FRANZ KAFKA

TRIALS & TRIBULATIONS

AN ABSURDIST CASEBOOK

PRÁVNICKÁ FAKULTA HRADNÍ UNIVERZITY

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Before the Law stands a doorkeeper on guard. To this doorkeeper there comes a man from the country who begs for admittance to the Law. But the doorkeeper says that he cannot admit the man at the moment. The man, on reflection, asks if he will be allowed, then, to enter later. 'It is possible,' answers the doorkeeper, 'but not at this moment.' Since the door leading into the Law stands open as usual and the doorkeeper steps to one side, the man bends down to peer through the entrance. When the doorkeeper sees that, he laughs and says: 'If you are so strongly tempted, try to get in without my permission. But note that I am powerful. And I am only the lowest doorkeeper. From hall to hall keepers stand at every door, one more powerful than the other. Even the third of these has an aspect that even I cannot bear to look at.'

Franz Kafka, *Der Prozess*

Contents

Preface

This book presents cases and other material for use in a course on the legal process. Topics covered include arbitrary and capricious procedures, cruel and unusual punishment, and devil's advocacy.

Most of the materials reproduced here are in the public domain; excerpts from copyrighted materials are included for teaching purposes under the fair use doctrine. Materials have been redacted to omit passages not pertinent to the learning objectives. Judicial opinions have also been "cleaned up"[1] for ease of reading.

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: Devilish Advocacy

1. Serving Satan

U.S. ex rel. Mayo v. Satan and His Staff, 54 F.R.D. 282 (W.D. Pa. 1971)

Weber, District Judge

Plaintiff, alleging jurisdiction under 18 U.S.C. § 241, 28 U.S.C. § 1343, and 42 U.S.C. § 1983 prays for leave to file a complaint for violation of his civil rights *in forma pauperis*. He alleges that Satan has on numerous occasions caused plaintiff misery and unwarranted threats, against the will of plaintiff, that Satan has placed deliberate obstacles in his path and has caused plaintiff's downfall.

Plaintiff alleges that by reason of these acts Satan has deprived him of his constitutional rights.

We feel that the application to file and proceed *in forma pauperis* must be denied. Even if plaintiff's complaint reveals a *prima facie* recital of the infringement of the civil rights of a citizen of the United States, the Court has serious doubts that the complaint reveals a cause of action upon which relief can be granted by the court. We question whether plaintiff may obtain personal jurisdiction over the defendant in this judicial district. The complaint contains no allegation of residence in this district. While the official reports disclose no case where this defendant has appeared as defendant there is an unofficial account of a trial in New Hampshire[1] where this defendant filed an action of mortgage foreclosure as plaintiff. The defendant in that action was represented by the preeminent advocate of that day, and raised the defense that the plaintiff was a foreign prince with no standing to sue in an American Court. This defense was overcome by

Are the plaintiff's allegations sufficient to state a claim for deprivation of constitutional rights? *See Ashcroft v. Iqbal*.

On what basis might the the court have personal jurisdiction over the defendant?

1. Devil v. Webster, 666 F.Supp. 1313 (D.N.H. 1936).

overwhelming evidence to the contrary. Whether or not this would raise an estoppel in the present case we are unable to determine at this time.

Would issue preclusion apply here?

If such action were to be allowed we would also face the question of whether it may be maintained as a class action. It appears to meet the requirements of Fed.R.of Civ.P. 23 that the class is so numerous that joinder of all members is impracticable, there are questions of law and fact common to the class, and the claims of the representative party is typical of the claims of the class. We cannot now determine if the representative party will fairly protect the interests of the class.

We note that the plaintiff has failed to include with his complaint the required form of instructions for the United States Marshal for directions as to service of process.

For the foregoing reasons we must exercise our discretion to refuse the prayer of plaintiff to proceed in forma pauperis.

It is ordered that the complaint be given a miscellaneous docket number and leave to proceed in forma pauperis be denied.

2. Cases affecting ambassadors, other public ministers and consul

The Devil & Daniel Webster

Stephen Vincent Benet, Saturday Evening Post (Oct. 24, 1936)

It's a story they tell in the border country, where Massachusetts joins Vermont and New Hampshire.

Yes, Dan'l Webster's dead—or, at least, they buried him. But every time there's a thunder storm around Marshfield, they say you can hear his rolling voice in the hollows of the sky. And they say that if you go to his grave and speak loud and clear, "Dan'l Webster—Dan'l Webster!" the ground 'll begin to shiver and the trees

begin to shake. And after a while you'll hear a deep voice saying, "Neighbour, how stands the Union?" Then you better answer the Union stands as she stood, rock-bottomed and copper sheathed, one and indivisible, or he's liable to rear right out of the ground. At least, that's what I was told when I was a youngster.

You see, for a while, he was the biggest man in the country. He never got to be President, but he was the biggest man. There were thousands that trusted in him right next to God Almighty, and they told stories about him and all the things that belonged to him that were like the stories of patriarchs and such. They said, when he stood up to speak, stars and stripes came right out in the sky, and once he spoke against a river and made it sink into the ground. They said, when he walked the woods with his fishing rod, Killall, the trout would jump out of the streams right into his pockets, for they knew it was no use putting up a fight against him; and, when he argued a case, he could turn on the harps of the blessed and the shaking of the earth underground. That was the kind of man he was, and his big farm up at Marshfield was suitable to him. The chickens he raised were all white meat down through the drumsticks, the cows were tended like children, and the big ram he called Goliath had horns with a curl like a morning-glory vine and could butt through an iron door. But Dan'l wasn't one of your gentlemen farmers; he knew all the ways of the land, and he'd be up by candlelight to see that the chores got done. A man with a mouth like a mastiff, a brow like a mountain and eyes like burning anthracite—that was Dan'l Webster in his prime. And the biggest case he argued never got written down in the books, for he argued it against the devil, nip and tuck and no holds barred. And this is the way I used to hear it told.

There was a man named Jabez Stone, lived at Cross Corners, New Hampshire. He wasn't a bad man to start with, but he was an unlucky man. If he planted corn, he got borers; if he planted potatoes, he got blight. He had good enough land, but it didn't prosper him; he had a decent wife and children, but the more children he had, the less there was to feed them. If stones cropped up in his neighbours's field, boulders boiled up in his; if he had a horse with the spavins, he'd trade it for one with the staggers and give something extra. There's some folks bound to be like that, apparently. But one day Jabez Stone got sick of the whole business.

He'd been plowing that morning and he'd just broke the plowshare on a rock that he could have sworn hadn't been there yesterday. And, as he stood looking at the plowshare, the off horse began to cough—that ropy kind of cough that means sickness and horse doctors. There were two children down with the measles, his wife was ailing, and he had a whitlow on his thumb. It was about the last straw for Jabez Stone. "I vow," he said, and he looked around him kind of desperate—"I vow

it's enough to make a man want to sell his soul to the devil. And I would, too, for two cents!"

Then he felt a kind of queerness come over him at having said what he'd said; though, naturally, being a New Hampshireman, he wouldn't take it back. But, all the same, when it got to be evening and, as far as he could see, no notice had been taken, he felt relieved in his mind, for he was a religious man. But notice is always taken, sooner or later, just like the Good Book says. And, sure enough, next day, about supper time, a soft-spoken, dark-dressed stranger drove up in a handsome buggy and asked for Jabez Stone.

Well, Jabez told his family it was a lawyer, come to see him about a legacy. But he knew who it was. He didn't like the looks of the stranger, nor the way he smiled with his teeth.

They were white teeth, and plentiful—some say they were filed to a point, but I wouldn't vouch for that. And he didn't like it when the dog took one look at the stranger and ran away howling, with his tail between his legs. But having passed his word, more or less, he stuck to it, and they went out behind the barn and made their bargain. Jabez Stone had to prick his finger to sign, and the stranger lent him a silver pin. The wound healed clean, but it left a little white scar.

After that, all of a sudden, things began to pick up and prosper for Jabez Stone. His cows got fat and his horses sleek, his crops were the envy of the neighbourhood, and lightning might strike all over the valley, but it wouldn't strike his barn. Pretty soon, he was one of the prosperous people of the county; they asked him to stand for selectman, and he stood for it; there began to be talk of running him for state senate. All in all, you might say the Stone family was as happy and contented as cats in a dairy. And so they were, except for Jabez Stone.

He'd been contented enough, the first few years. It's a great thing when bad luck turns; it drives most other things out of your head. True, every now and then, especially in rainy weather, the little white scar on his finger would give him a twinge. And once a year, punctual as clockwork, the stranger with the handsome buggy would come driving by. But the sixth year, the stranger lighted, and, after that, his peace was over for Jabez Stone.

The stranger came up through the lower field, switching his boots with a cane—they were handsome black boots, but Jabez Stone never liked the look of them, particularly the toes. And, after he'd passed the time of day, he said, "Well, Mr. Stone, you're a hummer! It's a very pretty property you've got here, Mr. Stone."

"Well, some might favour it and others might not," said Jabez Stone, for he was a New Hampshireman.

"Oh, no need to decry your industry!" said the stranger, very easy, showing his teeth in a smile. "After all, we know what's been done, and it's been according to contract and specifications. So when—ahem—the mortgage falls due next year, you shouldn't have any regrets."

"Speaking of that mortgage, mister," said Jabez Stone, and he looked around for help to the earth and the sky, "I'm beginning to have one or two doubts about it."

"Doubts?" said the stranger, not quite so pleasantly.

"Why, yes," said Jabez Stone. "This being the U. S. A. and me always having been a religious man." He cleared his throat and got bolder.

"Yes, sir," he said, "I'm beginning to have considerable doubts as to that mortgage holding in court."

"There's courts and courts," said the stranger, clicking his teeth. "Still, we might as well have a look at the original document." And he hauled out a big black pocketbook, full of papers. "Sherwin, Slater, Stevens, Stone," he muttered. "I, Jabez Stone, for a term of seven years—Oh, it's quite in order, I think."

But Jabez Stone wasn't listening, for he saw something else flutter out of the black pocket book. It was something that looked like a moth, but it wasn't a moth. And as Jabez Stone stared at it, it seemed to speak to him in a small sort of piping voice, terrible small and thin, but terrible human.

"Neighbour Stone!" it squeaked. "Neighbour Stone! Help me! For God's sake, help me!"

But before Jabez Stone could stir hand or foot, the stranger whipped out a big bandanna handkerchief, caught the creature in it, just like a butterfly, and started tying up the ends of the bandanna.

"Sorry for the interruption," he said. "As I was saying—"

But Jabez Stone was shaking all over like a scared horse.

"That's Miser Stevens' voice!" he said, in a croak. "And you've got him in your handkerchief!"

The stranger looked a little embarrassed.

"Yes, I really should have transferred him to the collecting box," he said with a simper, "but there were some rather unusual specimens there and I didn't want them crowded. Well, well, these little contretemps will occur."

"I don't know what you mean by contertan," said Jabez Stone, "but that was Miser Stevens' voice! And he ain't dead! You can't tell me he is! He was just as spry and mean as a woodchuck, Tuesday!"

"In the midst of life—" said the stranger, kind of pious. "Listen!" Then a bell began to toll in the valley and Jabez Stone listened, with the sweat running down his face. For he knew it was tolled for Miser Stevens and that he was dead.

"These long-standing accounts," said the stranger with a sigh; "one really hates to close them. But business is business."

He still had the bandanna in his hand, and Jabez Stone felt sick as he saw the cloth struggle and flutter.

"Are they all as small as that?" he asked hoarsely.

"Small?" said the stranger. "Oh, I see what you mean. Why, they vary." He measured Jabez Stone with his eyes, and his teeth showed. "Don't worry, Mr. Stone," he said. "You'll go with a very good grade. I wouldn't trust you outside the collecting box. Now, a man like Dan'l Webster, of course—well, we'd have to build a special box for him, and even at that, I imagine the wing spread would astonish you. He'd certainly be a prize. I wish we could see our way clear to him. But, in your case, as I was saying—"

"Put that handkerchief away!" said Jabez Stone, and he began to beg and to pray. But the best he could get at the end was a three years' extension, with conditions.

But till you make a bargain like that, you've got no idea of how fast four years can run. By the last months of those years, Jabez Stone's known all over the state and there's talk of running him for governor—and it's dust and ashes in his mouth. For every day, when he gets up, he thinks, "There's one more night gone," and every night when he lies down, he thinks of the black pocketbook and the soul of Miser Stevens, and it makes him sick at heart. Till, finally, he can't bear it any longer, and, in the last days of the last year, he hitches his horse and drives off to seek Dan'l Webster. For Dan'l was born in New Hampshire, only a few miles from Cross Corners, and it's well known that he has a particular soft spot for old neighbours.

It was early in the morning when he got to Marshfield, but Dan'l was up already, talking Latin to the farm hands and wrestling with the ram, Goliath, and trying out a new trotter and working up speeches to make against John C. Calhoun. But when he heard a New Hampshire man had come to see him, he dropped every thing else he was doing, for that was Dan'l's way. He gave Jabez Stone a breakfast that five men couldn't eat, went into the living history of every man and woman in Cross Corners, and finally asked him how he could serve him.

Jabez Stone allowed that it was a kind of mortgage case.

"Well, I haven't pleaded a mortgage case in a long time, and I don't generally plead now, except before the Supreme Court," said Dan'l, "but if I can, I'll help you."

"Then I've got hope for the first time in ten years," said Jabez Stone, and told him the details.

Dan'l walked up and down as he listened, hands behind his back, now and then asking a question, now and then plunging his eyes at the floor, as if they'd bore through it like gimlets. When Jabez Stone had finished, Dan'l puffed out his cheeks and blew. Then he turned to Jabez Stone and a smile broke over his face like the sunrise over Monadnock.

"You've certainly given yourself the devil's own row to hoe, Neighbour Stone," he said, "but I'll take your case."

"You'll take it?" said Jabez Stone, hardly daring to believe.

"Yes," said Dan'l Webster. "I've got about seventy-five other things to do and the Missouri Compromise to straighten out, but I'll take your case. For if two New Hampshiremen aren't a match for the devil, we might as well give the country back to the Indians."

Then he shook Jabez Stone by the hand and said, "Did you come down here in a hurry?"

"Well, I admit I made time," said Jabez Stone.

"You'll go back faster," said Dan'l Webster, and he told 'em to hitch up Constitution and Constellation to the carriage. They were matched grays with one white forefoot, and they stepped like greased lightning.

Well, I won't describe how excited and pleased the whole Stone family was to have the great Dan'l Webster for a guest, when they finally got there. Jabez Stone had lost his hat on the way, blown off when they overtook a wind, but he didn't take much account of that. But after supper he sent the family off to bed, for he had most particular business with Mr. Webster. Mrs. Stone wanted them to sit in the front parlor, but Dan'l Webster knew front parlors and said he preferred the kitchen. So it was there they sat, waiting for the stranger, with a jug on the table between them and a bright fire on the hearth—the stranger being scheduled to show up on the stroke of midnight, according to specification.

Well, most men wouldn't have asked for better company than Dan'l Webster and a jug. But with every tick of the clock Jabez Stone got sadder and sadder. His eyes roved round, and though he sampled the jug you could see he couldn't taste it. Finally, on the stroke of 11:30 he reached over and grabbed Dan'l Webster by the arm.

"Mr. Webster, Mr. Webster!" he said, and his voice was shaking with fear and a desperate courage. "For God's sake, Mr. Webster, harness your horses and get away from this place while you can!"

"You've brought me a long way, neighbour, to tell me you don't like my company," said Dan'l Webster, quite peaceable, pulling at the jug.

"Miserable wretch that I am!" groaned Jabez Stone. "I've brought you a devilish way, and now I see my folly. Let him take me if he wills. I don't hanker after it, I must say, but I can stand it. But you're the Union's stay and New Hampshire's pride! He mustn't get you, Mr. Webster! He mustn't get you!"

Dan'l Webster looked at the distracted man, all gray and shaking in the firelight, and laid a hand on his shoulder.

"I'm obliged to you, Neighbour Stone," he said gently. "It's kindly thought of. But there's a jug on the table and a case in hand. And I never left a jug or a case half finished in my life."

And just at that moment there was a sharp rap on the door "Ah," said Dan'l Webster, very coolly, "I thought your clock was a trifle slow, Neighbour Stone." He stepped to the door and opened it. "Come in," he said. The stranger came in—very dark and tall he looked in the firelight. He was carrying a box under his arm—a black, japanned box with little air holes in the lid. At the sight of the box, Jabez Stone gave a low cry and shrank into a corner of the room. "Mr. Webster, I presume," said the stranger, very polite, but with his eyes glowing like a fox's deep in the woods.

"Attorney of record for Jabez Stone," said Dan'l Webster, but his eyes were glowing too. "Might I ask your name?"

"I've gone by a good many," said the stranger carelessly. "Perhaps Scratch will do for the evening. I'm often called that in these regions."

Then he sat down at the table and poured himself a drink from the jug. The liquor was cold in the jug, but it came steaming into the glass.

"And now," said the stranger, smiling and showing his teeth, "I shall call upon you, as a law-abiding citizen, to assist me in taking possession of my property."

Well, with that the argument began—and it went hot and heavy. At first, Jabez Stone had a flicker of hope, but when he saw Dan'l Webster being forced back at point after point, he just sat scrunched in his corner, with his eyes on that japanned box. For there wasn't any doubt as to the deed or the signature—that was the worst of it. Dan'l Webster twisted and turned and thumped his fist on the table, but he couldn't get away from that. He offered to compromise the case; the stranger wouldn't hear of it. He pointed out the property had increased in value, and state senators ought to be worth more; the stranger stuck to the letter of the law. He was a great lawyer, Dan'l Webster, but we know who's the King of Lawyers, as the Good Book tells us, and it seemed as if, for the first time, Dan'l Webster had met his match.

Finally, the stranger yawned a little. "Your spirited efforts on behalf of your client do you credit, Mr. Webster," he said, "but if you have no more arguments to adduce, I'm rather pressed for time—" and Jabez Stone shuddered.

Dan'l Webster's brow looked dark as a thundercloud. "Pressed or not, you shall not have this man," he thundered. "Mr. Stone is an American citizen, and no American citizen may be forced into the service of a foreign prince. We fought England for that in '12 and we'll fight all hell for it again!"

"Foreign?" said the stranger. "And who calls me a foreigner?"

"Well, I never yet heard of the dev—of your claiming American citizenship," said Dan'l Webster with surprise.

"And who with better right?" said the stranger, with one of his terrible smiles. "When the first wrong was done to the first Indian, I was there. When the first slaver put out for the Congo, I stood on her deck. Am I not in your books and stories and beliefs, from the first settlements on? Am I not spoken of, still, in every church

in New England? 'Tis true the North claims me for a Southerner, and the South for a Northerner, but I am neither. I am merely an honest American like yourself—and of the best descent—for, to tell the truth, Mr. Webster, though I don't like to boast of it, my name is older in this country than yours."

"Aha!" said Dan'l Webster, with the veins standing out in his forehead. "Then I stand on the Constitution! I demand a trial for my client!"

"The case is hardly one for an ordinary court," said the stranger, his eyes flickering. "And, indeed, the lateness of the hour—"

"Let it be any court you choose, so it is an American judge and an American jury!" said Dan'l Webster in his pride. "Let it be the quick or the dead; I'll abide the issue!"

"You have said it," said the stranger, and pointed his finger at the door. And with that, and all of a sudden, there was a rushing of wind outside and a noise of footsteps. They came, clear and distinct, through the night. And yet, they were not like the footsteps of living men.

"In God's name, who comes by so late?" cried Jabez Stone, in an ague of fear.

"The jury Mr. Webster demands," said the stranger, sipping at his boiling glass. "You must pardon the rough appearance of one or two; they will have come a long way."

And with that the fire burned blue and the door blew open and twelve men entered, one by one.

If Jabez Stone had been sick with terror before, he was blind with terror now. For there was Walter Butler, the loyalist, who spread fire and horror through the Mohawk Valley in the times of the Revolution; and there was Simon Girty, the renegade, who saw white men burned at the stake and whooped with the Indians to see them burn. His eyes were green, like a catamount's, and the stains on his hunting shirt did not come from the blood of the deer. King Philip was there, wild and proud as he had been in life, with the great gash in his head that gave him his death wound, and cruel Governor Dale, who broke men on the wheel. There was Morton of Merry Mount, who so vexed the Plymouth Colony, with his flushed, loose, handsome face and his hate of the godly. There was Teach, the bloody pirate, with his black beard curling on his breast. The Reverend John Smeet, with his strangler's hands and his Geneva gown, walked as daintily as he had to the gallows. The red print of the rope was still around his neck, but he carried a perfumed handkerchief in one hand. One and all, they came into the room with the fires of

hell still upon them, and the stranger named their names and their deeds as they came, till the tale of twelve was told. Yet the stranger had told the truth—they had all played a part in America.

"Are you satisfied with the jury, Mr. Webster?" said the stranger mockingly, when they had taken their places.

The sweat stood upon Dan'l Webster's brow, but his voice was clear.

"Quite satisfied," he said. "Though I miss General Arnold from the company."

"Benedict Arnold is engaged upon other business," said the stranger, with a glower. "Ah, you asked for a justice, I believe."

He pointed his finger once more, and a tall man, soberly clad in Puritan garb, with the burning gaze of the fanatic, stalked into the room and took his judge's place.

"Justice Hathorne is a jurist of experience," said the stranger. "He presided at certain witch trials once held in Salem. There were others who repented of the business later, but not he."

"Repent of such notable wonders and undertakings?" said the stern old justice. "Nay, hang them—hang them all!" And he muttered to himself in a way that struck ice into the soul of Jabez Stone.

Then the trial began, and, as you might expect, it didn't look anyways good for the defense. And Jabez Stone didn't make much of a witness in his own behalf. He took one look at Simon Girty and screeched, and they had to put him back in his corner in a kind of swoon.

It didn't halt the trial, though; the trial went on, as trials do. Dan'l Webster had faced some hard juries and hanging judges in his time, but this was the hardest he'd ever faced, and he knew it. They sat there with a kind of glitter in their eyes, and the stranger's smooth voice went on and on. Every time he'd raise an objection, it'd be "Objection sustained," but whenever Dan'l objected, it'd be "Objection denied." Well, you couldn't expect fair play from a fellow like this Mr. Scratch.

It got to Dan'l in the end, and he began to heat, like iron in the forge. When he got up to speak he was going to flay that stranger with every trick known to the law, and the judge and jury too. He didn't care if it was contempt of court or what would happen to him for it. He didn't care any more what happened to Jabez Stone. He just got madder and madder, thinking of what he'd say. And yet, curiously enough, the more he thought about it, the less he was able to arrange his speech in his

mind. Till, finally, it was time for him to get up on his feet, and he did so, all ready to bust out with lightnings and denunciations. But before he started he looked over the judge and jury for a moment, such being his custom. And he noticed the glitter in their eyes was twice as strong as before, and they all leaned forward. Like hounds just before they get the fox, they looked, and the blue mist of evil in the room thickened as he watched them. Then he saw what he'd been about to do, and he wiped his forehead, as a man might who's just escaped falling into a pit in the dark.

For it was him they'd come for, not only Jabez Stone. He read it in the glitter of their eyes and in the way the stranger hid his mouth with one hand. And if he fought them with their own weapons, he'd fall into their power; he knew that, though he couldn't have told you how. It was his own anger and horror that burned in their eyes; and he'd have to wipe that out or the case was lost. He stood there for a moment, his black eyes burning like anthracite. And then he began to speak.

He started off in a low voice, though you could hear every word. They say he could call on the harps of the blessed when he chose. And this was just as simple and easy as a man could talk. But he didn't start out by condemning or reviling. He was talking about the things that make a country a country, and a man a man.

And he began with the simple things that everybody's known and felt—the freshness of a fine morning when you're young, and the taste of food when you're hungry, and the new day that's every day when you're a child. He took them up and he turned them in his hands. They were good things for any man. But without freedom, they sickened. And when he talked of those enslaved, and the sorrows of slavery, his voice got like a big bell. He talked of the early days of America and the men who had made those days. It wasn't a spread-eagle speech, but he made you see it. He admitted all the wrong that had ever been done. But he showed how, out of the wrong and the right, the suffering and the starvations, something new had come. And everybody had played a part in it, even the traitors.

Then he turned to Jabez Stone and showed him as he was an ordinary man who'd had hard luck and wanted to change it. And, because he'd wanted to change it, now he was going to be punished for all eternity. And yet there was good in Jabez Stone, and he showed that good. He was hard and mean, in some ways, but he was a man. There was sadness in being a man, but it was a proud thing too. And he showed what the pride of it was till you couldn't help feeling it. Yes, even in hell, if a man was a man, you'd know it. And he wasn't pleading for any one person any more, though his voice rang like an organ. He was telling the story and the failures and the endless journey of mankind. They got tricked and trapped and bamboozled,

but it was a great journey. And no demon that was ever foaled could know the inwardness of it—it took a man to do that.

The fire began to die on the hearth and the wind before morning to blow. The light was getting gray in the room when Dan'l Webster finished. And his words came back at the end to New Hampshire ground, and the one spot of land that each man loves and clings to. He painted a picture of that, and to each one of that jury he spoke of things long forgotten. For his voice could search the heart, and that was his gift and his strength. And to one, his voice was like the forest and its secrecy, and to another like the sea and the storms of the sea; and one heard the cry of his lost nation in it, and another saw a little harmless scene he hadn't remembered for years. But each saw something. And when Dan'l Webster finished he didn't know whether or not he'd saved Jabez Stone. But he knew he'd done a miracle. For the glitter was gone from the eyes of judge and jury, and, for the moment, they were men again, and knew they were men.

"The defense rests," said Dan'l Webster, and stood there like a mountain. His ears were still ringing with his speech, and he didn't hear any thing else till he heard Judge Hathorne say, "The jury will retire to consider its verdict."

Walter Butler rose in his place and his face had a dark, gay pride on it. "The jury has considered its verdict," he said, and looked the stranger full in the eye. "We find for the defendant, Jabez Stone."

With that, the smile left the stranger's face, but Walter Butler did not flinch.

"Perhaps 'tis not strictly in accordance with the evidence," he said, "but even the damned may salute the eloquence of Mr. Webster."

With that, the long crow of a rooster split the gray morning sky, and judge and jury were gone from the room like a puff of smoke and as if they had never been there. The stranger turned to Dan'l Webster, smiling wryly. "Major Butler was always a bold man," he said. "I had not thought him quite so bold. Nevertheless, my congratulations, as between two gentlemen."

"I'll have that paper first, if you please," said Dan'l Webster, and he took it and tore it into four pieces. It was queerly warm to the touch. "And now," he said, "I'll have you!" and his hand came down like a bear trap on the stranger's arm. For he knew that once you bested anybody like Mr. Scratch in fair fight, his power on you was gone. And he could see that Mr. Scratch knew it too.

The stranger twisted and wriggled, but he couldn't get out of that grip. "Come, come, Mr. Webster," he said, smiling palely. "This sort of thing is ridic—ouch!—is ridiculous. If you're worried about the costs of the case, naturally, I'd be glad to pay—"

"And so you shall!" said Dan'l Webster, shaking him till his teeth rattled. "For you'll sit right down at that table and draw up a document, promising never to bother Jabez Stone nor his heirs or assigns nor any other New Hampshire man till doomsday! For any Hades we want to raise in this state, we can raise ourselves, without assistance from strangers."

"Ouch!" said the stranger. "Ouch! Well, they never did run very big to the barrel, but—ouch!—I agree!"

So he sat down and drew up the document. But Dan'l Webster kept his hand on his coat collar all the time.

"And, now, may I go?" said the stranger, quite humble, when Dan'l 'd seen the document was in proper and legal form.

"Go?" said Dan'l, giving him another shake. "I'm still trying to figure out what I'll do with you. For you've settled the costs of the case, but you haven't settled with me. I think I'll take you back to Marshfield," he said, kind of reflective. "I've got a ram there named Goliath that can butt through an iron door. I'd kind of like to turn you loose in his field and see what he'd do."

Well, with that the stranger began to beg and to plead. And he begged and he pled so humble that finally Dan'l, who was naturally kind hearted, agreed to let him go. The stranger seemed terrible grateful for that and said, just to show they were friends, he'd tell Dan'l's fortune before leaving. So Dan'l agreed to that, though he didn't take much stock in fortunetellers ordinarily.

But, naturally, the stranger was a little different. Well, he pried and he peered at the line in Dan'l's hands. And he told him one thing and another that was quite remarkable. But they were all in the past.

"Yes, all that's true, and it happened," said Dan'l Webster. "But what's to come in the future?"

The stranger grinned, kind of happily, and shook his head. "The future's not as you think it," he said. "It's dark. You have a great ambition, Mr. Webster."

"I have," said Dan'l firmly, for everybody knew he wanted to be President.

"It seems almost within your grasp," said the stranger, "but you will not attain it. Lesser men will be made President and you will be passed over."

"And, if I am, I'll still be Daniel Webster," said Dan'l. "Say on."

"You have two strong sons," said the stranger, shaking his head. "You look to found a line. But each will die in war and neither reach greatness."

"Live or die, they are still my sons," said Dan'l Webster. "Say on."

"You have made great speeches," said the stranger. "You will make more."

"Ah," said Dan'l Webster.

"But the last great speech you make will turn many of your own against you," said the stranger. "They will call you Ichabod; they will call you by other names. Even in New England some will say you have turned your coat and sold your country, and their voices will be loud against you till you die."

"So it is an honest speech, it does not matter what men say," said Dan'l Webster. Then he looked at the stranger and their glances locked. "One question," he said. "I have fought for the Union all my life. Will I see that fight won against those who would tear it apart?"

"Not while you live," said the stranger, grimly, "but it will be won. And after you are dead, there are thousands who will fight for your cause, because of words that you spoke."

"Why, then, you long-barreled, slab-sided, lantern-jawed, fortune-telling note shaver!" said Dan'l Webster, with a great roar of laughter, "be off with you to your own place before I put my mark on you! For, by the thirteen original colonies, I'd go to the Pit itself to save the Union!"

And with that he drew back his foot for a kick that would have stunned a horse. It was only the tip of his shoe that caught the stranger, but he went flying out of the door with his collecting box under his arm.

"And now," said Dan'l Webster, seeing Jabez Stone beginning to rouse from his swoon, "let's see what's left in the jug, for it's dry work talking all night. I hope there's pie for breakfast, Neighbour Stone."

But they say that whenever the devil comes near Marshfield, even now, he gives it a wide berth. And he hasn't been seen in the state of New Hampshire from that day to this. I'm not talking about Massachusetts or Vermont.

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,[1] 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*.[2] 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

1. 15 U.S.C. § 1

2. 208 U.S. 274 (1908)

the union's conduct. But the Supreme Court reversed, holding that the boycott fell within the prohibition against conspiracies in restraint of interstate commerce.

> *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 members, the fact that labor had to "pass the hat" to avoid the foreclosure of members' homes made the case unforgettable.*[3]

Equivalent to about $5.6 million in 2023.

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."[4]

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

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

Section 6 of the Clayton Act[5] 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.*

5. 15 U.S.C. § 17

Section 20 of the Clayton Act[6] sought to restrict the use of injunctions in labor disputes:

6. 29 U.S.C. § 52

> *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.*
>
> *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*,[7] 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.

7. 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.*[8]

8. 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*,[9] the Supreme Court struck down those statutes as unconstitutional infringements on liberty of contract. *Adair v. United States*[10] (striking down federal statute making it a criminal offense for a railroad to fire an employee because of union membership); *Coppage v. Kansas*[11] (striking down state statute making it a crime for employers to require yellow dog contracts as a condition of employment).

9. 198 U.S. 45 (1905)

10. 208 U.S. 161 (1908)

11. 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)[12] 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.

12. 29 U.S.C. §§101 et seq.

Second, the National Labor Relations Act (1935)[13] 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.

13. 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 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.

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."

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."[1]

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;[2] he paid Shane from his pocket.

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,

1. (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."

2. (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.

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.[3] 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.

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.

3. (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."

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 UberBLACK 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.[4]

4. (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.

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.[5] Under the circumstances, we believe that a reasonable fact-finder could rule in favor of Plaintiffs.[6] Thus, summary judgment was inappropriate.

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.

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.[7]

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.

5. (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.

6. (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.

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

7. (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.

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.[8] For the reasons that follow, the Motion is denied.

8. (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.[9]

9. (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.[10]

10. (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[11]

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)

11. (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).

a conviction record; or (iii) a criminal background check." The NYCCHR defined "conditional offer of employment" in the Enforcement Guidance as:

> 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.
>
> 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.