowitz's attorney-husband present at the meeting, citing company policy. During the July 22 meeting, Roderick and Giustino questioned Yanowitz about the accusations in the July 16 memorandum without reading her written response. Yanowitz, who was being treated for nervous anxiety allegedly brought on by the situation at work, broke down in tears. During the meeting, Roderick imposed a new travel schedule on Yanowitz, a schedule that regulated precisely how often she should visit each market in her territory. Two days after the meeting, Yanowitz departed on disability leave due to stress. She did not return, and L'Oreal replaced her in November 1998.

B

Yanowitz filed a discrimination charge with the Department of Fair Employment and Housing (DFEH) on June 25, 1999. She alleged that L'Oreal had discriminated against her on the basis of sex, age (Yanowitz was 53), and religion (Yanowitz is Jewish). She also alleged that L'Oreal had retaliated against her for refusing to terminate the female employee whom Wiswall considered unattractive.

After receiving a right-to-sue letter from the DFEH, Yanowitz brought this action against L'Oreal in superior court. The first amended complaint, filed on September 13, 1999, included claims for age and religious discrimination and retaliation under the FEHA, violation of the unfair competition law (UCL), and breach of the covenant of good faith and fair dealing. The second amended complaint, filed July 21, 2000, added a cause of action for negligent infliction of emotional distress.

With respect to the retaliation claim, the trial court granted summary judgment in favor of L'Oreal, finding Yanowitz had not engaged in any protected activity. The Court of Appeal reversed this aspect of the trial court's judgment, holding that: (1) Yanowitz's refusal to obey Wiswall's sexually discriminatory order was protected activity under the FEHA; (2) Yanowitz was not required to give L'Oreal notice that Wiswall's order was discriminatory; (3) Yanowitz was not precluded from relying on L'Oreal's acts that occurred prior to the date of the alleged adverse action shown in the administrative complaint; (4) L'Oreal's conduct constituted adverse employment action; (5) a genuine issue of material fact remained as to whether L'Oreal's ostensibly nonretaliatory reasons for the adverse employment action were pretextual; (6) a workers' compensation exclusivity requirement did not bar Yanowitz's claim for negligent infliction of emotional distress derivative of her FEHA claim; and (7) L'Oreal's intentional acts could not provide a basis for establishing negligent infliction of emotional distress. The appellate court accordingly concluded that the trial court erred in granting summary judgment in favor of L'Oreal with regard to Yanowitz's retaliation claim and reversed the judgment, remanding the matter to the superior court to permit the retaliation claim to proceed to trial.

L'Oreal petitioned for review, contending (1) with regard to the "protected conduct" issue, that the Court of Appeal had erred in concluding that Yanowitz's acts properly could be considered protected conduct even though Yanowitz had not specifically notified any supervisor that she believed Wiswall's order was discriminatory, and (2) with regard to the "adverse employment action" issue, that the Court of Appeal had erred (a) in adopting an improper standard for evaluating whether an adverse employment action was imposed upon an employee, (b) in aggregating discrete employment actions and considering L'Oreal's conduct under a totality of the circumstances approach, and (c) in applying the continuing violation doctrine to consider adverse actions that occurred outside the statute of limitations period. Finally, L'Oreal maintained that even if the Court of Appeal properly found that Yanowitz had established a prima facie case of retaliation, that court erred in finding that she had presented sufficient evidence to create a triable issue of fact regarding whether L'Oreal's ostensible nondiscriminatory reasons for its actions were pretextual.

In light of the importance of a number of these issues, particularly the proper standard for determining whether an employee has been subjected to an adverse employment action, we granted review.

II.

Past California cases hold that in order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a "protected activity," (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation "drops out of the picture," and the burden shifts back to the employee to prove intentional retaliation.

A

We first must determine whether Yanowitz's refusal to follow Wiswall's order to terminate the sales associate because he found the associate sexually unattractive was protected activity for which she could not be subjected to retaliation. The statutory language of section 12940(h) indicates that protected conduct can take many forms. Specifically, section 12940(h) makes it an unlawful employment practice "for any employer to discharge, expel, or otherwise discriminate against any person because the person has *opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.*" The question here is whether Yanowitz's refusal to follow Wiswall's directive qualifies under the first category — that is, whether by refusing the directive, Yanowitz "opposed any practices forbidden under this part."

As a threshold matter, L'Oreal does not dispute that an employee's conduct may constitute protected activity for purposes of the antiretaliation provision of the FEHA not only when the employee opposes conduct that ultimately is determined to be unlawfully discriminatory under the FEHA, but also when the employee opposes conduct that the employee reasonably and in good faith believes to be discriminatory, whether or not the challenged conduct is ultimately found to violate the FEHA. It is well established that a retaliation claim may be brought by an employee who has complained of or opposed conduct that the employee reasonably believes to be discriminatory, even when a court later determines the conduct was not actually prohibited by the FEHA.

Strong policy considerations support this rule. Employees often are legally unsophisticated and will not be in a position to make an informed judgment as to whether a particular practice or conduct *actually* violates the governing antidiscrimination statute. A rule that permits an employer to retaliate against an employee with impunity whenever the employee's reasonable belief turns out to be incorrect would significantly deter employees from opposing conduct they believe to be discriminatory. As the United States Supreme Court recently emphasized in the context of title IX of the Education Amendments of 1972, "reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel." By the same token, a rule that would allow retaliation against an employee for opposing conduct the employee reasonably and in good faith believed was discriminatory, whenever the conduct subsequently was found not to violate the FEHA, would significantly discourage employees from opposing incidents of discrimination, thereby undermining the fundamental purposes of the antidiscrimination statutes.

In the present case, in her opposition to L'Oreal's motion for summary judgment, Yanowitz presented evidence that she reasonably believed that Wiswall's order constituted unlawful sex discrimination, because she thought the order represented the application of a different standard for female sales associates than for male sales associates. Yanowitz stated in this regard that she had hired and supervised both male and female sales associates for a number of years, and never had been asked to fire a male sales associate because he was not sufficiently attractive. Because a trier of fact could find from this evidence that Yanowitz believed Wiswall's order was discriminatory as reflecting an instance of disparate treatment on the basis of sex, we have no occasion in this case to determine whether a gender-neutral requirement that a cosmetic sales associate be physically or sexually attractive would itself be violative of the FEHA or could reasonably be viewed by an employee as unlawfully discriminatory. Courts in other jurisdictions have uniformly held that an appearance standard that imposes more stringent appearance requirements on employees of one sex than on employees of the other sex constitutes unlawful sexual discrimination unless such differential treatment can be justified as a bona fide occupational qualification. We believe it is clear that such unjustified disparate treatment also would constitute unlawful sex discrimination under the FEHA.

L'Oreal does not claim that such disparate treatment on the basis of sex is permissible under the FEHA, but maintains that the evidence presented at the summary judgment motion was insufficient to support a reasonable belief that Wiswall's order represented an instance of impermissible disparate treatment on the basis of sex. We disagree. Yanowitz presented evidence that Wiswall ordered her to terminate a female sales associate simply because he felt the associate was "not good looking enough," and directed her to "get me someone hot." On a subsequent visit to the Macy's store, when Wiswall discovered Yanowitz had not terminated the sales associate, he pointed out a young attractive blonde woman and stated, "God damn it, get me one that looks like that." Although Yanowitz repeatedly requested that Wiswall provide her with "adequate justification" for the dismissal, he failed to respond to the request. As noted, Yanowitz additionally stated that she had hired and supervised both male and female sales associates for a number of years, and never had been asked to fire a male sales associate because he was not sufficiently attractive.

Moreover, L'Oreal failed to present any evidence in the summary judgment proceedings to counter the claim that Wiswall's order constituted an instance of disparate treatment on the basis of sex. It introduced no evidence suggesting that Wiswall's order was based upon the particular sales associate's performance or sales record, or, indeed, that Wiswall had any knowledge of such matters. In addition, L'Oreal did not establish that the company maintained a general policy requiring cosmetic sales associates to be physically or sexually attractive, or that such a policy was routinely applied to both male and female sales associates.

L'Oreal additionally asserts that Yanowitz's evidence is insufficient to support a reasonable belief that Wiswall's order was discriminatory, because her belief rests solely on her own subjective experience. Inasmuch as Yanowitz had been a regional sales manager for many years and presumably was familiar with the company's job requirements for sales associates, we believe that a trier of fact properly could find that, in light of Yanowitz's experience, her assessment that Wiswall's order represented disparate treatment on the basis of the sex of the sales associate was reasonable. Accordingly, on this record, we conclude that a reasonable trier of fact could find that Yanowitz reasonably believed that Wiswall's order constituted sexual discrimination.

L'Oreal argues, however, that even if Yanowitz refused to follow Wiswall's order because she reasonably believed it was discriminatory, the papers before the trial court on the summary judgment motion failed to demonstrate that Yanowitz engaged in protected activity, because the materials failed to demonstrate that she ever made L'Oreal aware that her refusal to terminate the sales associate on the basis of her appearance amounted to a protest against unlawful discrimination. L'Oreal's position is that Yanowitz cannot be found to have "opposed" a practice forbidden by the FEHA, within the meaning of 12940(h), because Yanowitz never notified or advised either Wiswall or any other supervisor that she was refusing to obey the order because she believed the order violated the FEHA.

By contrast, although Yanowitz acknowledges that she never explicitly stated to Wiswall that she believed his order was discriminatory, she contends that in light of the nature of the order and her repeated requests that Wiswall provide "adequate justification" for that order, there is sufficient evidence from which a trier of fact could find that Wiswall knew that she had declined to follow the order because she believed it to be discriminatory, and that under such circumstances retaliation on the basis of her conduct was forbidden, even if she did not explicitly tell Wiswall, in so many words, that the order was discriminatory.

We agree with Yanowitz that when the circumstances surrounding an employee's conduct are sufficient to establish that an employer knew that an employee's refusal to comply with an order was based on the employee's reasonable belief that the order is discriminatory, an employer may not avoid the reach of the FEHA's antiretaliation provision by relying on the circumstance that the employee did not *explicitly* inform the employer that she believed the order was discriminatory. The relevant portion of section 12940(h) states simply that an employer may not discriminate against an employee "because the person has opposed any practices forbidden under this part." When an employer knows that the employee's actions rest on such a basis, the purpose of the antiretaliation provision is applicable, whether or not the employee has told her employer explicitly and directly that she believes an order is discriminatory.

Standing alone, an employee's unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation, where there is no evidence the employer knew that the employee's opposition was based upon a reasonable belief that the employer was engaging in discrimination. Although an employee need not formally file a charge in order to qualify as being engaged in protected opposing activity, such activity must oppose activity the employee reasonably believes constitutes unlawful discrimination, and complaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct.

Nonetheless, we believe it is clear that "an employee is not required to use legal terms or buzzwords when opposing discrimination. The court will find opposing activity if the employee's comments, when read in their totality, oppose discrimination." It is not difficult to envision circumstances in which a subordinate employee may wish to avoid directly confronting a supervisor with a charge of discrimination and the employee engages in subtler or more indirect means in order to avoid furthering or engaging in discriminatory conduct. In such circumstances "the thrust of inartful, subtle, or circumspect remarks nevertheless may be perfectly clear to the employer, and there is no evidence that Congress intended to protect only the impudent or articulate. The relevant question is not whether a formal accusation of discrimination is made but whether the employee's communications to the employer sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner."

Thus, in the present case we must determine whether, on the record before the trial court on the motion for summary adjudication, a trier of fact properly could find that Wiswall knew that Yanowitz was objecting repeatedly to the order because she believed in good faith that it was discriminatory. As noted above, Wiswall on multiple occasions directed Yanowitz to fire a sales associate he believed was insufficiently attractive, and on one occasion pointed to an attractive blonde woman while indicating his preference for hiring a sales associate who looked like her. Yanowitz refused to implement Wiswall's directive and repeatedly asked for "adequate justification" for that order. There is no evidence in the record that Wiswall ever asked Yanowitz to explain her numerous requests for "adequate justification," and L'Oreal failed to present any evidence regarding Wiswall's understanding or knowledge of Yanowitz's reasons for refusing to follow his directive or for demanding "adequate justification" for that directive.

We conclude that, on this record, a trier of fact properly could find that Wiswall knew that Yanowitz's refusal to comply with his order to fire the sales associate was based on Yanowitz's belief that Wiswall's order constituted discrimination on the basis of sex — that is, the application of a different standard to a female employee than that applied to male employees — and that her opposition to the directive thus was not merely an unexplained insubordinate act bearing no relation to suspected discrimination. A trier of fact properly could find that by repeatedly refusing to implement the directive unless Wiswall provided "adequate justification," Yanowitz sufficiently conveyed to Wiswall that she considered the order to be discriminatory and put him on notice that he should reconsider the order because of its apparent discriminatory nature.

In sum, we conclude that the evidence presented by Yanowitz would permit — although it certainly would not compel — a reasonable trier of fact to find that, in view of the nature of Wiswall's order, Yanowitz's refusal to implement the order, coupled with her multiple requests for "adequate justification," sufficiently communicated to Wiswall that she believed that his order was discriminatory. Thus, we conclude that Yanowitz presented sufficient evidence to satisfy the protected activity element of her prima facie case.

B

We turn next to an issue that generally is referred to in the employment discrimination cases and literature under the rubric of "adverse employment action." This term does not appear in the language of the FEHA or in title VII, but has become a familiar shorthand expression referring to the kind, nature, or degree of adverse action against an employee that will support a cause of action under a relevant provision of an employment discrimination statute. In the present case, the issue before us is the appropriate standard for determining whether an employee has been subjected to an adverse employment action for purposes of a retaliation claim under the FEHA.

We begin with the relevant statutory language. As already indicated, section 12940(h) provides in relevant part that it is an unlawful employment practice for an "employer to discharge, expel, *or otherwise discriminate* against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." The FEHA does not expressly define "discriminate" or "otherwise discriminate" as used in section 12940(h), but section 12940, subdivision (a) — the initial and basic antidiscrimination provision of the FEHA applicable to employers — provides in somewhat similar fashion that it is an unlawful employment practice for an "employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age or sexual orientation of any person to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, *or to discriminate against the person in compensation or in terms, conditions or privileges of employment.*"

When the provisions of section 12940 are viewed as a whole, we believe it is more reasonable to conclude that the Legislature intended to extend a comparable degree of protection both to employees who are subject to the types of basic forms of discrimination at which the FEHA is directed — that is, for example, discrimination on the basis of race or sex — and to employees who are discriminated against in retaliation for opposing such discrimination, rather than to interpret the statutory scheme as affording a greater degree of protection against improper retaliation than is afforded against direct discrimination. Accordingly, we conclude that the term "otherwise discriminate" in section 12940(h) should be interpreted to refer to and encompass the same forms of adverse employment activity that is actionable under section 12940(a).

III.

Yanowitz contends that the following activity constitutes adverse employment actions for purposes of her prima facie claim: (1) unwarranted negative performance evaluations (specifically, Roderick's July 16, 1998 memo criticizing Yanowitz); (2) L'Oreal's refusal to allow Yanowitz to respond to the allegedly unwarranted criticism, by insisting on the July 22, 1998 meeting despite Yanowitz's request to postpone the meeting to allow her to prepare a defense to the charges; (3) unwarranted criticism voiced by Roderick in the presence of Yanowitz's associates and other employees on May 13, 1998, and the "humiliating" public reprobation by Wiswall on June 11, 1998; (4) refusing Yanowitz's request to provide necessary resources and assistance to Christine DeGracia (sometime after May 13, 1998), thereby allegedly fueling the employee resentment for which Yanowitz was chastised in her performance reviews; and (5) Roderick's solicitation of negative feedback from Yanowitz's staff in April 1998.

As a threshold matter, we need not and do not decide whether each alleged retaliatory act constitutes an adverse employment action in and of itself. Yanowitz has alleged that L'Oreal's actions formed a pattern of systematic retaliation for her opposition to Wiswall's discriminatory directive. Contrary to L'Oreal's assertion that it is improper to consider collectively the alleged retaliatory acts, there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. Enforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute.

It is therefore appropriate that we consider plaintiff's allegations collectively. L'Oreal additionally argues, however, that in any event we may not consider the full range of acts, because only acts that occurred within one year prior to the filing of Yanowitz's claim with the DFEH — that is, within one year prior to June 25, 1999 — are actionable and the remaining acts are barred by the statute of limitations. L'Oreal urges us to apply the statute of limitations strictly and limit Yanowitz's claims to only those acts that occurred one year or less before she filed her DFEH claim — namely, Roderick's July 16, 1998 memorandum, the refusal to give Yanowitz additional time to respond to that memorandum, and the July 22, 1998 meeting. Conversely, Yanowitz urges us to apply the continuing violation doctrine we recently discussed in *Richards v. CH2M Hill, Inc.* Under that doctrine, an employer is liable for actions that take place outside the limitations period if these actions are sufficiently linked to unlawful conduct that occurred within the limitations period.

In *Richards,* we applied the continuing violation doctrine to a plaintiff's disability accommodation and disability harassment claims under the FEHA, reasoning that the FEHA statute of limitations should not be interpreted to force upon a disabled employee engaged in the process of seeking reasonable accommodation or ending disability harassment the unappealing choice of resigning at the first sign of discrimination or, on the other hand, persisting in the reconciliation process and possibly forfeiting a valid claim should that process prove unsuccessful. Thus, we held that when an employer unlawfully refuses reasonable accommodation of a disabled employee or engages in disability harassment, the statute of limitations begins to run either "when the course of conduct is brought to an end, as by the employer's cessation of such conduct or by the employee's resignation, *or* when the employee is on notice that further efforts to end the unlawful conduct will be in vain."

Subsequent to our decision in *Richards,* the United States Supreme Court decided *National Railroad Passenger Corp. v. Morgan*, where the court held that, with regard to the applicability of the continuing violations doctrine, a distinction should be drawn between discrimination and retaliation claims on the one hand, and hostile work environment claims on the other hand. The court in *Morgan* reasoned that because title VII's definition of "unlawful employment practices" includes many discrete acts but does not indicate that the term "practice" converts related discrete acts into a single unlawful practice for timely filing purposes, discrete discriminatory acts are not actionable if time-barred, even when they are related to acts alleged in timely filed charges. The court further stated that hostile work environment claims, by contrast, by their very nature involve repeated conduct and thus cannot be said to occur on any particular day. Because a harassment claim is composed of a series of separate acts that collectively constitute one "unlawful employment practice," the court in *Morgan* concluded that it does not matter that some of the component parts fall outside the statutory time period.

L'Oreal urges us to adopt *Morgan's* reasoning and limit the continuing violation doctrine to only harassment claims, thus excluding discrimination and retaliation claims. A rule categorically barring application of the continuing violation doctrine in retaliation cases, however, would mark a significant departure from the reasoning and underlying policy rationale of our previous cases interpreting the FEHA statute of limitations. In *Richards,* we recognized that such a strict approach to the statute of limitations could encourage early litigation, and that in order to minimize the filing of unripe lawsuits and to promote the conciliatory resolution of claims, the FEHA statute of limitations should be interpreted liberally to allow employers and employees an opportunity to resolve disputes informally. In our earlier decision in *Romano v. Rockwell Internat., Inc.*, these same policy concerns critically informed our decision that a FEHA action for discriminatory discharge does not commence until the actual discharge, not the time the employee was notified that he or she would be discharged.

Nothing in *Richards* or *Romano* limited application of these principles to only harassment claims, rather than discrimination or retaliation claims. Indeed, in *Richards,* we expressly applied the continuing violation doctrine to the plaintiff's disability discrimination claim, as well as to her disability harassment claim. Thus, we already have recognized that when the requisite showing of a temporally related and continuous course of conduct has been established, it is appropriate to apply the continuing violations doctrine to disability accommodation claims, as well as to harassment claims.

Indeed, an examination of the facts of the instant case illustrates why a categorical bar on the application of the continuing violations doctrine in the retaliation context is incompatible with our previous pronouncements in this area. Here, the plaintiff alleges a retaliatory course of conduct rather than a discrete act of retaliation, and as we concluded above, a series of separate retaliatory acts collectively may constitute an "adverse employment action" even if some or all of the component acts might not be individually actionable. If, however, we were to foreclose application of the continuing violations doctrine as a matter of law in retaliation cases, the statute of limitations would start running upon the happening of the first act of retaliation, even if that act would not be actionable standing alone. A rule that would force employees to bring actions for "discrete acts" of retaliation that have not yet become ripe for adjudication, and that the employee may not yet recognize as part of a pattern of retaliation, is fundamentally incompatible with the twin policy goals of encouraging informal resolution of disputes and avoiding premature lawsuits that critically informed our analysis in *Richards* and *Romano.*

Accordingly, foreclosing the application of the continuing violation doctrine in a case such as this one, where the plaintiff alleges a retaliatory *course of conduct* rather than a discrete act of retaliation, would undermine the fundamental purpose of the FEHA by encouraging early litigation and the adjudication of unripe claims. We believe the better rule is to allow application of the continuing violations doctrine in retaliation cases if the requisite showing of a continuing course of conduct has been made. Thus, we reiterate that in a retaliation case, as in a disability accommodation or harassment case, the FEHA statute of limitations begins to run when an alleged adverse employment action acquires some degree of permanence or finality.

Turning to the applicability of the doctrine in the present case, we apply the factors outlined in *Richards.* Specifically, we consider whether "the employer's actions were (1) sufficiently similar in kind — recognizing, as this case illustrates, that similar kinds of unlawful employer conduct, such as acts of harassment or failures to reasonably accommodate disability, may take a number of different forms Citation; (2) have occurred with reasonable frequency; (3) and have not acquired a degree of permanence." Here, Yanowitz contends that in retaliation for her refusal to follow Wiswall's discriminatory directives in the fall of 1997, L'Oreal began a campaign of retaliation that commenced with the solicitation of negative feedback from Yanowitz's subordinates in April 1998, continued with a refusal to accommodate those employees' administrative needs in May 1998, the presentation of unwarranted criticism and humiliation in the presence of these employees in June 1998, and an unwarranted negative written evaluation in a July 16, 1998 memorandum, and finally culminated with L'Oreal's refusal, after the transmittal of the July 16 memorandum, to allow Yanowitz time to respond to the charges leveled against her.

In sum, Yanowitz alleges that in the course of these actions, L'Oreal solicited or fabricated negative information about Yanowitz and then used this information to intimidate, disempower, and punish Yanowitz. We conclude that a reasonable trier of fact could find that the solicitation of negative information from subordinates, the criticism of Yanowitz both verbally and in written memos based in part on the negative information obtained from her subordinates, and the subsequent refusal to allow Yanowitz to answer the charges leveled against her, were similar in kind and occurred with sufficient frequency to constitute a continuous and temporally related course of conduct. Moreover, a reasonable trier of fact could conclude Yanowitz was not on notice that further conciliatory efforts would be futile, until her final attempts to meet with company representatives to discuss the criticism directed at her were finally rebuffed. Accordingly, in light of the evidence submitted by the parties at the summary adjudication stage, we cannot determine that the continuing violation doctrine is inapplicable as a matter of law.

Furthermore, with regard to the question whether L'Oreal's alleged acts of retaliation, considered collectively, constitute a sufficient adverse employment action under the relevant standard (materially affecting the terms, conditions, or privileges of employment), we conclude that Yanowitz has met her burden of establishing an adverse employment action for purposes of her prima facie case. The record establishes that prior to the period relevant here, Yanowitz had been a highly rated and honored employee of L'Oreal for 18 years. In April 1998, however, her supervisors Roderick and Wiswall began to actively solicit negative information about her and then employed this information to criticize Yanowitz both in the presence of her subordinates and in written memoranda. These supervisors refused to review her response to these charges and employed the negative information received to justify new, restrictive directives regarding her future performance and to impair her effectiveness with her staff.

These actions constituted more than mere inconveniences or insignificant changes in job responsibilities. Months of unwarranted and public criticism of a previously honored employee, an implied threat of termination, contacts with subordinates that only could have the effect of undermining a manager's effectiveness, and new regulation of the manner in which the manager oversaw her territory did more than inconvenience Yanowitz. Such actions, which for purposes of this discussion we must assume were unjustified and were meant to punish Yanowitz for her failure to carry out her supervisor's order, placed her career in jeopardy. Indeed, Roderick so much as told Yanowitz that unless there were immediate changes, her career at L'Oreal was over. Actions that threaten to derail an employee's career are objectively adverse, and the evidence presented here creates a factual dispute that cannot be resolved at the summary judgment stage.

Contrary to L'Oreal's assertion, this is not a case in which the plaintiff alleges merely commonplace indignities typical of the workplace. Yanowitz alleges a pattern of systematic retaliation, and numerous cases recognize that adverse employment action includes treatment similar to that here at issue.

We emphasize that we do not determine that the alleged adverse action occurred, or that it was not justified by bona fide concerns on the part of L'Oreal with regard to Yanowitz's general performance at work that might yet be proved at trial. We hold only that, at the summary adjudication stage, Yanowitz's evidence was sufficient to satisfy the adverse action element of her prima facie case. It remains for the trier of fact to decide whether Yanowitz's allegations are true.

IV.

Finally, L'Oreal argues that the Court of Appeal erred in holding that Yanowitz met her burden of establishing that L'Oreal's stated nonretaliatory grounds for taking the actions against her were pretextual. L'Oreal points to an August 5, 1997 memo from Roderick to Sears — written months before the incident with Wiswall — that severely criticized Yanowitz for deficiencies in her "listening" skills and her "attitude," and to Yanowitz's admission that the November 1997 merger created problems in her department and left her with additional job responsibilities that may have had an impact on her performance. L'Oreal additionally proffered evidence that it had received complaints about Yanowitz from customers before and after the incidents with Wiswall and that these complaints expressed negative feedback about Yanowitz, including an expressed desire by certain corporate customers not to work with Yanowitz again.

The evidence proffered by L'Oreal does indicate that there were problems with Yanowitz's performance both before and after the incident with Wiswall, but such evidence is not sufficient in itself to support the trial court's grant of summary judgment in L'Oreal's favor. The record reflects that many of the problems identified in the negative performance reviews had been associated with Yanowitz in a number of performance reviews conducted between 1987 and 1996. Despite these criticisms, however, these same performance reviews consistently rated Yanowitz "above expectation," and in 1997 — the year before the incidents here at issue — Yanowitz was awarded the sales manager of the year award. Moreover, there is no evidence that at the time of these earlier negative evaluations, L'Oreal actively solicited negative feedback about Yanowitz, berated her in the presence of her staff, or threatened to terminate her unless her performance improved. Roderick's active solicitation of negative information concerning Yanowitz in the spring of 1998 strongly suggests the possibility that her employer was engaged in a search for a pretextual basis for discipline, which in turn suggests that the subsequent discipline imposed was for purposes of retaliation.

Thus, we conclude that the record reveals triable issues of fact as to whether L'Oreal's heightened response to Yanowitz's allegedly poor performance — after she refused to follow Wiswall's directive — was retaliation for her protected activity under the FEHA. Taking into account all of the evidence submitted in support of and in opposition to the summary judgment motion, there exists a *genuine issue of material fact* as to whether L'Oreal's articulated, nonretaliatory reasons for its actions were pretextual. Therefore, the Court of Appeal properly held that the trial court's grant of summary judgment in favor of L'Oreal cannot be sustained on this ground.

Starbucks Corp., 372 NLRB No. 122 (N.L.R.B. Aug. 9, 2023)

CHAIRMAN MCFERRAN AND MEMBERS WILCOX AND PROUTY

On October 7, 2022, Administrative Law Judge Geoffrey Carter issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, to amend the remedy,[41] and to adopt the recommended Order as modified and set forth in full below.

The judge found, among other things, that the Respondent violated Section 8(a)(3) and 8(a)(4) by discharging employee Hannah Whitbeck. As explained below, we adopt the judge's finding that the discharge violated the Act as alleged.

Background

The Respondent is engaged in the operation of public restaurants selling food and beverages throughout the United States, including, as relevant here, five stores in Ann Arbor, Michigan, one of which is located at 300 South Main Street (Main and Liberty).These stores are part of a District of approximately 10 stores in Ann Arbor and the surrounding area, overseen by Respondent's District Manager, Paige Schmehl. Hannah Whitbeck was a shift supervisor at the Respondent's Main and Liberty store. Whitbeck reported directly to the Store Manager, Erin Lind, who in turn reports to Schmehl.

41. (n.3 in opinion) The Respondent excepts to the judge's ordering of a notice reading to remedy Whitbeck's unlawful discharge. Contrary to the judge, in the circumstances of this case, we find that the Board's standard remedies suffice to inform employees of the Respondent's unlawful conduct. In so doing, we observe that the circumstances of this case are distinguishable from those presented in *Gavilon Grain, LLC*, 371 NLRB No. 79 (2022), and *Absolute Healthcare d/b/a Curaleaf Arizona*, 372 NLRB No. 16 (2022), in which high-level management officials openly participated in a widely disseminated course of unlawful conduct. We have thus amended the judge's recommended remedy and Order to remove the notice reading. We shall substitute a new notice to conform to the Order as modified.

In about January 2022, Whitbeck, in collaboration with a coworker, initiated a union organizing effort at her store by contacting Workers United (the Union). Whitbeck and her coworkers viewed her as the lead organizer at the Main and Liberty store. Whitbeck became visible as a union advocate to the Respondent when, on February 4, she began wearing a union button at work and sent a letter, signed by her and a handful of coworkers to the Respondent's CEO, requesting that the Respondent voluntarily recognize the Union as their collective-bargaining representative.

On February 8, the Union filed a petition to represent the employees at Main and Liberty. Contemporaneously, the Union filed petitions to represent the employees at three other Ann Arbor stores, including its store on Zeeb Road. The Respondent actively opposed the Union's coordinated organizing effort among the Ann Arbor stores in Schmehl's District.

The Board held a representation hearing covering the petitions for the five Ann Arbor locations. Whitbeck attended the last day of the hearing and was noticed by Schmehl, who was also present for 10-15 minutes of the hearing. On March 20, employees at the Respondent's Zeeb Road store held a "sip-in" event in support of the union organizing effort there, during which volunteers handed out Union buttons and "post it" notes to customers entering the store to encourage them to post supportive comments regarding the organizing campaign on the store's community board. Whitbeck was on duty at Main and Liberty and did not participate, but Schmehl attended this 3-hour event, periodically removing "post it" notes from the board. Thereafter, on March 23, the Union filed a charge against the Respondent referencing Whitbeck, which the Respondent received on March 28.

During this same time period, the Respondent was investigating an incident involving Whitbeck's violation of the Respondent's "two-employee" rule. The rule requires that there be two employees in a store at all times. As discussed in detail in the judge's decision, on February 27, Whitbeck departed work promptly at her scheduled leave time although the other shift supervisor on duty (with whom she had a dispute earlier in the shift) had not yet returned from his break, leaving the barista on duty alone in the store until the other shift supervisor returned. After learning from the barista on duty, via text message, that he had been alone in store for over a half hour, Whitbeck filed an incident report the following day.

District Manager Schmehl oversaw the investigation of the incident with guidance from the Respondent's Partner Relations Support Center (PRSC), which handles human resources matters, and the Respondent's legal department. The Respondent's corrective action policy states generally that "the form of the corrective action taken will depend on the seriousness of the situation and the surrounding circumstances." The Respondent also maintains a nonbinding job aid that recommends a final warning for "two employee"-rule violations. Consistent with the job aid, a former store manager at Main and Liberty, Laura Gibbons, testified that, in consultation with PRSC, she issued a final warning to a shift supervisor (A.H.) in 2021 for violating the "two employee" rule. Nevertheless, on March 21, Schmehl recommended that Whitbeck be discharged for violating the rule.

The Respondent's legal department authorized Whitbeck's discharge on April 3. Schmehl testified that the final discharge decision was a product of her collaboration with PRSC and the Respondent's legal team. It is undisputed that the Respondent has not discharged any other employees at any of its Michigan locations for violating the "two employee" rule.

Discussion

Applying Wright Line, the judge found that the Respondent violated Section 8(a)(3) and 8(a)(4) of the Act by discharging Whitbeck on April 11. Under Wright Line, the General Counsel bears the initial burden of establishing that an employee's union or other protected activity was a motivating factor in the employer's adverse employment action. The General Counsel meets this burden by proving that (1) the employee engaged in union or other protected activity, (2) the employer knew of that activity, and (3) the employer bore animus against union or other protected activity. An employer's motivation is a question of fact that may be inferred from both direct and circumstantial evidence on the record as a whole. Circumstantial evidence of discriminatory motive may include, among other factors, the timing of the action in relation to the union or other protected conduct; contemporaneous unfair labor practices; shifting, false, or exaggerated reasons offered for the action; failure to conduct a meaningful investigation; departures from past practices; and disparate treatment of the employee. Once the General Counsel sustains her initial burden under Wright Line, the burden shifts to the employer to show that it would have taken the same action even in the absence of the protected activity.

Regarding the General Counsel's initial burden, as the judge made clear, there is no dispute that Whitbeck had engaged in protected activity, including supporting the Union and participating in Board proceedings, and that the Respondent was aware of such activities at the time it discharged her on April 11. In addition, in finding that the Respondent acted with animus in discharging Whitbeck, the judge relied upon (1) District Manager Schmehl's activity during the March 20 "sip-in" event at Zeeb Road, which the judge found arguably created an impression of surveillance, (2) the Respondent's disparate treatment of Whitbeck as compared with lesser discipline of another shift supervisor and the recommended corrective action set forth in Respondent's job aid, (3) the Respondent's deviation from its investigative practice in determining the level of discipline for Whitbeck, and (4) timing. As explained below, we agree with the judge that these factors provide ample evidence that the Respondent's animus was a motivating factor in Whitbeck's discharge.

In adopting the judge's finding that District Manager Schmehl's activity during the March 20 "sip-in" at the Respondent's Zeeb Road store supports an inference of unlawful motivation by the Respondent, we note that Schmehl's only discernable work activity during her unusual and unexplained 3-hour presence at the store was to remove "post it" notes from the community board, a task that the acting store manager clearly could have performed without assistance. Although there is no allegation in the complaint that Schmehl's actions created an impression of surveillance, and we do not find such an independent Section 8(a)(1) violation here, Schmehl's conduct nevertheless sheds light on the Respondent's unlawful motive in discharging Whitbeck. Moreover, we reject the Respondent's contention that the incident is irrelevant because Whitbeck did not participate in the sip-in. In this regard, we find the larger context here significant: on February 8, the Union had filed petitions to represent the Zeeb Road employees and the employees at Whitbeck's "home" store, along with petitions at two other Ann Arbor stores in Schmehl's District, and had filed a petition at a fifth Ann Arbor store only a few days earlier, on January 31. The Respondent actively opposed this coordinated organizing effort in which Whitbeck played a visible part.

We further agree with the judge that the Respondent subjected Whitbeck to disparate treatment in discharging her. Specifically, the Respondent departed from its job aid's recommendation of a final warning for violations of the "two employee" rule and from its history of issuing a final warning for a previous violation of the "two employee" rule. Even assuming, as the Respondent contends, that Schmehl was unaware of the previous lesser discipline issued to another shift supervisor who violated the "two employee" rule, that fact does not undercut a finding of disparate treatment here given the participation of multiple overlapping decisionmakers. Indeed, Schmehl admitted that the Respondent's Partner Relations Support Center (PRSC), which handles human resources issues and was involved in the previous discipline, collaborated with her in the final determination to discharge Whitbeck. *Compare New Otani Hotel & Garden*, 325 NLRB 928 (1998) (no disparate treatment warranting inference of unlawful motive where multiple decision makers' testimony established that none was aware of previous instances of misconduct similar to that which prompted alleged unlawful discipline). On these facts, we find, in agreement with the judge, that the Respondent's disparate treatment of Whitbeck supports an inference of unlawful motive.

Moreover, we agree with the judge's finding that the Respondent's failure to consider surrounding circumstances in evaluating the appropriate discipline for Whitbeck lends further support to the inference of unlawful motive here. We rely both on the language of the Respondent's corrective action policy–i.e., "the form of the corrective action taken will depend on the seriousness of the situation and the surrounding circumstances"–and on Schmehl's testimony that the Respondent's practice was consistent with that policy. Indeed, Schmehl specifically asserted that Whitbeck's reasons for her prompt departure at the end of her shift, which resulted in her leaving a partner alone in the store, would have been considered during the investigation. Yet, as the judge found, the Respondent entirely failed to follow up on Whitbeck's indication in her incident report that she had "something serious" after work that necessitated her prompt departure.

Finally, we agree with the judge that the timing also supports the inference that Whitbeck's discharge was unlawfully motivated. In so finding, we note that Schmehl recommended Whitbeck's discharge the day after her unusual activity in observing the "sip-in" at Zeeb Road and only 2-1/2 weeks after she noted Whitbeck in attendance at the Board's representation hearing on the petitions pending in Schmehl's district, including those for Zeeb Road and Whitbeck's home store. Unlike the judge, we further rely on the timing of the discharge in relation to the Union's filing of an unfair labor practice charge naming Whitbeck. It is undisputed that the Respondent's legal department–which, by Schmehl's own admission, also participated in the discharge decision–did not authorize the discharge until April 3, nearly 2 weeks after Schmehl recommended it and only 5 days after the Respondent received the charge.

Based on the foregoing, we find, in agreement with the judge, that the General Counsel sustained her initial burden under Wright Line of proving that the Respondent's discharge of Whitbeck was unlawfully motivated. Having done so, we turn to the Respondent's Wright Line defense burden. In finding that the Respondent did not meet its defense burden here, the judge noted that the Respondent asserted that it discharged Whitbeck for "knowingly" violating the "two employee" rule, but found that the Respondent failed to present any evidence that discharge would be the appropriate level of discipline for a "knowing" violation. In addition, the judge relied on the lack of comparator evidence from the Respondent that it had discharged other employees for violating the "two employee" rule. Further, the judge relied on the fact that Respondent's disciplinary job aid recommends a final written warning, not discharge, for violations of the "two employee" rule. For the reasons stated by the judge, we agree that the Respondent failed to establish that it would have discharged Whitbeck even absent her Section 7 and other protected activity. In particular, in the absence of evidence that any other employee in one of the Respondent's Michigan stores ever had been discharged for violating the rule, we agree with the judge that the Respondent failed to establish that it would have discharged Whitbeck for violating the "two employee" rule even absent her protected activity. See Tschiggfrie Properties, 368 NLRB No. 120, supra, slip op. at 5 (employer failed to meet defense burden, in part, based on absence of evidence that any other employee had previously been discharged for misconduct on which the employer relied).

Having found, in agreement with the judge, that the General Counsel sustained her initial burden under Wright Line and that the Respondent failed to establish that it would have discharged Whitbeck even absent her protected activities, we adopt the judge's findings that the Respondent violated Section 8(a)(3) and (4) by discharging Whitbeck on April 11.

ORDER

The National Labor Relations Board orders that the Respondent, Starbucks Corporation, Ann Arbor, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for supporting Workers United or any other labor organization.

(b) Discharging or otherwise discriminating against employees for participating in National Labor Relations Board processes.

(c) 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) Within 14 days from the date of this Order, offer Hannah Whitbeck full reinstatement to her former job or, if that no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights or privileges previously enjoyed.

(b) Make Hannah Whitbeck whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of the discrimination against her in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and, within 3 days thereafter, notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(d) Compensate Hannah Whitbeck for the adverse tax consequences, if any, 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.

(e) 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 Hannah Whitbeck's corresponding W-2 forms reflecting the backpay award.

(f) 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.

(g) Within 14 days after service by the Region, post at its Main and Liberty facility in Ann Arbor, 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 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 the facility at any time since April 11, 2022.

(h) 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 Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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 discharge or otherwise discriminate against any of you for supporting Workers United or any other labor organization.

WE WILL NOT discharge or otherwise discriminate against any of you for participating in National Labor Relations Board processes.

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, within 14 days of the Board's Order, offer Hannah Whitbeck full reinstatement to her former job or, if that no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Hannah Whitbeck whole for any loss of earnings and other benefits resulting from her discharge less any net interim earnings, plus interest, and WE WILL also make such employee whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful discharge, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Hannah Whitbeck for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 7, within 21 days of the date that the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL 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 Hannah Whitbeck's corresponding W-2 forms reflecting the

NLRB Notice

Driskell v. Summit Contracting Group, Inc., 828 Fed. Appx. 858 (4th Cir. 2020)

DIAZ, Circuit Judge

I.

A.

Summit is a general contractor that manages construction projects. On June 4, 2015, Summit hired Driskell as an Assistant Superintendent and promptly assigned him to a project in Charlotte, North Carolina. He reported to Superintendent Daniel Rhyner, who in turn reported to the Project Manager, Steve Fudge. Driskell's father, Tom Driskell, had been a senior Summit employee for years.

In June and July 2015, Driskell noticed that Rhyner frequently drank alcohol at lunch and returned to work intoxicated, occasionally acting belligerently. One day, Rhyner drunkenly brandished a handgun at the job site. Summit's policies prohibit visiting a job site after drinking or while carrying a gun.

Driskell reported Rhyner's drinking to more senior employees several times. During his first week at the Charlotte project, he complained to Fudge that it was a safety issue. Fudge relayed this complaint to Marc Padgett, Summit's president and chief executive officer. Tom Driskell also relayed his son's complaints to Padgett's wife, Nicole Padgett, who was Summit's chief administrative officer. The Padgetts, however, suspected that the Driskells were scheming to file a "bogus lawsuit" against Summit.

On the night of July 16, 2015, Justin Driskell ran into Rhyner, who was drunk, in the parking lot of a hotel where many employees were staying. They argued about a workplace safety issue, at which point Rhyner angrily told Driskell to pack his things and leave the job site.

Later that night, Driskell spoke with Mr. Padgett on the phone and complained again about Rhyner's drinking on the job. Padgett told Driskell to disregard what Rhyner had said about leaving the job site and that he would send a senior employee, Tom Born, to Charlotte to investigate Driskell's complaints. After the call, Rhyner apologized to Driskell. Mr. Padgett also alerted Rhyner that Born was coming to investigate the Driskells' allegations about his drinking.

On July 18, Born met with Rhyner and told him that the Driskells had complained about him. Born also asked a few employees whether they had seen Rhyner drink at the job site, which none of them had. He didn't test Rhyner for drugs or alcohol, check his company credit card receipts (which reflected purchases of alcohol), or ask anyone if they had seen Rhyner drink at lunch, as Driskell had alleged.

Born then met with Driskell. He asked no questions about Rhyner's drinking. Instead, he told Driskell to stop telling people what was going on at the job site, and that whatever happened at the job site should stay there. Born then took Rhyner and other employees (but not Driskell) out to lunch, buying Rhyner two beers. This wasn't a violation of company rules because Rhyner wasn't going back to work after lunch.

The next day, Born sent a report to Mr. Padgett, concluding that Driskell was "a good kid" but needed to "grow a pair of balls." Mr. Padgett agreed.

The day after that (July 20), Driskell saw Rhyner, who appeared drunk, in the hotel parking lot. At Rhyner's insistence, the two had a beer together. Rhyner then said that he was removing some employees from the team that Driskell supervised, and that Driskell's team needed to increase its production (even though it would have fewer members). In response, Driskell said that pushing his team any harder would create safety issues. The two argued about this and cursed each other.

According to Driskell and an eyewitness, Driskell then turned toward his truck to leave. Rhyner followed him and punched him in the face repeatedly. Driskell didn't throw a punch, but wrestled with Rhyner, threw him over his head, and put him in a headlock. Neither party was hurt seriously, although Rhyner had to wear a neck brace for two weeks. During the fight, Rhyner told Driskell, "You're fired."

Later that evening, Driskell spoke to Mr. Padgett on the phone. Padgett told Driskell that he wasn't fired and that Rhyner lacked the authority to fire him. Driskell replied that he would quit if Rhyner remained at Summit. Padgett didn't respond to that threat. Driskell also met with Fudge that night, who asked Driskell to return his work tools. Driskell expressed confusion about why he had to do that, as he planned to continue working at Summit, but he ultimately complied.

That same night, Driskell filed a criminal complaint against Rhyner—even though Fudge and Padgett had discouraged him from doing so—which led the police to charge Rhyner with assault. Driskell also visited the emergency room for medical treatment. The doctor examining him said that he could return to work three days later (July 23).

The next morning, Mrs. Padgett emailed her husband and several other employees, writing: "We need to find out what steps to take next because Tom and Justin Driskell are plotting a bogus lawsuit that I sniffed out almost two weeks ago. This whole thing was planned." J.A. 2699. She later followed up to write that Tom Driskell "orchestrated this entire scam" with "the intent to screw Marc Padgett out of 5 MIL."

Driskell took the next two days off and drove to Columbia, South Carolina, where his father lived and where Summit had another work site. He planned to return to work on July 23, but wasn't sure which work site he should report to, as he had been receiving "conflicting information" (presumably from his father) on this point. Driskell had no paid or unpaid leave time available, so if he was still employed by Summit on July 21 and 22, he was breaking the company's rules by missing work.

Over those two days, Driskell called and texted Fudge repeatedly, seeking clarity on where he should report to work. Fudge didn't answer. On July 22 at 3:37 p.m., Driskell emailed Fudge and Mr. Padgett, saying: "Steve you have refused my calls and text messages. After tomorrow my doctor has cleared me to go back to work, please advise what I'm supposed to do." Padgett promptly forwarded this message to his wife, who started a group email thread that included her husband, Born, and Zach Graham (another employee).

At 4:23 p.m. on July 22, Mrs. Padgett explained in the group thread that she told Fudge not to respond to Driskell "before we knew the plan from the attorney." J.A. 2702. The next day, the group debated via email which of them should "give Driskell the boot." Born wrote, "I think Zach was the designated terminator because Steve and I would have personal motivations to Fire him." Fudge also noted that Driskell still had his company phone and iPad, and asked Graham to collect Driskell's devices. But notwithstanding this conversation, no Summit employee (except for Rhyner back on July 20) ever told Driskell that he was fired.

Driskell's company-issued phone and iPad were deactivated on July 22, shortly after he had emailed Fudge and Mr. Padgett. At trial, he testified that he "knew at that point that he had been terminated and that it was not going to be reversed." Nevertheless, he texted Fudge the following message from his personal phone later that evening: "Still haven't heard any word as to what you need me to do. Please give me a call." Fudge never responded.

The next afternoon (July 23), Driskell turned in his company-issued devices at the Columbia job site. He explained at trial that he did so because he "knew that he had been fired and that if he kept company property that he could be prosecuted for theft."

About a month later, Driskell applied for a new job at another company. On the application, he checked a box indicating that he had never been "fired from a job." At trial, Driskell explained that this was a lie to improve his chances of getting the new job.

B.

In January 2016, Driskell filed a complaint with the North Carolina Department of Labor. He alleged that he was fired because of his complaints about Rhyner and his refusal (for safety reasons) to follow Rhyner's instructions to increase his team's production, and because he "became a threat, risk or liability to the Company after Mr. Rhyner attacked him." After the Labor Department declined to investigate his complaint, Driskell asked for and received a right-to-sue letter.

Driskell then filed this suit, bringing claims for, as relevant here, retaliatory termination in violation of North Carolina's Retaliatory Employment Discrimination Act ("REDA") and wrongful discharge in violation of North Carolina common law. He alleged two theories for why Summit fired him: (1) because of his complaints about Rhyner's drinking and their fight, and (2) because Summit believed that he would file a workers' compensation claim due to his injuries from his fight with Rhyner.

The jury found that Summit had fired Driskell and, in doing so, violated REDA and North Carolina common law. The jury didn't specify which of Driskell's two theories of retaliation it accepted. It also awarded Driskell $65,000 in compensatory damages (representing his lost wages and benefits) for his two claims (which he could collect only once) and $681,000 in punitive damages on the wrongful-discharge claim.

II.

A.

First, Summit insists that it was entitled to judgment as a matter of law on Driskell's REDA and wrongful-discharge claims because it never fired him; rather, he quit. We must affirm the district court unless no reasonable jury could have ruled for Driskell.

As relevant here, REDA provides that:

Additional provisions from the statute appear below.

> No person shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to … [f]ile a claim or complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to [the Occupational Safety and Health Act of North Carolina ("OSHANC") or the North Carolina Workers' Compensation Act].

To prevail on a REDA claim, a plaintiff must show that (1) he exercised his right to engage in protected activity; (2) he suffered an adverse employment action; and (3) a causal connection exists between his exercise of the protected activity and the retaliatory action. And a wrongful-discharge claim requires a plaintiff to "identify a specified North Carolina public policy"—here, the policy against retaliation codified in REDA—"that was violated by an employer in discharging the employee."

As an initial matter, we note that North Carolina law provides no legal standard for determining whether an employee was fired or quit. Relatedly, we have found no authority requiring that an employer expressly tell an employee that he's been fired.

With that in mind, we conclude that the evidence supports a finding that Summit fired Driskell on either July 22 or July 23, 2015. Most significantly, Summit deactivated Driskell's work-issued devices on July 22. Fudge and Padgett also didn't respond to Driskell's attempts to contact them on July 21 or 22, and Fudge had asked Driskell to return his work tools on the night of July 20. And when Driskell returned his work-issued devices on July 23, no one directed him to continue working at Summit or told him that Summit mistakenly deactivated his devices. A reasonable person in Driskell's position would have understood that he had been terminated, and Summit's internal emails on July 22 and 23 prove that it did in fact intend to terminate Driskell, despite Padgett's statement on July 20 that Driskell wasn't fired.

At no point did Driskell quit his job. While he did tell Mr. Padgett on July 20 that he would quit if Rhyner remained employed by Summit, threatening to quit and actually doing it are two different things. And while he also broke Summit's rules by missing work on July 21 and 22, he did so only because his doctor told him to, and in any event, breaking an employer's rules doesn't necessarily signify an intent to quit. Indeed, Rhyner violated Summit's rules by taking two weeks off from work after his fight with Driskell, and yet he received no punishment and continues to work for Summit.

Nor does Driskell's statement on a job application that he had never been fired doom his claims. To the contrary, a reasonable jury could credit his explanation that he lied to help his chances of getting a new job. Statements on job applications aren't binding admissions, contrary to what Summit argues. The case Summit points to, *Warch v. Ohio Cas. Ins. Co.*, 435 F.3d 510 (4th Cir. 2006), doesn't support that proposition. There, in ruling against a plaintiff, we relied on the plaintiff's "failure to present any evidence genuinely disputing" the fact that he had admitted in a job application. Here, Driskell did present such evidence.

B.

Next, Summit contends that REDA doesn't protect internal complaints to one's own employer. So, Summit argues that it is entitled to judgment as a matter of law because, even if Summit did fire Driskell for his complaints to Mr. Padgett, that couldn't support a REDA claim.

Whether REDA protects Driskell's complaints is a question of law, which we review de novo. We agree with the district court that, while REDA doesn't protect every internal complaint about workplace safety, it does protect Driskell's complaints to Mr. Padgett.

By its terms, REDA protects employees who "initiate any inquiry or investigation or provide information to any person with respect to" OSHANC. "The Supreme Court of North Carolina has not ruled whether an internal complaint is a protected activity under REDA."

"OSHNC": NC Occupational Safety & Health Act, N.C.G.S. Chap. 95, Art. 16, one of the statutes referenced in the Retaliatory Employment Discrimination Act, N.C.G.S. § 95-241(a).

The Court of Appeals of North Carolina, however, has indicated that some internal complaints are protected. In *Pierce v. Atlantic Grp., Inc.*, 219 N.C.App. 19 (2012), the court found "persuasive" a district court holding that REDA protected a plaintiff's communications to an internal auditor about an ongoing investigation into health and safety practices.

And in a later case, the Court of Appeals found that REDA would protect plaintiffs who were allegedly fired for photographing unsafe working conditions and complaining about those conditions to their boss, who replied that he wasn't interested in such complaints. The court reasoned that REDA's "primary purpose is to ensure that employees are not discouraged from reporting violations of OSHANC."

On the flip side, the Court of Appeals has also recognized "that merely talking to an internal supervisor about potential safety concerns is not a 'protected activity' under REDA". For instance, the plaintiff in Pierce proposed to his supervisors a process by which the company might comply with new safety regulations, raising it on a weekly basis for about a month without ever getting a response.

The Court of Appeals found that such activity was not protected because the plaintiff "spoke only to his supervisors" and "there was no evidence of an investigation" into the defendant's practices. While the Court of Appeals didn't explain why it mattered that the plaintiff spoke only to his supervisors, we suspect that it's because employees do that in the ordinary course. An employee who mentions an OSHANC issue to a supervisor won't typically be seeking to assist or initiate an "inquiry" or "investigation," which is what REDA protects. In contrast, an employee who goes over a supervisor's head and complains to the company president or an internal auditor will typically intend to assist or initiate an inquiry or investigation.

The Court of Appeals also cited approvingly a district court's holding "that a plaintiff's criticism of his supervisor to a division manager" wasn't protected. In that case, the plaintiff's criticism of his supervisor was largely unrelated to workplace safety.

We deduce from these authorities the following principles. Internal complaints alleging ongoing OSHANC violations, like the ones in Bigelow and Jurrissen (and unlike the one in Pierce, where the plaintiff proposed a way to comply with new safety rules but didn't allege any ongoing violations), can be protected. In assessing whether a particular complaint is protected, we should also consider: whether it relates or leads to an investigation, whether it's made to someone other than the plaintiff's "supervisors or managers," and whether workplace safety is a primary focus of the complaint.

Driskell's complaints about Rhyner meet these criteria. Driskell alleged OSHANC violations: namely, Rhyner's presence at the work site while intoxicated and his assault on Driskell. See N.C. Gen. Stat. § 95–129(1) (requiring employees to furnish "a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to employees"). These allegations led to Born's investigation into Rhyner's drinking. Driskell complained frequently to Mr. Padgett, who is Summit's president and chief executive officer, not a mere supervisor or manager. And workplace safety was the focus of Driskell's complaints. Thus, REDA protects Driskell's complaints to Mr. Padgett.

C.

Summit also makes two arguments that are specific to Driskell's second theory of retaliation: namely, that Summit expected Driskell to file a workers' compensation claim. While Driskell's first theory suffices to support the jury's verdict on the merits (and its compensatory-damages award), we address the second theory as well because it's relevant to evaluating Summit's challenge to the punitive-damages award.

1.

First, Summit assails the district court's jury instruction that "it is against the law for an employer to terminate an employee because the employer believes the employee will file a workers' compensation claim against the employer." In Summit's view, REDA's text requires an employee to actually file or "threaten to" file a workers' compensation claim. Because Driskell never explicitly threatened to file a claim, Summit insists, his second theory of retaliation shouldn't have been submitted to the jury. Whether the jury instruction was correct is another question of law that we review de novo.

We conclude that the jury instruction was correct, as no explicit threat by the plaintiff is required. In *Abels v. Renfro Corp.*, the Supreme Court of North Carolina construed REDA's predecessor statute—whose language was much narrower than REDA's6—to prohibit an employer from firing someone because the employer "anticipated her good-faith filing of a workers' compensation claim."

The plaintiff in Abels didn't threaten to file a claim. Rather, the employer was aware that she had suffered an injury and that her doctor had requested that she be given a leave of absence. Upon learning that, the employer discharged her "to forestall the anticipated filing of a workers' compensation claim." That was enough, the Supreme Court held, to support the jury's verdict for the plaintiff.

The only difference between the Abels standard and the jury instruction in this case is that the district court substituted "believe" for "anticipate." This difference is immaterial. The two words are analogous in that (1) they relate to the defendant's subjective expectation and (2) neither requires the plaintiff to have explicitly threatened to file a claim. And REDA was meant to expand its predecessor's protections, not narrow them. So, we must interpret REDA to prevent an employer from firing an individual because it anticipates (or believes) that she will file a workers' compensation claim. The jury instruction was therefore proper.

2.

Additionally, Summit asserts that Driskell failed to exhaust his administrative remedies as to his workers' compensation theory because he didn't raise that theory in his complaint to the North Carolina Department of Labor, relying instead on his OSHANC theory. We disagree.

Before bringing a REDA claim, a plaintiff must: "file a written complaint with the Commissioner of Labor alleging [a REDA] violation," N.C. Gen. Stat. § 95-242(a); obtain a right-to-sue letter, id. §§ 95-242(a), 95-243(a); and commence a civil action within ninety days of the letter's issuance, id. § 95-243(b). Driskell did that, so he exhausted his administrative remedies. Since North Carolina law doesn't require that a REDA suit be based on the same theory of retaliation that supported the plaintiff's administrative complaint, Summit's argument misses the mark.

D.

Next, Summit maintains that no reasonable jury could have found causation, i.e., that Summit fired Driskell because of his complaints or because it believed that he would file a worker's compensation claim. Instead, Summit posits, it fired Driskell for a legitimate reason: his violations of company policy, including insubordination, cursing and fighting his supervisor, and taking two days off when he had no leave available.

Summit is wrong. There was ample evidence to support causation with respect to both of Driskell's retaliation theories, including: Summit's internal emails strategizing about how to fire Driskell so as to avoid the appearance of illegality; the Padgetts' characterization of his complaints as a "scam," and as preparation for a "bogus lawsuit"; Born's lackluster investigation of Driskell's complaints and comment that he needed to "grow a pair of balls," with which Mr. Padgett agreed; Summit's failure to punish Rhyner for fighting with Driskell; and Mrs. Padgett's general hostility toward OSHANC accident reports and workers' compensation claims.

Indeed, the evidence of causation here is stronger than in Abels, where the Supreme Court of North Carolina held that the record supported an inference of retaliation. There, the plaintiff showed only that she was a good employee and that she was discharged shortly after her employer learned of her injury. In contrast, Driskell presented direct evidence of retaliatory animus.

There's also no contemporaneous evidence corroborating Summit's explanation for why it fired Driskell. Thus, a reasonable jury could infer from the late appearance of Summit's current justification that it is a post-hoc rationale, not a legitimate explanation for its adverse employment decision.

E.

Next, Summit asserts that it was entitled to judgment on Driskell's wrongful-discharge claim because Driskell never filed or threatened to file an OSHA or workers' compensation claim. Summit is mistaken.

As Summit recognizes, Driskell's "wrongful termination claim rises or falls on the viability of his REDA-based claim." This is because "wrongful discharge claims have been recognized in North Carolina where the employee was discharged for engaging in a legally protected activity," like complaining about OSHANC violations. Thus, just as we affirm the verdict for Driskell on his REDA claim, so too do we affirm the verdict on his wrongful-discharge claim.

NC Retaliatory Employment Discrimination Act, N.C.G.S. § 95-240 et seq.

§ 95-240. Definitions

The following definitions apply in this Article:

(1) "Person" means any individual, partnership, association, corporation, business trust, legal representative, the State, a city, town, county, municipality, local agency, or other entity of government.

(2) "Retaliatory action" means the discharge, suspension, demotion,

retaliatory relocation of an employee, or other adverse employment action taken against an employee in the terms, conditions, privileges, and benefits of employment.

§ 95-241. Discrimination Prohibited

(a) No person shall discriminate or take any retaliatory action against an employee because the employee in good faith does or threatens to do any of the following:

(1) File a claim or complaint, initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to any of the following:

a. Chapter 97 of the General Statutes.

b. Article 2A or Article 16 of this Chapter.

c. Article 2A of Chapter 74 of the General Statutes.

d. G.S. 95-28.1.

e. Article 16 of Chapter 127A of the General Statutes.

f. G.S. 95-28.1A.

g. Article 52 of Chapter 143 of the General Statutes.

h. Article 5F of Chapter 90 of the General Statutes.

(2) Cause any of the activities listed in subdivision (1) of this subsection to be initiated on an employee's behalf.

(3) Exercise any right on behalf of the employee or any other employee afforded by Article 2A or Article 16 of this Chapter, by Article 2A of Chapter 74 of the General Statutes, or by Article 52 of Chapter 143 of the General Statutes.

(4) Comply with the provisions of Article 27 of Chapter 7B of the General Statutes.

(5) Exercise rights under Chapter 50B. Actions brought under this subdivision shall be in accordance with the provisions of G.S. 50B-5.5.

(b) It shall not be a violation of this Article for a person to discharge or take any other unfavorable action with respect to an employee who has engaged in protected activity as set forth under this Article if the person proves by the greater weight of the evidence that it would have taken the same unfavorable action in the absence of the protected activity of the employee.

§ 95-242. Complaint; investigation; conciliation.

(a) An employee allegedly aggrieved by a violation of G.S. 95-241 may file a written complaint with the Commissioner of Labor alleging the violation. The complaint shall be filed within 180 days of the alleged violation. Within 20 days following receipt of the complaint, the Commissioner shall forward a copy of the complaint to the person alleged to have committed the violation and shall initiate an investigation. If the Commissioner determines after the investigation that there is not reasonable cause to believe that the allegation is true, the Commissioner shall dismiss the complaint, promptly notify the employee and the respondent, and issue a right-to-sue letter to the employee that will enable the employee to bring a civil action pursuant to G.S. 95-243. If the Commissioner determines after investigation that there is reasonable cause to believe that the allegation is true, the Commissioner shall attempt to eliminate the alleged violation by informal methods which may consist of conference, conciliation, and persuasion. The Commissioner shall make a determination as soon as possible and, in any event, not later than 90 days after the filing of the complaint.

(b) If the Commissioner is unable to resolve the alleged violation through the informal methods, the Commissioner shall notify the parties in writing that conciliation efforts have failed. The Commissioner shall then either file a civil action on behalf of the employee pursuant to G.S. 95-243 or issue a right-to-sue letter to the employee enabling the employee to bring a civil action pursuant to G.S. 95-243.

(b1) The Commissioner may reopen an investigation under this Article for good cause shown within 30 days of receipt of the right-to-sue letter. If an investigation is reopened pursuant to this section, the 90-day time limit set forth in G.S. 95-243(b) shall not commence until the new investigation is complete and either a new right-to-sue letter is issued or the

Commissioner notifies the parties in writing that conciliation efforts have failed.

(c) An employee may make a written request to the Commissioner for a right-to-sue letter after 90 days following the filing of a complaint if the Commissioner has not issued a notice of conciliation failure and has not commenced an action pursuant to G.S. 95-242.

(d) Nothing said or done during the use of the informal methods described in subsection (a) of this section may be made public by the Commissioner or used as evidence in a subsequent proceeding under this Article without the written consent of the persons concerned.

(e) The Commissioner's files and the Commissioner's other records relating to investigations and enforcement proceedings pursuant to this Article shall not be subject to inspection and examination as authorized by G.S. 132-6 while such investigations and proceedings are open or pending in the trial court division.

(f) In making inspections and investigations under this Article, the Commissioner or his duly authorized agents may, in addition to exercising the authority granted in G.S. 95-4, issue subpoenas to require the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be reimbursed for all travel and other necessary expenses which shall be claimed and paid in accordance with the prevailing travel reimbursement requirements of the State. In the case of failure or refusal of any person to obey a subpoena under this Article, the district court judge or superior court judge of the county in which the inspection or investigation is conducted shall, upon the application of the Commissioner, have jurisdiction to issue an order requiring compliance.

§ 95-243. Civil action.

(a) An employee who has been issued a right-to-sue letter or the Commissioner of Labor may commence a civil action in the superior court of the county where the violation occurred, where the complainant resides, or where the respondent resides or has his principal place of business.

(b) A civil action under this section shall be commenced by an employee within 90 days of the date upon which the right-to-sue letter was issued or by the Commissioner within 90 days of the date on which the Commissioner notifies the parties in writing that conciliation efforts have failed.

(c) The employee or the Commissioner may seek and the court may award any or all of the following types of relief:

(1) An injunction to enjoin continued violation of this Article.

(2) Reinstatement of the employee to the same position held before the retaliatory action or discrimination or to an equivalent position.

(3) Reinstatement of full fringe benefits and seniority rights.

(4) Compensation for lost wages, lost benefits, and other economic losses that were proximately caused by the retaliatory action or discrimination.

If in an action under this Article the court finds that the employee was injured by a willful violation of G.S. 95-241, the court shall treble the amount awarded under subdivision (4) of this subsection.

The court may award to the plaintiff and assess against the defendant the reasonable costs and expenses, including attorneys' fees, of the plaintiff in bringing an action pursuant to this section. If the court determines that the plaintiff's action is frivolous, it may award to the defendant and assess against the plaintiff the reasonable costs and expenses, including attorneys' fees, of the defendant in defending the action brought pursuant to this section.

(d) Parties to a civil action brought pursuant to this section shall have the right to a jury trial as provided under G.S. 1A-1, Rules of Civil Procedure.

(e) An employee may only bring an action under this section when he has been issued a right-to-sue letter by the Commissioner.

§ 95-244. Effect of Article on other rights.

Nothing in this Article shall be deemed to diminish the rights or remedies of any employee under any collective bargaining agreement, employment contract, other statutory rights or remedies, or at common law. (1991 (Reg. Sess., 1992), c. 1021, s. 1.)

§ 95-245. Rules.

The Commissioner may adopt rules needed to implement this Article pursuant to the provisions of Chapter 150B of the General Statutes.

Note: Protected Activity Under NC REDA

NC REDA applies only to discrimination or retaliation based on employee conduct under the specific North Carolina statutes identified in § 95-241:

N.C.G.S. Chap. 97: Workers' Compensation Act

N.C.G.S. Chap. 95, Art. 2A: Wage & Hour Act

N.C.G.S. Chap. 95, Art. 16: Occupational Safety & Health Act

N.C.G.S. Chap. 74, Art. 2A: Mine Safety & Health Act

N.C.G.S. 95-28.1: Discrimination Against Any Person Possessing Sickle Cell Trait or Hemoglobin C Trait Prohibited

N.C.G.S. Chap. 127A, Art. 16: National Guard Reemployment Rights

N.C.G.S. 95-28.1A: Discrimination Against Persons Based on Genetic Testing or Genetic Information Prohibited

N.C.G.S. Chap. 143, Art. 52: Pesticide Board

N.C.G.S. Chap. 90, Art. 5F: Control of Potential Drug Paraphernalia Products

N.C.G.S. Chap. 7B, Art. 27: Authority over Parents of Juveniles Adjudicated Delinquent or Undisciplined

N.C.G.S. Chap. 50B: Domestic Violence

Myers v. Howmedica Osteonics Corp., No. CV 14-248-M-DLC. (D. Mont. March 30, 2016)

DANA L. CHRISTENSEN, Chief District Judge.

Defendant/Counter-Plaintiff Howmedica Osteonics Corp. d/b/a Stryker Orthopedics ("Stryker") filed a motion for judgment as a matter of law with regard to the wrongful discharge claim brought by Plaintiff/Counter-Defendant Jeremy R. Myers ("Myers"). For the reasons explained below, the Court grants Stryker's motion.

BACKGROUND

Stryker, a medical device and equipment manufacturer, terminated Myers on December 10, 2013, following an investigation into Myers's professional conduct. Myers had begun working for Stryker in 2005 as a sales representative, selling Stryker products to doctors throughout Montana and nearby states. In July, 2010, Stryker promoted Myers to the position of Sales Manager for Stryker's Northwest Branch. Shortly after accepting the promotion, Myers signed a contract including, among other provisions, confidentiality and non-competition obligations. Myers agreed to be bound by those obligations for a year following termination of his employment.

Myers acknowledged that he received and read Stryker's employee handbook and its code of conduct during his employment. Stryker's personnel documents prohibit workplace harassment and promote ethical behavior. The company's published policies also established that Stryker may terminate an employee for violating company policies.

Myers's sales territory performed well under his leadership, and he was rated as outstanding in his 2013 performance review. Toward the end of that year, however, his manager, Scott Curtis ("Curtis"), and human resources manager, Jenny Lavey ("Lavey"), became concerned about Myers's behavior. Following several customer and employee complaints, Curtis and Lavey conducted an investigation into Myers's professional conduct. Immediately following the investigation, and without discussing the matter with Myers, Stryker terminated Myers's employment.

In the summer of 2013, Myers advocated for the termination of Justin Auch ("Auch"), a salesperson within his region. Curtis followed Myers's advice and discharged Auch. Curtis was surprised by the volume and negativity of feedback he received from other employees and customers regarding Auch's termination. The complaints questioned Myers's fitness to manage a sales team and suggested that Myers's continued employment would threaten Stryker's relationships with employees and customers. One doctor removed all of his business from Stryker.

Upon fielding complaints about Myers, Curtis traveled from his workplace, Denver, Colorado, to Montana to speak with the customers and employees who worked closely with Myers. Over the course of several weeks, Curtis heard from many of Myers's subordinates that Myers managed them through intimidation, harassment, and demands for money and services. Stryker's Operations Manager told Curtis that she had personally witnessed Myers behave aggressively and unprofessionally with her team of employees and with others. Curtis viewed the behavior described as serious, unusual, and unacceptable.

Conversations with customers similarly concerned Curtis. He learned that Myers had been banned from a hospital for 30 days for failing to sign in at the front desk and that Myers had not disclosed the disciplinary measure. Several customers stated that they would remove all of their business from Stryker to avoid working directly with Myers. Another described Myers bullying a hospital CFO.

Curtis notified Lavey of his conversations with employees and customers and asked her to conduct an investigation. Over several days, Lavey interviewed employees who worked with Myers and documented those interviews. The individuals interviewed corroborated the information compiled by Curtis. Lavey determined—and Curtis agreed—that Myers's misconduct was so egregious and extensive that discharge was necessary. Curtis and Lavey recommended Myers's termination to their respective managers. On December 10, 2013, Curtis and Lavey met with Myers and notified him that he was being terminated and gave a general explanation of the reasons. After Myers's termination, Stryker rehired Auch.

In May, 2014—seven months before expiration of Myers's contractual obligations—Myers took a job with Zimmer, Inc. ("Zimmer"), which manufactures and sells products competitive to Stryker's within the same markets.

ANALYSIS

I. WRONGFUL DISCHARGE CLAIM

Myers brings a wrongful discharge claim under Montana's Wrongful Discharge from Employment Act ("WDEA"). Mont. Code Ann. §§ 39-2-901 to 39-2-915 (2015). The parties agree that Myers was not a probationary employee. Under the WDEA, an employer's discharge of a non-probationary employee is lawful if: (1) the employer did not retaliate against the employee for protected activities; (2) the employer had good cause to terminate the employee; and (3) the employer did not violate his own personnel policies. § 39-2-904. Myers does not claim that his discharge was retaliatory. Rather, he raises three alternative theories for wrongful discharge. First, he asserts that Stryker lacked good cause for his termination. Second, he argues that Stryker's purported good cause reason is a pretext and that the true reason for his discharge is unlawful. And third, he claims that even if Stryker can show good cause, Stryker violated the provisions of its own personnel policies when it terminated him.

B. Good Cause

Myers argues that Stryker did not have good cause to terminate him because Stryker did not adequately ground its decision in the facts, making his discharge unreasonable. The Court disagrees. The undisputed facts clearly establish that Stryker discharged Myers for acting unethically, unprofessionally, and in a manner likely to harm the company.

An employer's termination is wrongful if it was not for good cause. Mont. Code Ann. § 39-2-904(1)(b). "'Good cause' means reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason." § 39-2-903(5). A legitimate business reason is "neither false, whimsical, arbitrary or capricious, and it must have some logical relationship to the needs of the business."

Under Montana law, a court may not substitute its judgment for an employer's discretion in employment matters: "it is inappropriate for courts to become involved in the day-to-day employment decisions of a business." An employer's discretion is greatest "where the employee occupies a 'sensitive' managerial position exercising 'broad discretion.'" Deference to an employer's business judgment is particularly great when the employer must place substantial trust in the employee's decision-making.

Myers was a managerial employee. Serving as Sales Manager for Stryker's Northwest Branch, Myers oversaw the work of eight sales representatives and associates operating within Montana and northern Wyoming. Myers reported directly to Curtis, who was based in Denver. Within Montana and northern Wyoming, Myers had extensive discretion over the day-to-day business of the regional team. Additionally, Myers served as a liaison between higher management and employees operating within the region. It was important for Stryker to trust Myers's leadership, and Stryker had significant discretion regarding Myers's continued employment.

Myers's termination was for good cause if it was not "false, whimsical, arbitrary or capricious" and had "some logical relationship to the needs of the business." The parties do not dispute the appropriateness of this standard, and they agree that Stryker's purported reasons for terminating

Myers—harassment of employees and harm to customer relationships—meet its requirements. However, the parties disagree: (1) whether Stryker was mistaken as to Myers's conduct; and (2) whether any mistake is relevant if Stryker was indeed mistaken.

The Court first considers the undisputed facts. Unless Myers's pretext argument, addressed separately below, is successful, there is no dispute that Stryker terminated Myers for its good faith belief that Myers harassed coworkers and damaged relationships with customers. Stryker conducted an investigation before Myers was terminated. As part of the investigation, Curtis and Lavey spoke with Myers's coworkers and customers. Following the investigation, Curtis and Lavey were concerned about Myers behaving unprofessionally within the organization and about him damaging relationships with customers. In their interviews with Myers's subordinates, Curtis and Lavey heard stories about Myers pressuring others to provide services to him in exchange for Myers's performance of his regular job duties. Employees from other sales divisions reported that Stryker's customers were considering leaving Stryker because they were unhappy with Myers. Doctors reported significant wrongdoing. Additionally, Myers was banned from a hospital for 30 days, and Stryker was concerned about the example this ban set for other employees, even though the violation leading to the ban was not particularly egregious.

Myers does not dispute the above facts. Instead, he argues that Stryker was mistaken about his conduct. This argument is unavailing. Myers had the opportunity to seek positive evidence to raise a dispute, but he did not do so. He merely denied that the statements Curtis and Lavey attributed to his co-workers were truthful. He did not submit affidavits from his former co-workers or any other evidence aside from his bare assertions that the events described by the interviewees had not, in fact, occurred.

Further, even if every person with whom Curtis and Lavey had spoken was indeed mistaken about Myers's conduct, Stryker's trust in Myers was reasonably and irrevocably eroded. Myers was in a managerial position requiring the exercise of discretion. The Court cannot second-guess Stryker's decision to terminate Myers when there is no dispute that Stryker lost confidence in Myers after an extensive investigation performed in good faith.

Rather than create a factual dispute, Myers raises a legal argument to support his position. Myers relies nearly completely upon *Marcy v. Delta Airlines,* in which the Ninth Circuit held that, under the WDEA, summary judgment for an employer is inappropriate when the plaintiff-employee introduces facts demonstrating that the employer's purported good cause reason was grounded in a mistake. In *Marcy,* the employee introduced positive evidence to show that her former employer was mistaken that she had knowingly sought payment for hours unworked. The employer's investigation into the misconduct was minimal.

In response to Myers's citation to *Marcy,* Stryker relies principally on *Sullivan v. Continental Construction of Montana, LLC*, 299 P.3d 832 (Mont. 2013). In *Sullivan,* the Montana Supreme Court affirmed summary judgment for the employer when it terminated an employee based solely on its internal investigation into allegations of misconduct. The employer interviewed the plaintiff's coworkers, who reported that the plaintiff, a managerial employee, regularly demeaned and derogated his subordinates. The employee could not raise a genuine issue of material fact by introducing evidence suggesting that some coworkers did not find his actions inappropriate. The court distinguished *Marcy,* determining that an employee must offer specific positive evidence to argue mistake. By offering evidence suggesting that he was a valuable employee who did not deserve termination, the employee in *Sullivan* did not successfully counter the "substantial conflicting evidence" uncovered by the employer in its investigation.

The controversy here is analogous to that presented in *Sullivan.* Myers's mere assertion that Stryker is mistaken does not create a factual dispute. To overcome summary judgment, Myers would need to offer evidence that Stryker's investigation was inadequate or specific positive evidence showing the presence of mistake. Myers has not met that burden. Summary judgment is appropriate for Stryker because the undisputed facts show that Stryker had good cause to terminate Myers for its good faith belief that Myers harassed coworkers and threatened valuable relationships with customers.

C. Pretext

Myers argues that even if Stryker can show good cause, a factual dispute exists regarding whether Stryker's purported reason for the termination is a mere pretext. Myers asserts that Stryker terminated Myers as a scapegoat for the company's decision to terminate Auch. In response, Stryker raises two arguments: (1) that, even if Myers were correct in arguing pretext, Stryker would still have good cause to terminate Myers for suggesting Auch's termination; and (2) that Myers has presented only speculation in support of his claim of pretext. No genuine dispute of material fact exists on the question of pretext, and Stryker is entitled to judgment as a matter of law.

To defeat summary judgment on the issue of pretext, "the employee 'must prove that the given reason for the discharge is a pretext and not the honest reason for the discharge.'" An employee fails to meet his burden when he does not present some evidence in the record substantiating his claim of pretext; "mere denial or speculation will not suffice."

The undisputed facts demonstrate that Myers advocated for Auch's termination. Shortly after Auch's termination, two physicians contacted Curtis, frustrated with the decision; one withdrew all business from Stryker because of Auch's termination. Additionally, Myers's colleagues within separate divisions of Stryker contacted Curtis expressing concern about Auch's discharge and Myers's management style. In response to the negative feedback, Curtis sought to rehire Auch, but Myers refused. After Stryker discharged Myers, the company hired Auch again.

Although Auch's termination factored into Myers's discharge, Myers cannot point to facts in the record supporting his claim that Stryker unfairly turned him into a scapegoat for Auch's termination. Stryker has introduced evidence showing that Auch's termination triggered questions about Myers's suitability for employment and that it then conducted an investigation resulting in Myers's termination. Myers cannot produce evidence supporting his claim that Stryker did not base its decision to terminate his employment on both Myers's advice regarding Auch and on the results of the investigation. Instead, Myers relies solely on "mere speculation."

Additionally, Myers has not adequately supported his argument that a pretextual discharge would have violated the WDEA. Myers asserts that he fully informed Curtis about the potential repercussions of Auch's termination in an attempt to minimize his responsibility. However, Myers is unable to dispute that Stryker's upper management was keenly dependent on his advice regarding his sales team because he was a regional manager with a direct connection to his sales team. Additionally, Myers can point to no evidence refuting Stryker's evidence that the discharge of Auch left Curtis feeling deceived and misguided by Myers. In the absence of such evidence, Myers has failed to substantiate his claim that Stryker discharged him for an improper purpose.

Thus, even if Stryker did terminate Myers for advocating for Auch's termination, Myers's claim of pretext would nonetheless fail because Stryker had a "legitimate business reason" to discharge Myers for precisely that reason. Myers's actions threatened customer relationships and made Myers's coworkers uncomfortable. As a result of Myers's conduct, Stryker lost trust in him, and the company had the discretion to terminate Myers as a result.

D. Compliance with Company Policy

Myers claims that, even if Stryker had good cause to terminate him, the discharge was wrongful because it was in violation of Stryker's own personnel policies. Stryker moved for summary judgment on this theory of wrongful discharge, and Myers did not respond to defend his claim. Summary judgment is appropriate for Stryker on this theory.

Under Montana law, a discharge is wrongful if an employer "violated express provisions of its own written personnel policy." § 39-2-904(c). Stryker's written personnel policies clearly outlined Stryker's discretionary authority to terminate employees for violations of company rules or policies. Stryker determined, following its investigation, that Myers violated the company's code of conduct and employee handbook, both of which promote ethical conduct and prohibit harassment and other unprofessional behavior. Under Stryker's written policies, of which he was informed, Myers was not entitled to an interview before termination, as he alleged. Stryker fully complied with its written policies.

2. Unemployment Compensation

Employment Security, N.C.G.S. Chap. 96

§ 96-1. Title and definitions.

(a) Title. - This Chapter shall be known and may be cited as the "Employment Security Law."

§ 96-2. Declaration of State public policy.

As a guide to the interpretation and application of this Chapter, the public policy of this State is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

§ 96-14.1. Unemployment benefits.

(a) Purpose. - The purpose of this Article is to provide temporary unemployment benefits as required by federal law to an individual who is unemployed through no fault on the part of the individual and who is able, available, and actively seeking work. […]

(b) Valid Claim. - To obtain benefits, an individual must file a valid claim for unemployment benefits, register for work, and have a weekly benefit amount […] that equals or exceeds fifteen dollars ($15.00). An individual must serve a one-week waiting period for each claim filed, except no waiting period applies under this subsection to a claim for unemployment due directly to a disaster covered by a federal disaster declaration. […]

§ 96-14.5. Disqualification for good cause not attributable to the employer.

(a) Determination. - The Division must determine the reason for an individual’s separation from work. An individual does not have a right to benefits and is disqualified from receiving benefits if the Division determines that the individual left work for a reason other than good cause attributable to the employer. When an individual leaves work, the burden of showing good cause attributable to the employer rests on the individual and the burden may not be shifted to the employer.

(b) Reduced Work Hours. - When an individual leaves work due solely to a unilateral and permanent reduction in work hours of more than fifty percent (50%) of the customary scheduled full-time work hours in the establishment, plant, or industry in which the individual was employed, the leaving is presumed to be good cause attributable to the employer. The employer may rebut the presumption if the reduction is temporary or was occasioned by malfeasance, misfeasance, or nonfeasance on the part of the individual.

(c) Reduced Rate of Pay. - When an individual leaves work due solely to a unilateral and permanent reduction in the individual’s rate of pay of more than fifteen percent (15%), the leaving is presumed to be good cause attributable to the employer. The employer may rebut the presumption if the reduction is temporary or was occasioned by malfeasance, misfeasance, or nonfeasance on the part of the individual.

§ 96-14.6. Disqualification for misconduct.

(a) Disqualification. - An individual who the Division determines is unemployed for misconduct connected with the work is disqualified for benefits. The period of disqualification begins with the first day of the first week the individual files a claim for benefits after the misconduct occurs.

(b) Misconduct. - Misconduct connected with the work is either of the following:

(1) Conduct evincing a willful or wanton disregard of the employer's interest as is found in deliberate violation or disregard of standards of behavior that the employer has the right to expect of an employee or has explained orally or in writing to an employee.

(2) Conduct evincing carelessness or negligence of such degree or recurrence as to manifest an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

(c) Examples. - The following examples are prima facie evidence of misconduct that may be rebutted by the individual making a claim for benefits:

(1) Violation of the employer's written alcohol or illegal drug policy.

(2) Reporting to work significantly impaired by alcohol or illegal drugs.

(3) Consumption of alcohol or illegal drugs on the employer's premises.

(4) Conviction by a court of competent jurisdiction for manufacturing, selling, or distributing a controlled substance punishable under G.S. 90-95(a)(1) or G.S. 90-95(a)(2) if the offense is related to or connected with an employee's work for the employer or is in violation of a reasonable work rule or policy.

(5) Termination or suspension from employment after arrest or conviction for an offense involving violence, sex crimes, or illegal drugs if the offense is related to or connected with the employee's work for an employer or is in violation of a reasonable work rule or policy.

(6) Any physical violence whatsoever related to the employee's work for an employer, including physical violence directed at supervisors, subordinates, coworkers, vendors, customers, or the general public.

(7) Inappropriate comments or behavior toward supervisors, subordinates, coworkers, vendors, customers, or to the general public relating to any federally protected characteristic that creates a hostile work environment.

(8) Theft in connection with the employment.

(9) Forging or falsifying any document or data related to employment, including a previously submitted application for employment.

(10) Violation of an employer's written absenteeism policy.

(11) Refusal to perform reasonably assigned work tasks or failure to adequately perform employment duties as evidenced by no fewer than three written reprimands in the 12 months immediately preceding the employee's termination.

§ 96-14.7. Other reasons to be disqualified from receiving benefits.

(a) Failure to Supply Necessary License. - An individual is disqualified for benefits if the Division determines that the individual is unemployed for failure to possess a license, certificate, permit, bond, or surety that is necessary for the performance of the individual's employment if it was the individual's responsibility to supply the necessary documents and the individual's inability to do so was within the individual's control. The period of disqualification begins with the first day of the first week the individual files a claim for benefits after the individual's failure occurs.

(b) Labor Dispute. - An individual is disqualified for benefits if the Division determines the individual's total or partial unemployment is caused by a labor dispute in active progress at the factory, establishment, or other premises at which the individual is or was last employed or by a labor dispute at another place within this State that is owned or operated by the employer that owns or operates the factory, establishment, or other premises at which the individual is or was last employed and that supplies materials or services necessary to the continued and usual operation of the premises at which the individual is or was last employed. An individual disqualified under the provisions of this subsection continues to be disqualified after the labor dispute has ceased to be in active progress for the period of time that is reasonably necessary and required to physically resume operations in the method of operating in use at the plant, factory, or establishment.

Jackson v. N.C. Department of Commerce, 775 S.E.2d 687 (N.C. Ct. App. 2015)

DILLON, Judge.

Jacqueline M. Jackson ("Petitioner") was discharged from her employment with Golden Age of Lexington, Inc. ("Employer"). The Board of Review at the North Carolina Department of Commerce, Division of Employment Security ("Division") determined that Petitioner was disqualified to receive unemployment benefits. On appeal, the superior court reversed the Board of Review's decision and held that Petitioner was *not* disqualified to receive unemployment benefits. Employer and the Division (hereafter "Appellants") appeal the superior court's order. For the following reasons, we reverse the superior court's order.

I. Background

Employer operates a nursing facility. Petitioner worked for Employer as a certified nursing assistant. In August 2013, Employer terminated Petitioner's employment because she failed to report to Employer a "patient fall" which had occurred the prior week.

Petitioner filed for unemployment benefits. An adjudicator inside the Division ruled that Petitioner was not qualified to receive unemployment benefits because she had been "discharged for misconduct connected with the work." Petitioner appealed this decision to an appeals referee within the Division.

Following a hearing in which evidence was taken, the appeals referee entered a decision agreeing with the adjudicator's determination that Petitioner was not eligible to receive benefits. Petitioner appealed to the Division's Board of Review. The Board of Review affirmed the appeals referee's decision that Petitioner was disqualified for unemployment benefits. Petitioner filed a petition in superior court for judicial review of the Board of Review's decision.

Following a hearing on the matter, the superior court *reversed* the Board of Review's decision and held that Petitioner was entitled to benefits. Specifically, the superior court held that there was no *competent* evidence at the initial hearing before the adjudicator that a patient had, in fact, fallen during Petitioner's watch. Appellants filed notice of appeal from the superior court's order.

II. Analysis

Employer contends that Petitioner is ineligible for unemployment benefits because she was discharged for cause. Employer contends that Petitioner was discharged for failing to report that a patient had fallen out of her wheelchair as required by Employer's policies. (A nurse or other attendant is required to report any patient fall so that the patient can be evaluated by a doctor.)

Petitioner claims that she was not required to file a report because the patient in question did not fall from her wheelchair but had merely slumped in the wheelchair, as she testified before the adjudicator. Petitioner contends—and the superior court agreed—that Employer failed to produce any *competent* evidence before the appeals referee that the patient had, in fact, fallen. Rather, Petitioner contends that the only evidence before the appeals referee that a fall had occurred was offered in the form of incompetent hearsay. Specifically, Employer offered the written statement of another nurse, Ms. Hyatt, that the patient was on the floor when Petitioner called her into the patient's room to assist her.

B. Termination for misconduct

In cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record test. A determination that an employee has engaged in misconduct under N.C. Gen.Stat. § 96-14.6 is a conclusion of law.

A claimant is presumed to be entitled to unemployment benefits, but this is a rebuttable presumption, with the burden on the employer to show circumstances which would disqualify the claimant. An individual can be disqualified for employment benefits if they are determined to be terminated from employment for "misconduct connected with the work." N.C. Gen.Stat. § 96-14.6(a)(2013). "Misconduct" is defined as follows:

> (1) Conduct evincing a willful or wanton disregard of the employer's interest as is found in deliberate violation or disregard of standards of behavior that the employer has the right to expect of an employee or has explained orally or in writing to an employee.
>
> (2) Conduct evincing carelessness or negligence of such degree or recurrence as to manifest an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

N.C. Gen.Stat. § 96-14.6(b).[42] The employer has the burden of showing the employee's disqualification from unemployment benefits on the basis of misconduct.

42. (n.4 in opinion) What constituted "misconduct" was previously defined in N.C. Gen.Stat. § 96-14. However, this statute was repealed by Session Laws 2013-2, s.2(a), effective 1 July 2013, and replaced by N.C. Gen.Stat. § 96-14.1 *et seq.*

The Board of Review determined that Petitioner was disqualified from receiving unemployment benefits because she was discharged from employment as a nursing assistant for work-related "misconduct," namely that she failed to report to a supervising nurse when a resident under her care fell and suffered a broken ankle. The trial court stated that only hearsay evidence supported the Board of Review's findings of fact concerning the fall and that, without these findings, the Board of Review's conclusion denying Petitioner unemployment benefits could not be sustained:

> 3. Claimant was discharged from this job for failing to report a fall by a resident.

> 7. At approximately 7 p.m., the resident had bruising and swelling on her right ankle and foot. The employer thought the resident had merely bumped her foot on something. However, as the employer began to ask questions of staff, she learned the resident had fallen while in the care of the claimant. Tabitha Hyatt, another certified nursing assistant had assisted the claimant with placing the resident back into her wheelchair. Ms. Hyatt wrote a statement for the employer which stated in pertinent part: that as she was walking up the hall, the claimant approached her and asked her for her help. Ms. Hyatt and the claimant walked to room 200. The resident was in the bathroom and the claimant asked Ms. Hyatt to help her get the resident up. The resident was on the floor when Ms. Hyatt entered the room. A copy of Ms. Hyatt's statement in its entirety is a part of the record and marked Commission exhibit 3H.
>
> 10. The resident's slip, even by claimant's explanation that she required assistant to put the resident back in her chair required reporting to the employer. The claimant was concerned about injury to the resident because she asked the resident if she was ok and noted that the resident did not complain of pain.

Ms. Hyatt's statement says that she observed the resident on the floor. Ms. Dunaway testified for Employer that the resident was in Petitioner's care at the time of the incident and Petitioner never reported the fall to Employer. The unchallenged findings further state that it was Employer's policy that required all residents "to be assessed by a nurse prior to being picked up from the floor after a fall;" that "an employee may be discharged immediately when his presence or conduct constitutes a significant problem or when his conduct is detrimental to the residents;" and that "any physical abuse to residents will result in dismissal on the first offense." Petitioner waived any hearsay objections to Ms. Hyatt's statement and Ms. Hyatt's statement, along with corroborating testimony from Ms. Holloway, support the contested Board of Review's findings. We hold that these findings support the Board of Review's determination that Employer met its burden to show that Petitioner was discharged from her employment for "misconduct" and was properly denied benefits pursuant to N.C. Gen.Stat. § 96-14.6.

Whichard v. CH Mortgage Company, Inc., 248 N.C.App. 123 (2016)

HUNTER, JR., ROBERT N., Judge.

I. Facts and Procedural Background

Following her termination from DHI Mortgage, Whichard filed a new initial claim for unemployment insurance benefits effective 20 April 2014. The Division of Employment Security (the Division) determined the weekly benefit amount payable to Whichard was $350.00, and the maximum amount of unemployment insurance benefits payable to Whichard was $6,650.00. The Division referred the claim to an adjudicator on the issue of separation from last employment. The adjudicator determined DHI Mortgage terminated Whichard for unacceptable personal conduct. As a result, she did not qualify for benefits. Whichard filed an appeal from the determination to an Appeals Referee. The Appeals Referee reversed the adjudicator's decision, finding Whichard qualified for receiving unemployment benefits. DHI appealed the Referee's decision to the Board of Review. The Board of Review reversed the Referee's decision, concluding that Whichard was not qualified for benefits because DHI terminated Whichard for violating the Employee Conduct and Work Rules and for conduct disregarding the standard of behavior for which an employer had the right to expect of an employee. The Board of Review found the following facts, which are unchallenged and therefore binding on appeal.

Whichard worked in DHI's Raleigh office under the supervision of Pam Carroll. Cindy Sheldon was the branch manager of the Raleigh office but did not have the authority to terminate Whichard's employment. In September 2013, Whichard complained to Ingrid Peterson, the northern regional processing manager, and Carroll concerning Sheldon's conduct in the workplace. She complained Sheldon was loud and abrasive and often slammed doors. Whichard requested a transfer to the branch's location in Wilmington, North Carolina, but there was no processing work available at that location. In December 2013 Whichard again complained to Peterson regarding Sheldon. Whichard stated she felt she was in a hostile work environment because of Sheldon's continued abrasiveness. On 17 January 2014, Whichard submitted a written complaint concerning Sheldon's workplace conduct to the vice president of human resources compliance as well as the president of the company. This complaint was forwarded to Vickie Jones, Human Resources Manager. Jones spoke to Whichard regarding her complaint but did not contact other employees at her office regarding allegations of Sheldon's conduct. Jones discussed the incidents with Sheldon who denied the allegations. Jones told Sheldon she received an anonymous complaint regarding Sheldon's conduct. Neither Peterson or Jones informed Sheldon who complained about her.

After hearing nothing from Jones in two weeks, Whichard sent a follow-up email on 13 February 2014 regarding her complaint. Whichard believed Sheldon was retaliating against her, and stated "things are no better in the Raleigh office. Some behaviors have improved while others are much worse." She indicated Sheldon continued to curse, use gay and racial slurs, talk loudly, conduct county business during work hours, gossip, say unkind things about employees and others, use negative and opinionated language, and exhibit insensitivity towards the needs and concerns of those around her. No one contacted Whichard regarding the concerns expressed in either of her two complaints. Sheldon later humiliated Whichard in a staff meeting. Sheldon said she would be supervising the processors from now on, and "everyone might not be happy about this but oh well … maybe they'll need to seek other employment." After the meeting, Whichard overheard Sheldon say on the telephone "I just got her goat. The company isn't making any changes. I said that to get a reaction from her. I'm a mean bitch, I know it but I enjoyed making her nervous. I bet she … in her pants thinking she'd have me for a manager. I've been trying to run her off, hopefully this will do it." She then concluded by saying "It's time for her to take her old ass somewhere else."

A few days later, Sheldon acknowledged a female employee complained about her and stated "You don't mess with Cynthia Sheldon. Especially my job and my income. If you do, I'll take you down. She doesn't know who she's dealing with. The gloves are out, I'll bury her." Whichard overheard Sheldon refer to her granddaughter as a "biracial gay baby" and that it may be time for her to "quit work and draw her social security. She sure doesn't fit in here with the rest of us."

In March 2014, Whichard called Carroll and informed her Sheldon continually bullied and harassed her. She told Carroll she was afraid of Sheldon. Carroll did not report the complaint to upper management or investigate the matter. Whichard also sought assistance from DHI's Employee Assistance Program. On 18 April 2014, Whichard expressed her frustrations with Sheldon on Facebook to friends and family members. In response to a comment from her son, she posted the following: "I'll quit before I do something stupid—like bash in Cindy's brains with a baseball bat. But I'm not a quitter." Another employee informed Peterson about the Facebook post. She reported the incident to upper management and the human resources department. DHI's Employee Conduct and Work Rules provided for disciplinary action, including termination, for "fighting or threatening violence in the workplace" and for "disruptive activity in the workplace." DHI decided to terminate Whichard for violation of the Employee Conduct and Work Rules due to her Facebook posting which DHI perceived as a threat.

Whichard appealed the Board's decision to superior court. The superior court reversed the Board of Review's decision, determining Whichard's conduct did not disqualify her from receiving unemployment benefits. The court determined Whichard was not guilty of misconduct because the findings of fact did not support the conclusion that she violated a work rule; her Facebook post did not threaten violence or a disruption of workplace activity nor did it constitute a violation or disregard of standards of behavior that the employer has the right to expect of an employee DHI timely filed a notice of appeal.

III. Standard of Review

The standard of review in appeals from the Division, both to the superior court and to the appellate division, is established by statute. The statute reads in pertinent part: "In any judicial proceeding under this section, the findings of fact by the Division, if there is any competent evidence to support them, and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." N.C. Gen Stat. § 96–15(i) (2015). If no exception to findings of fact is stated, then those findings are presumed to be supported by the evidence and are binding on appeal. N.C. Gen.Stat. 96–15(i) (2015).

In considering an appeal from a decision of the Division, the reviewing court must (1) determine whether there was evidence before the Division to support its findings of fact and (2) decide whether the facts found sustain the Division's conclusions of law and its resulting decision. The Board of Review's conclusions of law are reviewed de novo.

IV. Analysis

Ordinarily a claimant is presumed to be entitled to benefits under the Unemployment Compensation Act, but this is a rebuttable presumption with the burden on the employer to show circumstances which disqualify the claimant. "An individual who the Division determines is unemployed for misconduct connected with the work is disqualified for (unemployment) benefits." N.C. Gen.Stat. § 96–14 .6(a) (2015). "Misconduct connected with the work" includes "conduct evincing a willful or wanton disregard of the employer's interest as is found in deliberate violation or disregard of standards of behavior that the employer has the right to expect of an employee or has explained orally or in writing to an employee." N.C. Gen.Stat. § 96–14.6(b)(1) (2015). Violation of an employer's work rules is misconduct unless the evidence shows that the employee's actions were reasonable and were taken with good cause. In the absence of a specific rule violation, misconduct may consist in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee.

Appellant asserts the superior court disregarded the statutory standard of review, which prohibited the superior court from finding facts for itself. Appellant claims the Board found as fact Whichard's Facebook post violated workplace rules, while the superior court found the opposite. Appellant also asserts the superior court incorrectly applied the law to the facts when it held Whichard was not discharged for misconduct. We are not persuaded by either claim.

Appellant asserts the Board of Review found as a fact Whichard's post constituted a violation of DHI's work rules. The record before us does not support this claim. The Board found as fact claimant was "separated from employment for violation of the employer's policies due to posting an alleged threatening comment about Cindy Sheldon," and "employer decided to terminate the claimant's employment for violation of the

Employee Conduct and Work Rules due to her Facebook posting which the employer perceived as a threat towards Sheldon." However, the Board's conclusion that Whichard's post was a threatening statement is a statement of law requiring both the exercise of judgment and the application of legal principles.

We also affirm the superior court's determination that Whichard's Facebook post was not "threatening violence" and therefore was not a rule violation that constitutes misconduct as a matter of law. A communication of a threat must be a willful threat to physically harm another stated in a manner leading a reasonable person to believe the threat is likely to be carried out. Without intent, there can be no will to injure. Here, Whichard makes a conditional statement, indicating she "would quit work" before she did anything "stupid" like that. There is no evidence Whichard intended to threaten Sheldon. It's unlikely she intended anyone at DHI to view the post at all, as she addressed it to "friends and family members."

If no rule violation occurs, misconduct may consist in deliberate violations or disregard of standards of behavior that the Employer had a right to expect. The Board made no factual finding to support its conclusion that Whichard's Facebook post violated standards of behavior that the Employer had a right to expect. The superior court decides whether the facts found sustain the Division's conclusions of law and its resulting decision, and correctly held that the Board's conclusion was without merit.

V. Conclusion

We affirm superior court's award of unemployment benefits to the claimant.

Burroughs v. Green Apple, LLC, 832 S.E.2d 267 (N.C. Ct. App. 2019)

ZACHARY, Judge

Respondent North Carolina Department of Commerce, Division of Employment Security ("the Division"), appeals from the superior court's order reversing the Board of Review's decision that Petitioner Devon J.A. Burroughs was disqualified from receiving unemployment compensation benefits. We affirm.

Background

Burroughs began working as a server for Applebee's in September 2015. Burroughs reported a wage-and-hour concern to Human Resources in May 2016, complaining of nonpayment for hours worked. Following an investigation, Applebee's issued a check to Burroughs in the amount of $1,299.45.

On 22 June 2016, Burroughs filed another complaint with Human Resources alleging that the assistant manager had engaged in a pattern of retaliatory behavior against him that included physical contact—specifically, "pushing him in his back" on one occasion. Human Resources employee Vanessa Roman opened an investigation into the complaint, and spoke with the assistant manager as well as other employees. Ms. Roman testified that, based on her investigation, she was unable to substantiate Burroughs's allegations.

On 18 July 2016, Ms. Roman held a meeting with Burroughs, the assistant manager, and the general manager. At the meeting, all parties were asked to sign a document stating that they "would all agree to move forward and align with the organization's guiding principles." The document also contained an acknowledgment that Applebee's had "completed its investigation into the concerns raised by" Burroughs's complaint, and had taken "corrective actions as needed."

Burroughs agreed to sign that portion of the document in which he pledged to abide by his employer's expectations moving forward, but he refused to sign the portion acknowledging that Applebee's had made a complete investigation into his complaint and that appropriate corrective action had been taken. According to Ms. Roman, Burroughs

> said he would only provide me with additional details to support his allegations if I provided him a copy of my investigation report. Since I was the one that conducted the investigation I was the lead on that case, I expressed to him that I had completed a thorough investigation into his concerns and that the document that we were asking him to sign was only a tool to memorialize our previous conversation about alignment and moving forward and again continuing to provide our guests with excellent service. He still refused and stated that he did not agree and he said I guess I can't work for you guys then. And at that moment we agreed to separate.

Burroughs last worked for Applebee's on 17 July 2016.

Burroughs filed a claim for unemployment insurance benefits on 7 August 2016. Ms. Roman reported that the reason for Burroughs's discharge was that he had "failed to follow instructions, policy, and contract." Thereafter, a claims adjudicator determined that Burroughs was disqualified from receiving unemployment insurance benefits pursuant to N.C. Gen. Stat. § 96-14.6(a)(b), in that he "was discharged for misconduct connected with the work." Burroughs appealed that decision to the Appeals Referee, who issued a decision on 9 November 2016 concluding that Burroughs had been "discharged for insubordination," which amounted to "misconduct connected with his work," thereby disqualifying him from receiving benefits. Burroughs appealed to the Board of Review, which affirmed the Appeals Referee's decision.

Burroughs petitioned for judicial review in Wake County Superior Court. By order entered 9 August 2017, the superior court reversed the Board's decision and ordered that "the agency shall ensure that Burroughs receives the unemployment benefits to which he is entitled as a matter of law." The Division filed timely notice of appeal from the superior court's order.

On appeal, the Division argues that the superior court erred by disregarding the applicable standard of review and reversing the Board's determination that Burroughs was discharged for misconduct connected with his work, disqualifying him from receiving unemployment benefits.

We disagree, and affirm the superior court's order reversing the Board's decision and requiring that the Division issue to Burroughs the unemployment benefits to which he is entitled.

Standard of Review

The instant appeal arises under N.C. Gen. Stat. § 96-15(i).

> The statute provides in relevant part that in any judicial proceeding under this section, the findings of fact by the Division, if there is any competent evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law. Thus, findings of fact in an appeal from a decision of the Employment Security Commission are conclusive on both the superior court and this Court if supported by any competent evidence.

The Division's conclusions of law are reviewed *de novo*. A determination that an employee's unemployment is due to misconduct connected with the work is a conclusion of law, and is therefore reviewed *de novo*.

Discussion

Pursuant to N.C. Gen. Stat. § 96-14.6, an individual will be disqualified from receiving unemployment benefits if the individual is discharged due to "misconduct connected with the work." The burden is on the employer to show that a claimant is unemployed due to misconduct, thereby disqualifying the individual from receiving unemployment benefits.

While an employer may be within its right in terminating an employee, this fact alone is not necessarily determinative of the employee's right to receive unemployment benefits. However, an employee who is fired for "misconduct connected with the work" will be disqualified from receiving unemployment benefits. In the context of the statute, "misconduct" means "conduct which shows a wanton or wilful disregard for the employer's interests, a deliberate violation of the employer's rules, or a wrongful intent."

Nevertheless, “violating a work rule is not willful misconduct if evidence shows the employee’s actions were reasonable and were taken with good cause.” “Good cause is a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work.” Indeed, “the purpose of denying a discharged employee unemployment benefits because of misconduct connected with work is to prevent these benefits from going to employees who lose their jobs because of callous, wanton and deliberate misbehavior.” In that respect, one of the key considerations in determining, as a matter of law, whether an employee was discharged for “misconduct connected with the work” is whether the circumstances “displayed wrongful intent” in the employee’s actions.

In the instant case, the Division found that Burroughs was discharged from employment for “insubordination” based solely upon Burroughs’s refusal to sign a portion of the document that was presented to him in response to his complaint against the assistant manager. Burroughs communicated his support for, and willingness to sign, those portions of the agreement concerning his employer’s future expectations; however, he declined to sign that portion acknowledging that his employer had fully investigated the allegations of his grievance and had taken appropriate corrective action.

The Division’s findings of fact that Burroughs was terminated on the grounds of insubordination are supported by competent evidence, and are thus binding on appeal. Accordingly, the only issue remaining on appeal is whether, as a matter of law, Burroughs’s refusal to attest that his employer had conducted a complete investigation into his internal complaint and taken appropriate “corrective actions” in response constituted “misconduct connected with the work.” The superior court concluded that such “insubordination” did “not rise to the level of misconduct” sufficient to disqualify Burroughs from receiving unemployment insurance benefits. We agree.

Burroughs’s refusal to attest to the completion of the investigation or the appropriateness of the corrective action that had been taken did not show a “wanton disregard for his employer’s interests, a deliberate violation of its rules, or a wrongful intent,” but was instead “a reasonable response” to the disagreement at hand. Moreover, Burroughs’s reluctance to acknowledge that his employer had conducted a complete investigation in no way prevented his employer from closing that investigation. The record reveals "no refusal to report to work or to perform an assigned task," in that Burroughs readily agreed to sign that portion of the document indicating his willingness to move forward and to abide by his employer's expectations.

In these respects, the Division's findings and the evidence before it do not support a conclusion that Burroughs's insubordination constituted "callous, wanton and deliberate misbehavior." The superior court therefore correctly concluded that Burroughs's employer failed to meet its burden of showing that his conduct "rose to the level of culpability required for a finding of 'misconduct' within the meaning of the statute."

Accordingly, we affirm the superior court's order reversing the Division's decision that Burroughs is disqualified from receiving unemployment insurance benefits.

Matter of Lennane, 869 S.E.2d 243 (N.C. 2022)

BARRINGER, Justice

In this case, we consider whether to uphold the determination that petitioner Frank Lennane is disqualified from receiving unemployment benefits. To guide the interpretation and application of unemployment benefits under Chapter 96 of the General Statutes of North Carolina, the legislature has declared the public policy of this State for nearly ninety years as the following:

> Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The Legislature, therefore, declares that in its considered judgment the public good and the general

> welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

N.C.G.S. § 96-2 (2021).

This declaration guides our analysis of the issue before us: whether Lennane's leaving work was attributable to his employer as required by N.C.G.S. § 96-14.5(a) to avoid disqualification for unemployment benefits. *See* N.C.G.S. § 96-2. Having considered the legislature's declared public policy, the plain language of the applicable statute, and the binding findings of fact, we conclude that Lennane failed to show that his leaving work was attributable to his employer as required by N.C.G.S. § 96-14.5(a).

I. Background

Lennane left work on 16 November 2018. Lennane filed an initial claim for unemployment benefits on 11 November 2018. An adjudicator held Lennane disqualified for benefits, and Lennane appealed. Thereafter, an appeals referee conducted a hearing on the matter. The appeals referee affirmed the prior decision and ruled that Lennane was disqualified for unemployment benefits because he failed to show good cause attributable to the employer for leaving as required by N.C.G.S. § 96-14.5(a). Lennane then appealed to the Board of Review for the North Carolina Department of Commerce. The Board of Review adopted the appeals referee's findings of fact as its own and concluded that the appeals referee's decision was in accord with the law and the facts. Accordingly, the Board of Review affirmed the appeals referee's decision. Lennane next appealed to the superior court, which affirmed the Board of Review's decision. Lennane then appealed to the Court of Appeals.

A divided panel of the Court of Appeals affirmed the superior court's order.

II. Standard of Review

In these judicial proceedings, “the findings of fact by the Division, if there is any competent evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law.” N.C.G.S. § 96-15(i) (2021). When no challenge to a finding of fact is made, an appellate court presumes that the finding of fact is supported by the evidence, and the finding of fact is binding on appeal. We review de novo whether the Division’s findings of fact support the conclusions of law.

III. Analysis

Article 2C of Chapter 96 of the North Carolina General Statutes sets forth when benefits are payable for unemployment and when an individual is disqualified from receiving benefits. N.C.G.S. §§ 96-14.1 to — 14.16 (2021). As relevant to this appeal, subsection 96-14.5(a) mandates that “an individual does not have a right to benefits and is disqualified from receiving benefits if the Division determines that the individual left work for a reason other than good cause attributable to the employer.” N.C.G.S. § 96-14.5(a). “When an individual leaves work, the burden of showing good cause attributable to the employer rests on the individual and the burden may not be shifted to the employer.” N.C.G.S. § 96-14.5(a). Good cause exists when an individual’s “reason for leaving would be deemed by reasonable men and women valid and not indicative of an unwillingness to work.” “A separation is attributable to the employer if it was produced, caused, created or as a result of actions by the employer.”

Since the Division conceded on appeal that Lennane had good cause to leave work, the only question before us is whether the findings of fact support the conclusion of law that Lennane’s leaving work was not attributable to his employer. We cannot substitute our view of the evidence for the findings of fact before us.

All findings of fact by the Division are as follows:

1. The claimant filed an initial claim for unemployment insurance benefits on November 11, 2018.

2. The claimant last worked for ADT LLC on November 16, 2018 as a service technician.

3. The Adjudicator issued a determination under Issue No. 1669952 holding the claimant disqualified for benefits. The claimant appealed. Pursuant to N.C.G.S. § 96-15(c), this matter came before Appeals Referee Stephen McCracken on August 7, 2019. Present for the hearing: Frank Lennane, claimant; Joseph Chilton, claimant representative; Randall Goodson, employer witness and installation/service manager; Stephanie Morgan, employer witness and administrative team leader; Michael Curtis, employer representative. The employer's representative participated in the hearing via teleconference following a written request to participate by telephone due to a travel distance of more than 40 miles to the hearing location. Neither parties were prejudiced by the hybrid hearing.

4. The claimant was employed by the above-captioned employer from February 1, 2012 until November 16, 2018.

5. As a service technician for the employer, the claimant conducted service calls to the employer's residential and commercial customers with security or business alarm systems. Generally, service calls only require a part/component replacement and, generally, do not require a significant amount of physical activity. Although, a service call sometimes required some ladder climbing and crawling.

6. At times, the claimant had to perform residential and commercial security system and alarm system installations. Installations require more physical work, such as more drilling, climbing, and crawling, than a service call.

7. The claimant was aware of his job duties and responsibilities and was trained to perform both service calls and installation jobs.

8. In 2014, the claimant injured his left knee while on the job. Said injury caused the claimant to undergo surgery. Following the claimant's surgery, the claimant began to favor his right knee, which resulted in the claimant experiencing regular pain in his right knee. The claimant had a permanent partial disability in his left knee.

9. The claimant kept the employer informed of his physical health conditions.

10. In 2016, service technicians began to perform installation jobs following a business merger and a merger of the employer's service and installation departments.

11. The claimant had difficulty performing installations due to the poor physical conditions of his knees, of which he notified his manager. The claimant asked his manager if there were other jobs, such as administrative or clerical work, that in which sic he could apply for or be placed.

12. The employer only had administrative positions in Spartanburg, South Carolina and Knoxville, Tennessee, and the claimant was unwilling to relocate from North Carolina.

13. In 2017, the claimant took a five week leave of absence via the Family and Medical Leave Act (FMLA) to rest his knees and seek additional medical intervention.

14. On or about September 5, 2017, the claimant returned to work from his medical leave. The claimant's doctor requested that the claimant not stand or walk for prolonged periods.

15. The claimant asked his manager, Randall Goodson, if he could only be assigned service calls due to the less strenuous nature of those jobs. The claimant's manager denied the claimant's request because he needed to keep a fair balance of work distribution among all of the service technicians.

16. However, the claimant's manager made attempts thereafter to not dispatch the claimant on the most strenuous or large installations.

17. If the claimant had to be dispatched on a large installation, then manager Goodson would try to ensure that he (claimant) had another service technician available to assist him.

18. In October 2018, the claimant had an appointment with a surgeon to discuss treatment for his knees. At which time, the claimant was told that he could undergo surgery or stem cell therapy. The claimant was unwilling to undergo either options sic.

19. As of November 2018, the claimant was continuing to fully perform his service technician job duties and responsibilities.

20. On or about November 8, 2018, the claimant notified the employer that he was resigning from employment because he was no longer able to perform his job due to the physical health condition of his knees.

21. Prior to the claimant's resignation, he did not make any formal or written requests for workplace accommodations from either the employer's administrative or human resources staff members. During 2018, the claimant did not request intermittent leave via FMLA.

22. The claimant left this job due to personal health or medical reasons.

23. At the time the claimant left, the employer did have continuing service technician work available for him.

Lennane argues that the findings of fact show that the employer's actions and inactions, not those of Lennane, caused him to leave work to protect his health. According to Lennane, the findings of fact show that his employer acted by changing his job duties by increasing the amount of installation work required for his position and failed to act by not implementing his request to only be assigned service calls. Lennane, like the dissent, advances the proposition that "*Ray* compels a conclusion" that Lennane left work with good cause attributable to the employer. Lennane also contends that his unwillingness to relocate for an administrative position with his employer cannot support the conclusion of law that he left work without good cause attributable to the employer and relies on the Court of Appeals' decision in *Watson v. Employment Security Commission of North Carolina*.

Admittedly, Lennane's employer modified the allocation of installation jobs to service technicians two years before Lennane left work, and Lennane had difficulty performing installations because of pain in his knees. However, the findings of fact do not support the causal link required by N.C.G.S. § 96.14.5(a) between the employer's action (change in allocation of installation work) or inaction (not ceding to Lennane's request) and Lennane's leaving.

Lennane has not shown that his allocation of installation jobs as modified by his employer in 2016 was more detrimental to his health than his prior duties and responsibilities. Before 2016, Lennane performed service calls as well as installations at times. Lennane's partial disability in his left knee and pain in his right knee predated the 2016 modification. In 2016, only the allocation of service calls and installations assigned to service technicians, like Lennane, changed. Although installations involved "more physical work, such as more drilling, climbing, and crawling, than a service call," Lennane's "doctor requested that Lennane not stand or walk for prolonged periods." There is no finding that the installations increased the amount of prolonged standing and walking by Lennane relative to service calls. Thus, we cannot conclude that the employer's action caused Lennane's leaving.

Despite our sympathy for those with health conditions, we cannot fill in the facts for Lennane. We only have the binding findings of facts properly before us, and the burden is on Lennane pursuant to N.C.G.S. § 96-14.5(a) to show good cause attributable to the employer. We also do not rely on *Barnes v. Singer Co.* In *Barnes,* this Court imposed the burden on the employer and declined to address whether there was good cause attributable to the employer.

Our legislature expressly placed on the individual the burden—that cannot be shifted to an employer—to show good cause attributable to the employer when the individual left work. The goal sought by unemployment insurance is to avoid economic insecurity from involuntary unemployment. The legislature for nearly ninety years has recognized that this achievement "can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment." Given the requirement of *attribution* to the employer under N.C.G.S. § 96-14.5(a), we must consider both an individual's and employer's efforts to preserve the employment relationship when assessing whether the individual's leaving is attributable to the employer. Consideration of these efforts is consistent also with the legislative purposes of "encouraging employers to provide more stable employment" and "preventing the spread of involuntary unemployment." If we ignore the efforts of employer in the binding findings of fact, like the dissent, employers are not encouraged to provide stable employment. Likewise, if we ignore the efforts of the employed individual, employers are not encouraged to provide stable employment. Thus, we review the findings of fact concerning both Lennane's and his employer's efforts to preserve the employment relationship.

Here, Lennane made some efforts to preserve his employment. He "kept his employer informed of his physical health conditions," "notified his manager" that he "had difficulty performing installations due to the poor physical condition of his knees," and his doctor in 2017 "requested that Lennane not stand or walk for prolonged periods." He "asked his manager if there were other jobs, such as administrative or clerical work, that he could apply for or be placed." In 2017, he "took a five week leave of absence via the Family and Medical Leave Act to rest his knees and seek additional medical intervention." He also "asked his manager, Randall Goodson, if he could only be assigned service calls due to the less strenuous nature of those jobs."

In response to Lennane's efforts, the employer made efforts to preserve the employment relationship. Lennane's manager "made attempts after Lennane's request to not dispatch Lennane on the most strenuous or large installations" and "would try to ensure that Lennane had another service technician available to assist him." The employer also "had administrative positions in Spartanburg, South Carolina and Knoxville, Tennessee," but not in North Carolina.

Ultimately, Lennane was unwilling to relocate from North Carolina for an administrative position and did not take additional Family and Medical Leave to treat his knees. Lennane subsequently resigned, working his last day on 16 November 2018.

Given the foregoing, his employer acted to preserve the employment relationship. The employer, at Lennane's request, provided Lennane the option to take an administrative position where the employer had administrative positions. The employer further made attempts to adjust the assignment of installations to be more favorable to Lennane given Lennane's request. Lennane also had choices other than leaving his employment —choices he did not take. Lennane could have relocated from North Carolina for an administrative position with his employer, an option provided by his employer at his request, or he could have taken additional Family and Medical Leave to treat his knees as his employer previously supported. Prior to his leaving, Lennane also had continued to fully perform his duties and responsibilities.

For these reasons, *Ray* is easily distinguishable from this case. In *Ray,* the employer did not act to preserve the employment relationship: the supervisor refused the employee Ray's request to transfer to another department, denied her request for a protective mask, and threatened to terminate her employment if she conveyed her requests to the plant manager. It is also "axiomatic that this Court is not bound by precedent of our Court of Appeals."

The Court of Appeals' decision in *Watson v. Employment Security Commission of North Carolina* is also not binding on this Court and is distinguishable. Unlike *Watson,* the employer in this matter did not relocate, and Lennane did not leave work because of unreliable transportation to work. Also, unlike this matter, the binding findings of fact in *Watson* reflected substantial attempts by the employee, Watson, to maintain the employment relationship. She expressed her concern to her employer about reliable transportation to and from work before the relocation; she obtained some transportation from her supervisor; she used her own car until it broke down; and she made a series of other arrangements to get to work. Watson did not leave work until she arrived late to work on account of her co-worker's truck being in disrepair, was sent home as a penalty for arriving late, believed the truck beyond repair, and had no other foreseeable means of transportation to and from work every day of her work week. As a result, the Court of Appeals concluded that "all of the Commission's findings of fact make clear that petitioner desired, and attempted, to continue to work for respondent employer," such that "her leaving work was solely the result of the relocation of the plant by her employer." Given the binding findings of fact before us, we cannot conclude the same in this matter.

Although Lennane left work for good cause as conceded by the Division, the legislature created unemployment insurance for a more limited subset of individuals: those who left work for "good cause attributable to the employer." N.C.G.S. § 96-14.5(a). Here, the employer made available to Lennane an administrative position as Lennane specifically requested. The employer offered positions in all the locales where the employer had such positions. The employer, thus, acted. Lennane still left, but his employer's inaction did not cause Lennane's leaving. Lennane had made other requests to his employer, but an employer need not cede to every request of an individual employed by the employer to avoid having his inaction deemed the cause of an individual's leaving.

This Court's holding honors the limitation created by our legislature on unemployment benefits, consistent with the plain language of the statute and the legislature's express purpose of "encouraging employers to provide more stable employment" to prevent the spread of involuntary unemployment. N.C.G.S. § 96-2. "The actual words of the legislature are the clearest manifestation of its intent, so we give every word of the statute effect, presuming that the legislature carefully chose each word used." This Court in *In re Watson* explained:

> In N.C.G.S. § 96-14(1) it is provided that one is disqualified from receiving benefits under the act if he left work voluntarily "without good cause attributable to the employer." The disqualification imposed in N.C.G.S. § 96-14(3) for failure to accept suitable work "without good cause" does not carry the qualifying phrase "attributable to the employer." It cannot be presumed that the omission of these qualifying words was an oversight on the part of the Legislature. Thus, the "good cause" for rejection of tendered employment need not be a cause attributable to the employer.

Decades later, the legislature still does not omit the statutory language "attributable to the employer" for individuals leaving work: "an individual is disqualified for any remaining benefits if the Division determines that the individual has failed, without good cause, to accept suitable work when offered," N.C.G.S. § 96-14.11(b), but "disqualified from receiving benefits if the Division determines that the individual left work for a reason other than good cause *attributable to the employer,*" N.C.G.S. § 96-14.5(a). Thus, we decline to create insurance paid for by employers for unemployment not attributable to an employer's actions or inactions.

IV. Conclusion

Unemployment insurance does not provide benefits to individuals who "left work for a reason other than good cause attributable to the employer." N.C.G.S. § 96-14.5(a). While Lennane, as conceded by the parties, left work for good cause, he has failed to satisfy his burden to show that his leaving work was "attributable to the employer" as a matter of law. Accordingly, we affirm the Court of Appeals' decision.

Justice EARLS dissenting.

Both Mr. Lennane and the Employment Security Division agreed that Mr. Lennane's reason for leaving his job, after having worked for ADT as a service technician for over six and a half years, was for "good cause" as defined by law. Indeed, respondent acknowledged to the court below that "the Petitioner's reason for resigning was the personal knee issues, and the Division's Findings of Fact support the conclusion it was for 'good cause.'" Where, as the dissent below noted, "respondent concedes petitioner had good cause to resign," the only issue for this Court is whether Mr. Lennane has met his burden of establishing that the good cause was attributable to his employer. Here the majority observes that the Division conceded good cause, but then illogically concludes that Mr. Lennane failed to establish a "casual link" to explain why he left work. The majority then imposes a newly crafted "efforts to preserve the employment relationship" test and infers from the absence of factual findings that in fact, Mr. Lennane did not have good cause to leave his employment because he refused to leave North Carolina for Spartanburg, South Carolina or Knoxville, Tennessee and did not take additional Family and Medical Leave. These are all, in essence, arguments that he did not have good cause to leave his employment.

The appeals referee's factual findings here do not suggest that ADT offered Mr. Lennane service calls that would comply with his medical restrictions at the time rather than installation work. Based on the findings of fact, "the claimant's manager denied the claimant's request only to be assigned service rather than installation calls because he needed to keep a fair balance of work distribution among all of the service technicians." In these circumstances, the decision not to offer Mr. Lennane work that he could perform safely is what led to the good cause for his need to stop working. Mr. Lennane carried his burden of demonstrating that the good cause for his leaving was attributable to a decision of the employer. He should not be disqualified from receiving unemployment benefits. Therefore, I dissent.

Although our task here is to determine whether the Division's findings of fact support its legal conclusions, the majority begins with an examination of the public policy behind the General Assembly's establishment of unemployment compensation. Ironically, the legislature's declared policy actually supports the conclusion that ADT did not do enough here to keep Mr. Lennane on its payroll with work that he could safely perform given his health condition, rather than the majority's conclusion that Mr. Lennane should have moved out of state to work in an administrative position or take unpaid leave. According to the 1936 statute, economic security in North Carolina is promoted by "encouraging employers to provide more stable employment." N.C.G.S. § 96-2 (2021) (carrying forward the original statutory language). Moreover, "the public good and the general welfare of the citizens of this State require … the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own." The statute is intended to protect North Carolina workers and to encourage employers to provide stable employment.

Whatever the policy implications, the more specific language of the statute's disqualification provision applies here. This Court has found that "sections of the act imposing disqualifications for its benefits should be strictly construed in favor of the claimant and should not be enlarged by implication or by adding to one such disqualifying provision words found only in another." It goes without saying that this Court should not be imposing new disqualification rules that have no basis in the statute.

'Good cause,' which was conceded here, is understood to be "a reason which would be deemed by reasonable men and women valid and not indicative of an unwillingness to work." Given that Mr. Lennane's reason for resigning was for "good cause," it is therefore clear that the facts do not support any conclusion that he resigned because he was unwilling to work. And yet, that is precisely what the majority ultimately concludes, that Mr. Lennane had "other choices" but chose not to keep working. The majority's conclusion is not supported by the factual findings in this case.

If the separation is "produced, caused, created or as a result of actions by the employer," it is attributable to the employer. Inaction by the employer also can provide good cause to leave a job. Good cause is attributable to the employer where circumstances caused by the employer "make continued work logistically impractical" or "when the work or work environment itself is intolerable."

Examples of good cause attributable to employers when they create circumstances that make work logistically impractical for the employee are instructive. In *Barnes v. Singer Co*, the employee quit after her employer relocated her job and she did not have reliable transportation to her new place of employment. In *Couch v. North Carolina Employment Security Commission,* a woman who quit her job after her employer unilaterally and substantially reduced her working hours was not disqualified from receiving unemployment benefits. In *Couch,* the Court of Appeals remanded the case to determine whether the decrease of two hours per day of work was substantial enough to constitute good cause. In *Milliken & Co. v. Griffin,* the Court of Appeals found good cause attributable to the employer when Ms. Griffin quit after her employer failed to heed her doctor's advice that she receive work that did not aggravate her muscle spasms or be assigned shorter shift hours. The Court of Appeals based its decision on the fact that Ms. Griffin spoke to her manager about her health issues and desire for alternative work options within the company, ultimately found none and then resigned. None of these precedents are reversed by the Court's decision in this case.

Instead, whether good cause attributable to the employer exists is a highly fact-specific determination, for which Mr. Lennane bears the burden of proof. The fact to be decided here was not whether ADT or Mr. Lennane made the most effort to "preserve the employment relationship," but rather, who was responsible for the circumstances that led to Mr. Lennane resigning for good cause. It is most important to remember that this is not a fault-based inquiry, ADT may have had a very good business reason for not allowing Mr. Lennane to work only service calls. But in this particular workplace, it was ADT's decision to make, not Mr. Lennane's.

As the factual findings explain, ADT had previously divided its home security system service and installation departments. Despite Mr. Lennane's having been trained to do the more physically demanding job of installation work, he was still primarily a service technician. He had worked at this job for over six years by the time he quit, and four of those years were spent dealing with various knee injuries. The injury to his left knee happened while he was on the job, and despite undergoing knee surgery, he sustained a permanent partial disability in that knee. This injury and the subsequent limit on the full use of his left knee caused Mr. Lennane to favor his right knee, which led to him "experiencing regular pain in his right knee."

As his pain increased, Mr. Lennane also experienced a reshuffling of his duties at work when a merger caused ADT to combine its service and installation departments. The loss of that structural divide required service technicians to do installation work as well. There was conflicting testimony at the hearing regarding how much of an increase in installation work this created for Mr. Lennane, and the findings of fact do not resolve that question. But the appeals referee did find that Mr. Lennane "kept the employer informed of his physical health conditions" and that he "had difficulty performing installations due to the poor physical conditions of his knees, of which he notified his manager." He asked about two less strenuous work options: a desk job or forgoing installation work. Neither option was a realistic choice for him because the administrative work was only available out of state and the manager "needed to keep a fair balance of work distribution among all of the service technicians."

Mr. Lennane tried to continue with his job by taking a five-week FMLA leave of absence to heal, but that hiatus could not permanently fix the deterioration of his knees. His manager still would assign him installations while attempting to keep these jobs smaller or to assign a second service technician to assist him on large installations. Yet, these attempts were not enough because Mr. Lennane's doctor recommended that he not walk or stand for long periods.

The findings of fact paint a vivid picture of someone who tried to hold on to his job despite chronic pain from a workplace injury, but who ultimately had good cause to leave. And the findings also present a picture of an employer that tried to accommodate his employees' bad knees in some fashion but who, for business reasons, failed to do so adequately. Just as in *Barnes,* in which the court concluded that materially moving an employee's job is good cause attributable to that employer, similarly here it should not be held against Mr. Lennane that ADT's only administrative work option was outside of North Carolina and that his manager's preference was to make an equal distribution of installation work among service technicians. ADT had less strenuous service work still available at Mr. Lennane's North Carolina location but chose not to let him focus only on that work. Given that the majority does not purport to overrule *Barnes,* but inexplicably decides not to rely on it, the principle established by this Court in *Barnes* remains good law, namely that: "an employee does not leave work voluntarily when the termination is caused by events beyond the employee's control or when the acts of the employer caused the termination." There, an employer moving a plant eleven miles away to a location the employee could not commute to from her home, constituted good cause attributable to the employer. In this case, requiring that Mr. Lennane move out of state to maintain employment that does not further damage his health similarly is holding him responsible for matters beyond his control. The application of the law here is not about sympathy for an injured worker, it requires an analysis of whether the good cause, conceded by respondent, was due to factors within the employer's control.

Ultimately, Mr. Lennane's manager decided not to meet his medical needs by assigning only service work and, just as the employee in *Ray,* Mr. Lennane chose his health and had to quit. Unlike the situation in *Ray,* however, Mr. Lennane did pursue several avenues to try to keep his job. All of the steps taken by Mr. Lennane — keeping his employer informed of his health problems, requesting a transfer to office work, taking FMLA leave, and asking for lighter field assignments — show an employee trying to keep working. Indeed, Mr. Lennane's pursuit of reasonable remedial measures exceeded the efforts to preserve employment undertaken by employee Ray, who did not take FMLA leave. More importantly, as the unanimous court in *Ray* pointed out, "speculation as to what claimant *could have done*" is irrelevant.

Mr. Lennane was in an even more compelling circumstance than the successful claimant in *Ray.* Mr. Lennane acquired his underlying health problems on the job. The findings of fact make clear that his health concerns arose from job requirements that had changed since his hire, even if the magnitude of that change is not specified. Mr. Lennane was a "person who must quit a job for health reasons but who is available for other employment," and therefore, "reason and justice demand that such a claimant receive unemployment benefits." Indeed, the logic of the Court of Appeals' decision in *Griffin* is compelling here, because in that case the very policy cited by the majority here was the basis of the Court of Appeals' conclusion that an employee whose health condition leads to unemployment is entitled to receive unemployment benefits:

> Milliken would have us follow those jurisdictions which have denied benefits to individuals who became unemployed because of sickness, accident or old age. We find that the language in the *Mills* decision is in conflict with the policy behind North Carolina's Employment Security Act and application of the Act. The *Mills* court concluded that "involuntary

> unemployment" under the Act meant unemployment resulting from a failure of industry to provide stable employment; and that unemployment due to changes in personal conditions to the employee, which made it impossible for him to continue his job, was not the type covered by the Act. Our Legislature did not intend such a narrow application of the Act when it declared the following public policy to be accomplished by the Act: "The public good and the general welfare of the citizens of this State require the enactment of this measure… for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own."

Both *Ray* and *Griffin* remain good law. The majority does not dispute the logic or reasoning of either decision. Instead, the majority finds a significant distinction that in *Ray* the employer "did not act to preserve the employment relationship" because Ray's supervisor denied a transfer request and refused to provide a protective mask. Even if denying a transfer request differs significantly from offering a transfer that requires moving out of state while denying limited work assignments at the current worksite, the ultimate question is who has created the condition under which continued employment is not possible. Based on the factual findings in this case, the relevant business decisions were made by ADT. Mr. Lennane wanted to work, he just could not continue to put too much strain on his knees by installing security systems.

The majority also goes beyond the findings of fact in assuming that Mr. Lennane could have continued to perform installation work for ADT so long as he periodically took FMLA leave to rest his knees. While there was some testimony in the record from Mr. Lennane concerning how frequently he already was resting his knees to no lasting effect, the assumption made by the majority is not in the appeals referee's findings of fact. We do not know from this record whether such leave would have been paid or unpaid, or even if it would have addressed the medical problem. On the record before us, Mr. Lennane left his job for good cause, namely, personal health or medical reasons, in circumstances in which his employer did have work that he could have performed, specifically service calls rather than installation work, but chose not to give him the option of doing that work. Mr. Lennane's good cause for leaving work was attributable to ADT, and he should not be disqualified from receiving unemployment benefits.