

LER 522 GOVERNMENT REGULATION**Professor Michael H. LeRoy****244-4092 (work)/e-mail: mhl@illinois.edu****Fall 2020**

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Course Description: This course examines a variety of federal and state laws, administrative regulations, and court rulings that regulate employment relationships. Topics include employee privacy rights and employer rights to acquire personal information about prospective and current employees; negligent hiring; disparate treatment and disparate impact under Title VII of the 1964 Civil Rights Act; the Immigration Reform and Control Act; age, disability, pregnancy, and sexual orientation discrimination; wage and hour regulations; sexual harassment; family and medical leave; health care benefits, and others.

Course Structure: Your diligent preparation and consistent participation are necessary to make this course successful. Given your presumed unfamiliarity with analyzing legal issues, most classes will involve my presentation of lecture materials. As the semester progresses, however, you will be able to participate in more class discussions.

Text: For the first time, I am making this course available completely without any book cost to my students. I have found links to all cases in the syllabus. About half of our cases are from Mark Rothstein and Lance Liebman, *EMPLOYMENT LAW* (8th ed.). It is an excellent book and future resource. **It costs about \$250, which I consider to be too expensive now to require as a course text.**

Assignments: You are required to submit a written assignment every week. See below for details. Send your paper to mhl@illinois.edu. **Be sure to put this exact heading in the subject line: LER 522.**

For each case (usually four per week), you should write one page (or more) that summarizes the following material:

1. What is the legal issue?
2. What are the main facts of the case?
3. What is the court's ruling? How did the court justify its ruling?
4. Where there is a dissenting opinion, summarize its conclusion and reasoning. In general, devote one page per case. Use standard font, spacing, and margins.
5. Incorporate key quotes and specific references to statutes.

There is no penalty for exceeding the one-page guideline for each case. Excellent

summaries are often longer than one page.

GRADES:

Weekly Assignments (100% of your course grade): You will be responsible for submitting a weekly assignment before the start of every class. **A typical assignment will be 4 cases.**

Grading for weekly assignments has two components: Weekly Regularity (50%), and End-of-the Semester-Quality (50%).

Weekly Regularity (50%) (“Pre-Submit Paper”): If you miss one pre-submit timely submissions, this component will drop to an A-, 2 pre-submit assignments, B+, and so on. However, if you are simply late and send me a pre-submit after the deadline, I will except without grading penalty. In other words, during COVID-19, pre-submits are expected but I am allowing flexibility because of the highly unusual disruptions we are experiencing. Please keep up ... your learning experience will be much more enjoyable and beneficial. That said, if you can’t meet a deadline, don’t stress. Send me a quick note, just as a courtesy.

End-of-the Semester-Quality (50%) (“Complied Paper”): As each week passes, you will copy your weekly assignment into a different file where you will accumulate all weekly assignments. For example, if your name is Mary Jones, name the file something such as “Mary Jones Compiled Paper.” Each week, paste your current work in this cumulative file. The purpose of this compiled paper is to correct mistakes (which are fairly common) and add useful detail to the weekly assignment.

COVID-19 GRADING POLICY: I am not penalizing late submissions, however, I am not exempting assignments. Late assignments must be made-up or I will issue an “Incomplete” for the course.

Your complied paper will be accepted between the end of the last class (**Monday, December 7th**) and one week later (**Monday, December 14th, 11:59 p.m.**). **This part of your course grade will be substantively graded at the end of the semester.** Papers are graded using these criteria: (a) comprehension, (b) accuracy, (c) support for conclusions in footnotes,¹ (d) length (including word count), (e) grammar, and (f) spelling.

Sexual Misconduct Policy and Reporting

The University of Illinois is committed to combating sexual misconduct. As such, you should know that faculty and staff members are required to report any instances of sexual misconduct—

¹ Quote or cite to cases in the book in this manner: *Casename*, p. _____. If citing to an online case, cite the name and page number, too. Citations to lectures are also permitted. *E.g.*, *Lecture/Discussion* (February 21, 2015).

which also includes dating violence, domestic violence, and stalking—to the University’s Title IX and Disability Office. What this means is that as your instructor, I am required to report any incidents of sexual misconduct that are directly reported to me, or of which I am somehow made aware. When a report is received, an individual with the Title IX and Disability Office reaches out to provide information about rights and options, including accommodations, support services, the campus disciplinary process, and law enforcement options.

There is an exception to this reporting requirement about which you should be aware. A list of the designated University employees who, as counselors, confidential advisors, and medical professionals, do not have this reporting responsibility and can maintain confidentiality, can be found here: wecare.illinois.edu/resources/students/#confidential.

Other information about resources and reporting is available here: wecare.illinois.edu.

Office Hours: I promise to make myself readily available to you upon request. Please call (244-4092) or e-mail me for an appointment, and suggest times.

Concluding Thought: *My hope is that you will find this course among the most valuable in your professional education.*

Synopsis of Employment Laws Covered in LER 522

I. Federal Law

A. U.S. Constitution

First Amendment

Fourth Amendment

Fourteenth Amendment (Due Process and Equal Protection)

B. Statutes and Related Regulations

Immigration Reform and Control Act

Immigration Reform and Immigrant Responsibility Act of 1996

Equal Pay Act

Title VII, 1964 Civil Rights Act, as amended

 Pregnancy Discrimination Act

 1991 Civil Rights Act

Fair Labor Standards Act

Americans with Disabilities Act

Family and Medical Leave Act

Employee Retirement Income Security Act

COBRA (Continuation of Health Insurance Coverage)

Health Insurance Portability and Accountability Act (HIPAA)

Age Discrimination in Employment Act

 Older Worker Benefit Protection Act

 Negotiated Public Rule Making, amending Waiver Provisions of OWBPA
(June 8, 1998)

II. State Employment Laws (Selected Sample)

Illinois (Negligent Hiring Doctrine)
California (Labor Code- Privacy Rights)
Indiana (Defamation for Negative Employment References)
Massachusetts (Mandated Employee Health Insurance)
Louisiana (Negligence in Company Doctor-Employee Relationship)
Georgia (Breach of Health Insurance Contract)
Connecticut (Right to Personnel and Medical Records)
Utah (Employee Drug Testing)
Washington (Employee Political Expression)
Texas (AIDS Insurance)
Ohio (Personal Leave for School Conference)
New York (Disclosure of Employee Finances)

III. Web Sites Used in LER 522

A. U.S. Congress

1. U.S. Senate and House of Representatives at <http://thomas.loc.gov/>

B. Federal Courts

1. U.S. Supreme Court (current and recent decisions),
<http://supct.law.cornell.edu/supct/>
(expanded Supreme Court services).
Also see <http://www.supremecourtus.gov>
2. U.S. Court of Appeals, First Circuit <http://www.ca1.uscourts.gov/>
3. U.S. Court of Appeals, Second Circuit <http://www.ca2.uscourts.gov/>
4. U.S. Court of Appeals, Third Circuit <http://www.ca3.uscourts.gov/>
5. U.S. Court of Appeals, Fourth Circuit <http://www.ca4.uscourts.gov/>
6. U.S. Court of Appeals, Fifth Circuit <http://www.ca5.uscourts.gov/>
7. U.S. Court of Appeals, Sixth Circuit <http://www.ca6.uscourts.gov/>
8. U.S. Court of Appeals, Seventh Circuit <http://www.ca7.uscourts.gov/>
9. U.S. Court of Appeals, Eighth Circuit <http://www.ca8.uscourts.gov/>
10. U.S. Court of Appeals, Ninth Circuit <http://www.ca9.uscourts.gov/>
11. U.S. Court of Appeals, Tenth Circuit <http://www.ca10.uscourts.gov/>
12. U.S. Court of Appeals, Eleventh Circuit <http://www.ca11.uscourts.gov/>
13. U.S. Court of Appeals, D.C. Circuit <http://www.cadc.uscourts.gov/>
<http://www.ca1.uscourts.gov/> <http://www.findlaw.com/casecode/courts/9th.html>
5. U.S. Court of Appeals, Eleventh Circuit <http://www.law.emory.edu/11circuit/>

6. A good general source for cases is at
<http://www.law.com/professionals/emplaw.html>

C. Administrative Agencies

1. U.S. Department of Justice, Civil Rights Division
<http://www.usdoj.gov/crt/osc/>
2. U.S. Equal Opportunity Commission <http://www.eeoc.gov/>
3. U.S. Department of Labor <http://www.dol.gov/>

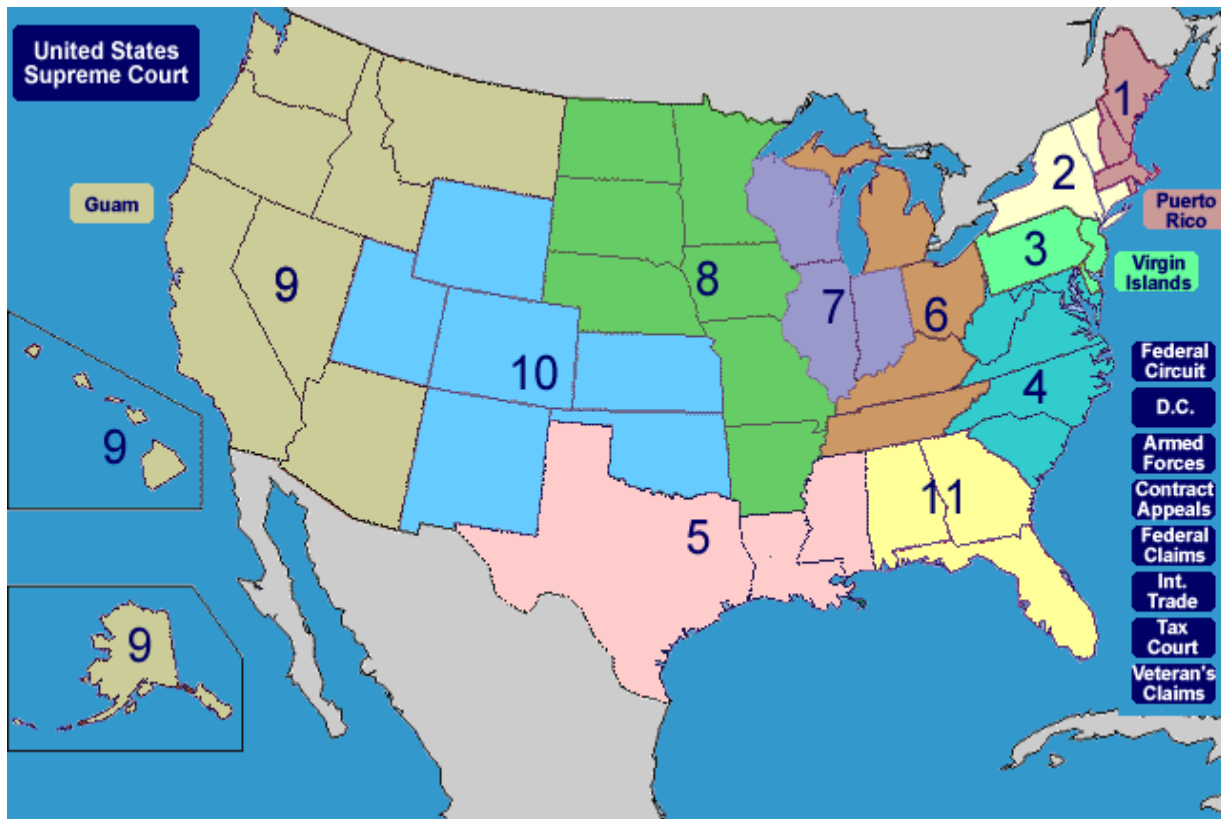
D. State Courts

1. Illinois Supreme Court <http://www.state.il.us/court/>
2. Links to All State Supreme Courts
<http://www.law.cornell.edu/opinions.html#state>

E. Useful “Utility” Research Link

1. Legal Information Institute has a rich compendium of research websites.
<http://www.law.cornell.edu/wex/employment>

READINGS FROM THE SYLLABUS MAY CHANGE AT ANY TIME



ASSIGNMENT OF CASEBOOK PAGES INCLUDE ADDITIONAL REQUIRED MATERIALS, AS WELL AS THE LEAD CASE

I. Establishing the Employment Relationship

Foundations of Employment Law

1. Master-Servant, William Blackstone, Commentaries 17
2. *Lemmerman v. A.T. Williams Oil Co.* 21-26
Also here: <https://www.courtlistener.com/opinion/1340753/lemmerman-v-at-williams-oil-co/>
3. *O'Connor v. Uber Technologies, Inc.*, 82 F.Supp.3d 1133 (N.D. Cal. 2015)
 [supplement, below]

Recruitment

4. *Kotch v. Bd. of River Port Pilot Commissioners* 69-72

- Also here* <https://www.law.cornell.edu/supremecourt/text/330/552>
5. See video: <https://www.youtube.com/watch?v=8oqkdKsIcEo>
6. *EEOC v. Consolidated Service Systems* 73-77
Available here <https://openjurist.org/989/f2d/233/equal-employment-opportunity-commission-v-consolidated-service-systems>

The Labor Pool

7. *Aramark Facility Services v. Services Employees Int'l Union* 83-89,
also here <https://caselaw.findlaw.com/us-9th-circuit/1003272.html>
8. *Chamber of Commerce v. Whiting* 90-97
Also here <https://www.justice.gov/sites/default/files/crt/legacy/2011/06/08/commerceopinion.pdf>
 (read pp. 2-15, and Breyer Dissent, pp. 4-11)
9. Read “Remedies for Unlawful Alien Workers,” [Download the article from:
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2246397
 (Click on Download this Paper, near top, and write a one page summary of the article)
10. *Dandamudi v. Tisch* (Supplement)

Applications, Interviews and References

11. *Lysak v. Seiler Corp.*, *here*:
<file:///C:/Users/arbit/Downloads/Lysak%20v.%20Seiler%20Corp.pdf>
12. *Kadlec Medical Center v. Lakeview Anesthesia Associates*, *here*:
13. <http://www.ca5.uscourts.gov/opinions%5Cpub%5C06/06-30745-CV0.wpd.pdf>
14. *Abed v. Western Dental Services, Inc.*, click here to read:
<https://caselaw.findlaw.com/ca-court-of-appeal/1896532.html>
15. Artificial Intelligence Video Interview Act (HB 2557) (Supplement below) (for your one-page write-up, (a) summarize the main points of the law, and (b) discuss ambiguous portions of the law and/or shortcomings or problems with the law.

Truth Detecting Devices and Psychological Testing

16. *Greenawalt v. Indiana Department of Corrections* 142-145
Also here: <https://caselaw.findlaw.com/us-7th-circuit/1098543.html>
17. *Soroka v. Dayton Hudson Corp.* (Case Supplement)

Medical Screening

18. *Harrison v. Benchmark Electronics Huntsville, Inc.* 149-154
Also here: <https://caselaw.findlaw.com/us-11th-circuit/1497008.html>

Biometric Data Collection

19. *Petry v. Bimbo Bakeries* ([Supplement below](#))

Genetic, Disease and Pregnancy Testing

20. *Lowe v. Atlas Logistics*, ([Supplement below](#))

Negligent Hiring

21. *Malorney v. B & L Motor Freight, Inc.* 184-186
Also here <https://www.courtlistener.com/opinion/2078779/malorney-v-b-l-motor-freight-inc/>
22. *Maksimovic v. Tsogalis* 177 Ill.2d 511 (1997), <http://caselaw.findlaw.com/il-supreme-court/1472604.html>

II. Discrimination

- | | |
|---------------------------|---------|
| 23. Discrimination | 191-192 |
| 24. Sources of Protection | 192-199 |

Disparate Treatment

25. *Price Waterhouse v. Hopkins* 204-212
Also here pp. 1780-1789
<https://www.constangy.com/assets/htmldocuments/Price%20Waterhouse%20v.%20Hopkins.pdf>
26. *Hicks v. City of Tuscaloosa* (11th Cir. 2017),
<http://media.ca11.uscourts.gov/opinions/pub/files/201613003.pdf>.

Race Discrimination

27. *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140 (2d Cir. 2014),
<http://caselaw.findlaw.com/us-2nd-circuit/1686828.html>
28. *Phillips v. UAW Int'l*, 149 F.Supp.3d 790 (E.D. Mich. 2016) (**SUPPLEMENT**)
29. *EEOC v. Catastrophe Management Solutions* (**READ THE CASE IN THE LINK**,
<http://media.ca11.uscourts.gov/opinions/pub/files/201413482.pdf>
30. *Cooper Tire & Rubber v. NLRB*, (**CLICK LINK**)
<http://www.chamberlitigation.com/sites/default/files/cases/files/17171717/Order%20--%20Cooper%20Tire%20%26%20Rubber%20Company%20v.%20NLRB%20%28Eighth%20Circuit%29.pdf>

Sexual Harassment

- | | |
|---|---------|
| 31. <i>Harris v. Forklift Systems, Inc.</i> | 236-240 |
| https://supreme.justia.com/cases/federal/us/510/17/#tab-opinion-1959429 | |
| 32. <i>Oncala v. Sundowner Offshores Services, Inc.</i> | 241-245 |

<https://supreme.justia.com/cases/federal/us/523/75/#tab-opinion-1960325>

33. *Pennsylvania State Police v. Suders* (SUPPLEMENT) 245-251

Sex Stereotype & Transgender

34. *Smith*

35. *Bostock v. Clayton County*

Here: https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf at pp. 1-23

Disparate Impact

36. *Griggs v. Duke Power Co.* 283

Here: <https://supreme.justia.com/cases/federal/us/401/424/#tab-opinion-1949187>

37. **Uniform Guidelines: Employee Selection Procedures (4/5th Rule)**

Here <https://www.eeoc.gov/laws/guidance/questions-and-answers-clarify-and-provide-common-interpretation-uniform-guidelines>

The Bona Fide Occupational Qualification Defense

38. **The BFOQ Defense** 303

<https://www.eeoc.gov/laws/guidance/cm-625-bona-fide-occupational-qualifications>

39. *Wilson v. Southwest Airlines* 304-310

Also here: <https://law.justia.com/cases/federal/district-courts/FSupp/517/292/2386882/>

40. *Ferrill v. The Parker Group* 278-281

Here: <https://caselaw.findlaw.com/us-11th-circuit/1078500.html>

41. *Lewis v. Heartland Inns*, 591 F.3d 1033 (8th Cir. 2010) SUPPLEMENT

Retaliation

42. *Yanowitz v. L'Oreal USA, Inc.* 330-336

Here: <https://caselaw.findlaw.com/ca-court-of-appeal/1190610.html>

43. *Crawford v. Metropolitan Government of Nashville* 337-340

Here: <https://caselaw.findlaw.com/us-supreme-court/555/271.html>

44. *Burlington No. & Santa Fe Ry. Co. v. White* 341-345

Here: <https://www.supremecourt.gov/opinions/05pdf/05-259.pdf> ,

Religion

45. *Our Lady of Guadalupe School v. Morrissey-Berru* and *St. James School v. Biel*,

Here: https://www.supremecourt.gov/opinions/19pdf/19-267_1an2.pdf?source=email, pp. 1-18 (Alito, pp. 1-27; Sotomayor Dissent, pp. 1-21)

46. *Friedman v. Southern Cal. Permanente Medical Group*, 102 Cal.App.4th 39

- (Cal.App. 2 Dist. 2002 (**SUPPLEMENT**)
 47. *E.E.O.C. v. Abercrombie & Fitch, Inc.*, at
https://www.supremecourt.gov/opinions/14pdf/14-86_p86b.pdf
 48. *U.S. E.E.O.C. v. Consol Energy, Inc.*, **Supplement**

National Origin

49. *Fragante v. City & County of Honolulu* 379-384
Here: <https://law.resource.org/pub/us/case/reporter/F2/888/888.F2d.591.87-2921.html>
 50. *Contreras v. Crown Zellerbach Corp.*, 565 P.2d 1173 (1977) (**SUPPLEMENT**)
 51. *El-Hakem v. BJY Inc.*, 262 F.Supp.2d 1139 (D.Or. 2003) **Supplement**

Age

52. *Smith v. City of Jackson* 389-391
Here: <https://www.law.cornell.edu/supct/pdf/03-1160P.ZO>
 53. *Carr v. Armstrong Air Conditioning, Inc.* **Supplement**

Disability

54. *Doe v. DeKalb County School Dist.*, 145 F.3d 1441 (11th Cir. 1998),
<http://openjurist.org/145/f3d/1441/doe-v-dekalb-county-school-district>
 55. Ontario Bureau of Prisons ADA Case (**Attached PDF FILE**)
 56. *Parker v. Crete Carrier Corp.*, No. 16-1371 (8th Cir. 2016),
<http://law.justia.com/cases/federal/appellate-courts/ca8/16-1371/16-1371-2016-10-12.html>
 57. *E.E.O.C. v. Orion Energy Systems, Inc.*, link here:
<https://hr.cch.com/ELD/EEOCOrion091916.pdf>

III. Wages and Hours

Who Is A Covered Employee?

58. *Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951 (2014) (**CASE SUPPLEMENT BELOW**)
 59. *Dynamex West Operations, Inc. v. Superior Court of Los Angeles County* (**CASE SUPPLEMENT BELOW**)

Exempt Employees

60. *Christopher v. Smithline Beechman Corp.*
HERE:
<file:///C:/Users/arbit/Downloads/Christopher%20v.%20Smithkline%20Beecham>

%20Corp.pdf***Hours***

61. *IBP, Inc. v. Alvarez* 468-472
 HERE: <https://supreme.justia.com/cases/federal/us/546/21/#tab-opinion-1961951>
62. *Troester v. Starbucks Corp.*, Cal., No. S234969, 7/26/18, **available here**
<http://src.bna.com/AFJ>
63. Michael H. LeRoy, *Bare Minimum: Stripping Pay for Independent Contractors in the Share Economy*,
<http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1448&context=wmjowl>
64. **(WRITE A ONE-PAGE [OR MORE] SUMMARY)**
65. Michael H. LeRoy, “Misclassification under the Fair Labor Standards Act: Court Rulings and Erosion of the Employment Relationships ,” *University of Chicago Legal Forum* (2018), available <https://legal-forum.uchicago.edu/publication/misclassification-under-fair-labor-standards-act-court-rulings-and-erosion-employment>.
66. *Lewis v. Governor of Alabama*, (11th. Cir. 2018), **HERE:**
<http://media.ca11.uscourts.gov/opinions/pub/files/201711009.pdf>

IV. Health Benefits***Denial of Benefits***

67. *Hargrave v. Commonwealth Gen. Corp. LTD Plan*, **available here:**
<http://www.leagle.com/decision/In%20FCO%2020110513095.xml>
68. *Garrett v. Principal Life Insurance.*, 555 Fed.Appx. 809 (10th Cir. 2014), link here:
<http://www.ca10.uscourts.gov/opinions/13/13-6087.pdf>
69. *Kuhl v. Lincoln National Health Insurance Plan*, 999 F.2d 298 (8th Cir. 1993),
<https://openjurist.org/999/f2d/298/kuhl-v-lincoln-national-health-plan-of-kansas-city-inc>

Family and Medical Leave

70. Family and Medical Leave 538
71. *Rhodia Corp.* (**SUPPLEMENT**)
72. *Storey v. Burns Intern. Security Services*, 390 F.3d 760 (3d Cir. 2004)
<http://caselaw.findlaw.com/us-3rd-circuit/1155794.html>
73. *Media General Corp. v. Unemployment Appeals Commission* (Fla. Ct. App. 2007),
<http://caselaw.findlaw.com/fl-district-court-of-appeal/1277325.html>

SUPPLEMENTAL MATERIALS APPEAR BELOW

HB 2557 Enrolled LRB101 07046 JLS 52082 b

1 AN ACT concerning employment.

2 Be it enacted by the People of the State of Illinois,
3 represented in the General Assembly:

4 Section 1. Short title. This Act may be cited as the
5 **Artificial Intelligence Video Interview Act.**

6 Section 5. Disclosure of the use of artificial intelligence
7 analysis. An employer that asks applicants to record video
8 interviews and uses an artificial intelligence analysis of the
9 applicant-submitted videos shall do all of the following when
10 considering applicants for positions based in Illinois before
11 asking applicants to submit video interviews:

12 (1) Notify each applicant before the interview that
13 artificial intelligence may be used to analyze the
14 applicant’s video interview and consider the applicant’s
15 fitness for the position.

16 (2) Provide each applicant with information before the
17 interview explaining how the artificial intelligence works
18 and what general types of characteristics it uses to
19 evaluate applicants.

20 (3) Obtain, before the interview, consent from the
21 applicant to be evaluated by the artificial intelligence
22 program as described in the information provided.

23 An employer may not use artificial intelligence to evaluate

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1 applicants who have not consented to the use of artificial
2 intelligence analysis.

3 Section 10. Sharing videos limited. An employer may not

4 share applicant videos, except with persons whose expertise or
5 technology is necessary in order to evaluate an applicant's
6 fitness for a position.

7 Section 15. Destruction of videos. Upon request from the
8 applicant, employers, within 30 days after receipt of the
9 request, must delete an applicant's interviews and instruct any
10 other persons who received copies of the applicant video
11 interviews to also delete the videos, including all
12 electronically generated backup copies. Any other such person
13 shall comply with the employer's instructions.

O'Connor v. Uber Technologies, Inc., 82 F.Supp.3d 1133 (N.D. Cal. 2015)

ORDER DENYING DEFENDANT UBER TECHNOLOGIES, INC.'S MOTION FOR
SUMMARY JUDGMENT
(Docket No. 211)

EDWARD M. CHEN, District Judge

Plaintiffs filed this putative class action on behalf of themselves and other similarly situated individuals who drive for Defendant Uber Technologies, Inc. Plaintiffs claim that they are employees of Uber, as opposed to its independent contractors, and thus are eligible for various statutory protections for employees codified in the California Labor Code, such as a requirement that an employer pass on the entire amount of any gratuity "that is paid, given to, or left for an employee by a patron." Cal. Lab. Code § 351. [§ is a legal symbol that means "section."]

Pending before the Court is Uber's motion for summary judgment that Plaintiffs are independent contractors as a matter of law. As is discussed below, the Court first concludes that Plaintiffs are Uber's presumptive employees because they "perform services" for the benefit of Uber. The Court next holds that whether an individual should ultimately be classified as an employee or an independent contractor under California law presents a mixed question of law and fact that must

typically be resolved by a jury. Finally, because a number of facts material to the employee/independent contractor determination in this case remain in dispute, the Court denies Uber's summary judgment motion.

I. BACKGROUND

In a nutshell, Uber provides a service whereby individuals in need of vehicular transportation can log in to the Uber software application on their smartphone, request a ride, be paired via the Uber application with an available driver, be picked up by the available driver, and ultimately be driven to their final destination. Uber receives a credit card payment from the rider at the end of the ride, a significant portion of which it then remits to the driver who transported the passenger.

Named plaintiffs Douglas O'Connor and Thomas Colopy drive principally for Uber's "UberBlack" service. UberBlack drivers transport passengers in black sedans (e.g., Lincoln Towncars) or other limousine-like vehicles. O'Connor received access to a luxury vehicle through at least two different companies, SF Bay and Bay Network Limo. In exchange for providing a car and paying all of O'Connor's expenses (e.g., fuel and tolls), SF Bay received sixty percent of O'Connor's earnings from transporting Uber passengers. Bay Network Limo provided O'Connor with a luxury vehicle for a flat \$735 weekly fee, which included maintenance and insurance on the vehicle, but no other expenses. O'Connor was free to use Bay Network Limo's vehicle as much or as little as he chose. Colopy had similar arrangements with two third-party limousine companies that provided him with a vehicle necessary to work as an UberBlack driver.

Named plaintiffs Matthew Manahan and Elie Gurfinkel drive principally for Uber's "uberX" service. uberX drivers transport passengers in their own personal vehicles, which are typically hybrids or other "mid-range" cars. Manahan, a self-employed screenwriter in Los Angeles, drives for uberX, as well as Lyft and Sidecar, two of Uber's competitors. Manahan transports passengers in his personal vehicle—a 2012 Kia Soul. Gurfinkel began driving for uberX while he was employed full-time as a "fulfillment and project manager" by a company called ADL Embedded Solutions. Two months after he began driving for Uber, Gurfinkel left his job at ADL, and now drives for Uber full time.

Before becoming "partners" with Uber, Plaintiffs and other aspiring drivers must first complete Uber's application process. Applicants are required to upload their driver's license information, as well as information about their vehicle's registration and insurance. Applicants must also pass a background check conducted by a third party. Would-be drivers are further required to pass a "city knowledge test" and attend an interview with an Uber employee. Interviewees are instructed to "[b]ring your car, dress professionally and be prepared to stay for 1 hour."

Once a prospective driver successfully completes the application and interview stages, the driver must sign contracts with Uber or one of Uber's subsidiaries (Raiser LLC). Those contracts

explicitly provide that the relationship between the transportation providers and Uber/Raiser4 “is solely that of independent contracting parties.” The parties “expressly agree that this Agreement is not an employment agreement or employment relationship.”

The relevant contracts further provide that drivers will be paid a “fee” (i.e., fare) upon the successful completion of each ride. According to an Uber deponent [a person who is required to give pre-trial testimony in a proceeding called a deposition], Uber sets fares based principally on the miles traveled by the rider and the duration of the ride. Because Uber receives the rider’s payment of the entire fare, the relevant contracts provide that Uber will automatically deduct its own “fee per ride” from the fare before it remits the remainder to the driver. Plaintiffs presented evidence that Uber typically takes roughly 20 percent of the total fare billed to a rider as its “fee per ride.”

In this litigation, Uber bills itself as a “technology company,” not a “transportation company,” and describes the software it provides as a “lead generation platform” that can be used to connect “businesses that provide transportation” with passengers who desire rides. Uber notes that it owns no vehicles, and contends that it employs no drivers. Rather, Uber partners with alleged independent contractors that it frequently refers to as “transportation providers.” *Id.* Plaintiffs characterize Uber’s business (and their relationship with Uber) differently. They note that while Uber now disclaims that it is a “transportation company,” Uber has previously referred to itself as an “On–Demand Car Service,” and goes by the tagline “Everyone’s Private Driver.” (Onboarding Script) (“Our tagline and vision is to be ‘Everyone’s Private Driver.’”). Indeed, in commenting on Uber’s planned expansion into overseas markets, its CEO wrote on Uber’s official blog: “We are ‘Everyone’s Private Driver.’ We are Uber and we’re rolling out a transportation system in a city near you.” Other Uber documents state that “Uber provides the best transportation service in San Francisco....”

Moreover, Uber does not sell its software in the manner of a typical distributor. Rather, Uber is deeply involved in marketing its transportation services, qualifying and selecting drivers, regulating and monitoring their performance, disciplining (or terminating) those who fail to meet standards, and setting prices.

In addition to contending it is a technology company and not a transportation company, Uber argues the drivers are not its employees but instead are independent contractors, and therefore not entitled to the protection of the California Labor Code as asserted herein. In this regard, Uber contends it exercises minimal control over how its transportation providers actually provide transportation services to Uber customers, an important factor in determining whether drivers are independent contractors. Among other things, Uber notes that drivers set their own hours and work schedules, provide their own vehicles, and are subject to little direct supervision.

Plaintiffs vigorously dispute these contentions, and claim that Uber exercises considerable control and supervision over both the methods and means of its drivers’ provision of

transportation services, and that under the applicable legal standard they are employees. For the reasons explained in this Order, based on the record before the Court, the question whether Uber's drivers are employees or independent contractors is an issue to be decided by a jury, not this Court on summary judgment.

A. Applicable Legal Standards

1. Summary Judgment Standard [Summary Judgment means that a court will either rule for a complainant (plaintiff) or defendant before a trial takes place; so, people win or lose their cases in the absence of a trial, or the court rules that a trial will go forward. That is essentially a favorable ruling for a plaintiff.]

This Court may only grant summary judgment in favor of Uber if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” That is, Uber is entitled to summary judgment only if, viewing the evidence in the light most favorable to the drivers, this Court necessarily must conclude that Plaintiffs are independent contractors as a matter of law.

2. California's Test of Employment

The parties agree that determining whether Plaintiffs are employees or independent contractors is an analysis that proceeds in two stages. “First, under California law, once a plaintiff comes forward with evidence that he provided services for an employer, the employee has established a prima facie case that the relationship was one of employer/employee.” *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir.2010) (citation omitted). “As the Supreme Court of California has held ... the fact that one is performing work and labor for another is prima facie evidence of employment and such person is presumed to be a servant in the absence of evidence to the contrary.” *Id.* at 901. If the putative employee establishes a prima facie case (i.e., shows they provided services to the putative employer), the burden then shifts to the employer to prove, if it can, that the “presumed employee was an independent contractor.” *Id.*

For the purpose of determining whether an employer can rebut a prima facie showing of employment, the Supreme Court's seminal opinion in *Borello* “enumerated a number of indicia of an employment relationship.” *Narayan*, 616 F.3d at 901. The “most significant consideration” is the putative employer's “right to control work details.” *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations (Borello)*, 48 Cal.3d 341, 350, 256 Cal.Rptr. 543, 769 P.2d 399 (1989). This right of control need not extend to every possible detail of the work. Rather, the relevant question is whether the entity retains “all necessary control” over the worker's performance. *Id.* at 357; see also *Air Couriers Int'l v. Emp't Dev. Dep't*, 150 Cal.App.4th 923, 934, 59 Cal.Rptr.3d 37 (2007) (explaining that “the fact that a certain amount of freedom is allowed or is inherent in the nature of the work involved” does not preclude a finding of employment status).

The Supreme Court has further emphasized that the pertinent question is “not how much control a hirer exercises, but how much control the hirer retains the right to exercise.” *Ayala v. Antelope Valley Newspapers Inc.*, 59 Cal.4th 522, 533. When evaluating the extent of that control, the Supreme Court has stressed that an employer’s “right to discharge at will, without cause” is “strong evidence in support of an employment relationship.” *Borello*, 48 Cal.3d at 350, 256 Cal.Rptr. 543, 769 P.2d 399; see also *Ayala*, 59 Cal.4th at 531, 173 Cal.Rptr.3d 332, 327 P.3d 165 (characterizing the right to discharge without cause as “[p]erhaps the strongest evidence of the right to control”); *Narayan*, 616 F.3d at 900 (characterizing the right to discharge at will as the “most important” factor for determining whether an employment relationship exists). This is because the “power of the principal to terminate the services of the agent [without cause] gives him the means of controlling the agent’s activities.” *Ayala*, 327 P.3d 165 (citations omitted).

The putative employer’s right to control work details is not the only relevant factor, however, and the control test cannot be “applied rigidly and in isolation.” *Borello*, 48 Cal.3d at 350, 256 Cal.Rptr. 543, 769 P.2d 399. Thus, the Supreme Court has also embraced a number of “secondary indicia” that are relevant to the employee/independent contractor determination. *Id.* These additional factors include:

- (a) whether the one performing services is engaged in a distinct occupation or business;
- (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
- (c) the skill required in the particular occupation;
- (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (e) the length of time for which the services are to be performed;
- (f) the method of payment, whether by the time or by the job;
- (g) whether or not the work is a part of the regular business of the principal; and
- (h) whether or not the parties believe they are creating the relationship of employer-employee.

Borello also “approvingly cited” five additional factors (some overlapping or closely related to those outlined immediately above) for evaluating a potential employment relationship. *Narayan*, 616 F.3d at 900. These additional factors include:

- (1) the alleged employee’s opportunity for profit or loss depending on his managerial skill;
- (2) the alleged employee’s investment in equipment or materials required for his task, or his employment of helpers;
- (3) whether the service rendered requires a special skill;
- (4) the degree of permanence of the working relationship; and
- (5) whether the service rendered is an integral part of the alleged employer’s business.

Borello, 48 Cal.3d at 355. While the Supreme Court explained that all thirteen of the above “secondary indicia” are helpful in determining a hiree’s employment status, it noted that “the

individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends on particular combinations.” *Id.* at 351, 256 Cal.Rptr. 543, 769 P.2d 399. Moreover, the Court made it “clear that the label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.” *Alexander*, 765 F.3d at 989 (quoting *Borello*, 48 Cal.3d at 349, 256 Cal.Rptr. 543, 769 P.2d 399) (internal modifications omitted).

Thus, as the Ninth Circuit explained in *Narayan*, the fact-finder must “assess and weigh all of the incidents of the relationship with the understanding that no one factor is decisive, and that it is the rare case where the various factors will point with unanimity in one direction or the other.” *Narayan*, 616 F.3d at 901 (citation omitted).

Indeed, this Court’s extensive survey of the caselaw confirms that no one *Borello* factor is dispositive when analyzing employee/independent contractor status.

For instance, in *Mission Ins. Co. v. Workers’ Comp. Appeals Bd.*, the Court of Appeal reversed a determination made by the Workers’ Compensation Appeals Board that an individual was an employee of his putative employer. 123 Cal.App.3d 211, 213 (1981). The Court of Appeal held instead that the individual was an independent contractor as a matter of law. One piece of evidence the Court of Appeal relied on in reaching this conclusion was that whereas a “regular employee applicant worked a normal eight-hour shift,” plaintiff “did not work any specific hours.”

But the same was true of the putative employee in a later case, where the Court of Appeal determined that an employment relationship did exist as a matter of law. See *Air Couriers Int’l*, 150 Cal.App.4th at 926 (package delivery drivers were employees of their courier company as a matter of law even though “individual drivers determined their own schedules and decided when and how long to work”); see also *JKH Enterprises, Inc. v. Dep’t of Indus. Relations*, 142 Cal.App.4th 1046, 1052, 48 Cal.Rptr.3d 563 (2006) (holding that delivery drivers were employees of courier service, despite the fact that “drivers set their own schedules”).

The flexibility (and variability) of the *Borello* test can further be demonstrated by comparing *Mission* with *Alexander*. In *Mission*, the Court of Appeal found the putative employee was an independent contractor despite the fact that he was required to wear a uniform displaying his putative employer’s insignia. *Mission Ins. Co.*, 123 Cal.App.3d at 217. Yet, the same fact supported a conclusion in *Alexander* that plaintiffs were FedEx’s employees as a matter of law. *Alexander*, 765 F.3d at 987 (noting that the fact that drivers were required to “wear a FedEx uniform” supported finding of employee status) (internal quotation marks omitted). And while in *Mission*, the Court of Appeal found independent contractor status at least in part because the putative employee used his own personal vehicle while on the job, 123 Cal.App.3d at 216, the same fact has proved not to be dispositive in *Alexander* and in numerous other California cases where an employment relationship was found. See *Alexander*, 765 F.3d at 986 (“FedEx requires its drivers to provide their own vehicles”).

Put simply, the cases bear out the Supreme Court's exhortation that the weight given to the Borello factors "depends on [their] particular combinations." Borello, 48 Cal.3d at 351, 256 Cal.Rptr. 543, 769 P.2d 399. It is with these principles in mind that the Court now turns to the merits of Uber's summary judgment motion.

B. The Plaintiffs Are Uber's Presumptive Employees Because They Provide a Service to Uber

If Plaintiffs can establish that they provide a service to Uber, then a rebuttable presumption arises that they are Uber's employees. See Narayan, 616 F.3d at 900. Uber argues that the presumption of employment does not apply here because Plaintiffs provide it no service. The central premise of this argument is Uber's contention that it is not a "transportation company," but instead is a pure "technology company" that merely generates "leads" for its transportation providers through its software. Using this semantic framing, Uber argues that Plaintiffs are simply its customers who buy dispatches that may or may not result in actual rides. In fact, Uber notes that its terms of service with riders specifically state that Uber is under no obligation to actually provide riders with rides at all.

Thus, Uber passes itself off as merely a technological intermediary between potential riders and potential drivers. This argument is fatally flawed in numerous respects.

First, Uber's self-definition as a mere "technology company" focuses exclusively on the mechanics of its platform (i.e., the use of internet enabled smartphones and software applications) rather than on the substance of what Uber actually does (i.e., enable customers to book and receive rides).

This is an unduly narrow frame. Uber engineered a software method to connect drivers with passengers, but this is merely one instrumentality used in the context of its larger business. Uber does not simply sell software; it sells rides. Uber is no more a "technology company" than Yellow Cab is a "technology company" because it uses CB radios to dispatch taxi cabs, John Deere is a "technology company" because it uses computers and robots to manufacture lawn mowers, or Domino Sugar is a "technology company" because it uses modern irrigation techniques to grow its sugar cane. Indeed, very few (if any) firms are not technology companies if one focuses solely on how they create or distribute their products.

If, however, the focus is on the substance of what the firm actually does (e.g., sells cab rides, lawn mowers, or sugar), it is clear that Uber is most certainly a transportation company, albeit a technologically sophisticated one. In fact, as noted above, Uber's own marketing bears this out, referring to Uber as "Everyone's Private Driver," and describing Uber as a "transportation system" and the "best transportation service in San Francisco."

Even more fundamentally, it is obvious drivers perform a service for Uber because Uber simply

would not be a viable business entity without its drivers. See *Yellow Cab Coop.*, 277 Cal.Rptr. 434 (holding that cab drivers provided service to cab company because “the enterprise could no more survive without [drivers] than it could without working cabs”); see also *JKH Enterprises*, 48 Cal.Rptr.3d 563 (finding that delivery drivers were employees of courier service as a matter of law in part because “the worker’s duties are an integral part of the operation,” and “their work is the basis for [defendant’s] business”).

Uber’s revenues do not depend on the distribution of its software, but on the generation of rides by its drivers. As noted above, Uber bills its riders directly for the entire amount of the fare charged—a fare amount that is set by Uber without any input from the drivers. Uber then pays its drivers eighty percent of the fare it charges the rider, while keeping the remaining twenty percent of the fare as its own “service fee.” Put simply, the contracts confirm that Uber only makes money if its drivers actually transport passengers.

Furthermore, Uber not only depends on drivers’ provision of transportation services to obtain revenue, it exercises significant control over the amount of any revenue it earns: Uber sets the fares it charges riders unilaterally.

The record also shows that Uber claims a “proprietary interest” in its riders, which further demonstrates that Uber acts as more than a mere passive intermediary between riders and drivers. For instance, Uber prohibits its drivers from answering rider queries about booking future rides outside the Uber app, or otherwise “soliciting” rides from Uber riders. See, e.g., Handbook at 7 (providing that actively soliciting business from a current Uber client is categorized as a “Zero Tolerance” event that “may result in immediate suspension from the Uber network.”) By contrast, “passive client solicitation (e.g., business cards or branded equipment in backseat)” is categorized as a “Major” issue that Uber “takes very seriously and will take action if you receive more than one in every 180 trips”); Onboarding Script at 10 (stating that if a rider specifically asks drivers about “arranging pickups, tell them to reach out to Uber”); Docket No. 223–13 at 6 (stating that riders cannot request specific Uber drivers).

As further indicia of its role as a transportation company rather than a software provider, Uber exercises substantial control over the qualification and selection of its drivers. Before becoming “partners” with Uber, aspiring drivers must first complete Uber’s application process, including a background check, city knowledge exam, vehicle inspection, and personal interview. In an internal document titled “SF Hiring Freeze & Quality Push,” Uber stresses that these screening measures are important because “Uber provides the best transportation service ... and to keep it this way, we will be taking some major steps to improve both driver and vehicle quality on the Uber system.”

In another document, Uber notes that background checks are important because it only wants “to partner with the safest drivers.” And Uber documents further reveal that Uber regularly terminates the accounts of drivers who do not perform up to Uber’s standards. See, e.g., Docket

No. 223–29 at 2 (“We will be deactivating Uber accounts regularly of drivers who are in the bottom 5% of all Uber drivers and not performing up to the highest standards.... We believe that the removal of underperforming drivers will lead to more opportunities for our best drivers.”); Docket No. 238–2 (spreadsheet listing terminated driver accounts and reasons for termination); Docket No. 238–3 (email from “Uber SF Community Manager” instructing fellow Uber employer to “[g]et rid of this guy. We need to make some serious cuts of guys below 4.5”); Docket No. 238–5 (email terminating underperforming Uber driver because business was “slower than normal and we have too many drivers ... [so] we have to look for accounts to deactivate”).

Although the Court’s conclusion based on the record facts can likely stand on logic and common sense alone, the case law makes abundantly clear that the drivers are Uber’s presumptive employees. In *Yellow Cab Cooperative*, a cab company argued, like Uber here, that its drivers were not its employees because they did not provide any service to the cab company. The company’s principal argument, like Uber’s, was that it was only in the business of collecting fees from its drivers—specifically a flat \$56 fee-per-shift for the use of a cab and provision of “leads” through its radio dispatch service. Notably, (and unlike Uber) Yellow did not share in any of the actual fares a driver received. *Id.* at 1291, 277 Cal.Rptr. 434. Thus, if a Yellow driver never provided any rides during a shift or actually used any of Yellow’s “leads,” Yellow would receive the same \$56 lease payment regardless.

Based on these facts, the Court of Appeal flatly rejected Yellow’s argument that the drivers did not provide it a service, finding that Yellow’s actual “enterprise consists of operating a fleet of cabs for public carriage. The drivers, as active instruments of that enterprise, provide an indispensable ‘service’ to Yellow; the enterprise could no more survive without them than it could without working cabs.”

The reasoning of *Yellow Cab Cooperative* applies even more forcefully here. Unlike *Yellow Cab*, which received a flat fee and did not share in its drivers’ fares, Uber only receives its fees if a driver successfully transports an Uber “lead” to some destination. Moreover, the precise amount of this fee is set by Uber, without negotiation or input from the drivers. Under such circumstances, it strains credulity to argue that Uber is not a “transportation company” or otherwise is not in the transportation business; it strains credulity even further to argue that Uber drivers do not provide Uber a valuable service. Like the cab drivers in *Yellow Cab Cooperative*, Uber’s drivers provide an “indispensable service” to Uber, and the firm “could no more survive without them” than it could without a working smartphone app. Or, put more colloquially, Uber could not be “Everyone’s Private Driver” without the drivers.

Uber cites two cases in support of its contention that it receives no services from its drivers, but neither case is on-point. In *Kubinec v. Top Cab Dispatch, Inc.*, a Massachusetts trial judge concluded (in an unpublished order applying Massachusetts law) that a taxi driver was not the employee of his radio dispatch service, *Top Cab*. 2014 WL 3817016, at *9 (Super.Ct.Mass. June

25, 2014). Importantly, the court stressed that the \$25 weekly fee Top Cab received from Kubinec was the same “regardless of whether Kubinec had his cab on the road twenty-four hours a day ... or left it parked in his driveway.” Unlike Uber, Top Cab received “no income” from any dispatches it provided, its members were not required to accept any dispatch assigned, and the dispatches accepted constituted only “9.95% of all fares driven by Top Cab members in 2010.” Top Cab “received only the same [\$25] weekly payment from its members regardless of whether the dispatches were accepted or passengers simply hailed member cabs from the street.”

Without belaboring the multitude of differences between this case and Kubinec, the Court notes that Uber does not receive a flat fee from its drivers in exchange for an unlimited number of “leads” or dispatches. Rather, Uber receives a percentage of each and every fare its drivers labor to earn—a fact that, as indicated above, makes it clear that Uber receives a (very lucrative) service from its drivers and depends on its drivers’ performance of services for its revenues. Kubinec is thus completely distinguishable from the facts in this case.

Uber’s second case, *Callahan v. City of Chicago*, 78 F.Supp.3d 791, 2015 WL 394021 (N.D.Ill.2015), is equally inapposite to the issues here. In *Callahan*, a Chicago taxicab driver sued the City of Chicago arguing that the City was her employer under the Fair Labor Standards Act. *Id.* at 793 2015 WL 394021, at *1. According to the district court, the “critical question” in determining the viability of the driver’s claims was “whether the ‘business’ to which Callahan renders service is, in fact, the City’s business.” *Callahan*, 78 F.Supp.3d at 801, 2015 WL 394021, at *8. *Callahan*, the court noted, “is a taxicab driver; the service she provides is therefore the transportation of passengers by taxicab....” *Id.* But while recognizing that the City “controls to quite a significant extent the operation of taxicabs in Chicago” by way of extensive regulation, the court (unsurprisingly) concluded that “controlling or regulating how taxicabs are operated is not the same as providing, or undertaking to provide, transportation by taxicab. The City does not perform the latter role.” *Id.*

While this Court will not exhaustively list the ways a private corporation like Uber differs from a municipality like the City of Chicago, the Court notes one obvious difference—Uber derives profits from providing transportation services, whereas the City does not. Moreover, among other facts, Uber markets itself as “Everyone’s Private Driver;” Chicago does not. As the district judge in *Callahan* correctly noted, “the collection of taxes, fees, or revenue by a government entity does not make the regulated industry the business of that government.” *Id.* at 803, 2015 WL 394021, at *9.

Uber’s collection of fees from its drivers, however, and its deep involvement in prescribing the qualifications of its drivers and the quality of their service, as well as its representations to the public that it is a provider of transportation services (“Everyone’s Private Driver”), does indicate that transportation is its business.

This Court holds, as a matter of law, that Uber’s drivers render service to Uber, and thus are

Uber's presumptive employees.

C. Whether a Hiree is an Employee or Independent Contractor is a Mixed Question of Law and Fact Generally to be Decided by the Jury

Because the Court has determined that the Plaintiffs are Uber's presumptive employees, the burden now shifts to Uber to disprove an employment relationship. As noted above, when determining under California law whether a putative employer can rebut a hiree's prima facie case of employment, the Court applies the multi-factor test laid out in the Supreme Court's decision in *Borello*. *Borello*, 48 Cal.3d at 350, 256 Cal.Rptr. 543, 769 P.2d 399.

Both parties suggest that the employee/independent contractor question is one of law for ultimate resolution by the Court. See, e.g., Oral Arg. Tr. at 7:24–9:8. Both parties, however, are mistaken. According to the California Supreme Court, the “determination of employee or independent contractor status is one of fact if dependent upon resolution of disputed evidence or inferences.”

Put simply, the reasoning in *Hana* that juries should typically decide mixed questions of law and fact supports the great weight of California authority that establishes that a hiree's status as either an employee or independent contractor should typically be determined by a jury, and not the judge.

D. Uber is Not Entitled to Summary Judgment Because Material Facts Remain in Dispute and a Reasonable Inference of an Employment Relationship May Be Drawn

As noted above, the “principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.” *Ayala*, 59 Cal.4th at 531, (quoting *Borello*, 48 Cal.3d at 350). “Perhaps the strongest evidence of the right to control” is whether Uber can fire its transportation providers at will. *Id.*

This critical fact appears to be in dispute. Uber claims that it is only permitted to terminate drivers “with notice or upon the other party's material breach” of the governing contracts. Plaintiffs, however, point out that the actual contracts seem to allow Uber to fire its drivers for any reason and at any time. See, e.g., Addendum at 4 (“Uber will have the right, at all times and at Uber's sole discretion, to reclaim, prohibit, suspend, limit or otherwise restrict the Transportation Company and/or the Driver from accessing or using the Driver App....”).

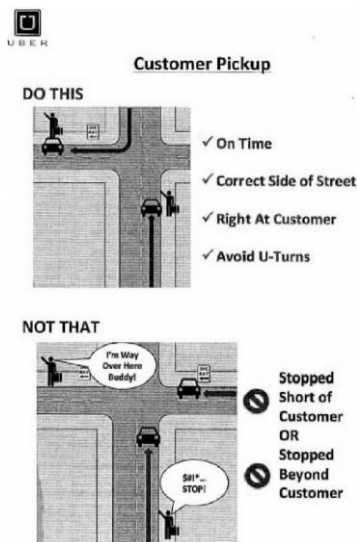
To the extent this important factor in the employee/independent contractor test is in dispute, summary judgment is unwarranted.

Uber further claims that the right to control element is not met because drivers can work as much or as little as they like, as long as they give at least one ride every 180 days (if on the uberX platform) or every 30 days (if on the UberBlack platform). According to Uber, drivers never

have to accept any “leads” generated by Uber (i.e., they can turn down as many rides as they want without penalty), and they can completely control how to give any rides they do accept.

These contentions are very much in dispute. For instance, while Uber argues that drivers never actually have to accept ride requests when logged in to the Uber application, Plaintiffs provided an Uber Driver Handbook that expressly states: “We expect on-duty drivers to accept all [ride] requests.” Handbook at 1. The Handbook goes on to state that “[w]e consider a dispatch that is not accepted to be a rejection,” and we “will follow-up with all drivers that are rejecting trips.” Id. The Handbook further notes that Uber considers “[r]ejecting too many trips” to be a performance issue that could lead to possible termination from the Uber platform. Id. at 8; see also Docket No. 223–57 (email from Uber to driver stating that the driver’s “dispatch acceptance rate [of 60%] is too low ... Please work towards a dispatch acceptance rate of 80%. If you are unable to significantly improve your dispatch acceptance rate, Uber may suspend your account”).

It is also hotly disputed whether Uber has the right to significantly control the “manner and means” of Plaintiffs’ transportation services. See *Alexander*, 765 F.3d at 988. Plaintiffs cite numerous documents, written in the language of command, that instruct drivers to, amongst other things: “make sure you are dressed professionally;” send the client a text message when 1–2 minutes from the pickup location (“This is VERY IMPORTANT”); “make sure the radio is off or on soft jazz or NPR;” and “make sure to open the door for your client.” Onboarding Script at 3–6. As Uber emphasizes, “it is the small details that make for an excellent trip,” and Plaintiffs have presented evidence (when viewed in the light most favorable to them) that Uber seeks to control these details right down to whether drivers “have an umbrella in [their] car for clients to be dry until they get in your car or after they get out.” Id. at 6, 9. Plaintiffs note that drivers are even instructed on such simple tasks as how to pick up a customer with their car:



Docket No. 223–20.

Uber responds that it merely provides its drivers with “suggestions,” but does not actually require its drivers to dress professionally or listen to soft jazz or NPR. *See, e.g.*, Reply Br. at 6. But the documents discussed above (and others in the record) are not obviously written as mere suggestions, and Uber’s arguments to the contrary cannot be assumed as true on Uber’s motion for summary judgment where all reasonable inferences from the record must be drawn in favor of Plaintiffs. *See, e.g.*, Docket No. 223–50 (informing driver that “a passenger let us know that your attitude wasn’t up to Uber’s professional standards,” and noting that “[i]f we continue to receive negative feedback ... your account will be reviewed and may be deactivated”); Docket No. 223–54 (terminating driver whose “overall driver rating has fallen below the minimum threshold we allow”); Docket No. 223–58 (informing driver that a “passenger let us know that they felt you did not take the most efficient/direct route on a trip” and noting that the driver’s account may be deactivated).

Finally, Uber makes much of the fact that Uber has no control over its drivers’ hours or whether its drivers even “report” for work more than once in the relevant period. This is a significant point, and one on which this Court previously commented in noting that such evidence might weigh heavily in favor of a finding of independent contractor status. However, as noted above, freedom to choose one’s days and hours of work (which concededly did not truly exist for FedEx drivers in *Alexander*²⁰) does not in itself preclude a finding of an employment relationship.

As noted above, rarely does any one factor dictate the determination of whether a relationship is one of employment or independent contract. Here, numerous factors point in opposing directions. As to many, there are disputed facts, including those pertaining to Uber’s level of control over the “manner and means” of Plaintiffs’ performance. Viewing the current record in the light most favorable to Plaintiffs, the Court cannot conclude as a matter of law that Plaintiffs are Uber’s independent contractors rather than their employees. Consequently, Uber’s summary judgment motion must be denied.

Minnesota

Ban the Box FAQ for Private Employers

http://mn.gov/mdhr/employers/banbox_faq_privemp.html

Governor Dayton signed the criminal background check bill, which expanded Ban the Box to private employers on January 1, 2014. This requirement has been in effect for public employers in Minnesota since 2009.

Does the new Ban the Box law require an employer to hire someone with a criminal record?

No. The Ban the Box law imposes no requirements on an employer that it hire an individual with a criminal record. However, the law does require employers to wait until the applicant has been selected for an interview, or until a conditional job offer has been extended, before inquiring about the applicant's criminal history.

Does the Ban the Box law require employers to interview someone with a criminal record?

No. The new law does not compel employers to interview individuals who have a criminal record.

Does the Ban the Box law prevent employers from conducting a criminal background check before hiring an applicant?

No. Employers may still conduct a criminal background check on an applicant before hiring an applicant. The Ban the Box law merely moves the inquiry into criminal history from the initial point of contact with the applicant until after the point in time in which the employer has decided to interview or extend a conditional job offer.

Does the law apply to small businesses as well as large companies?

Yes. There is no minimum threshold. All Minnesota employers, large and small, are covered under the new law.

Does Ban the Box eliminate laws that require individuals with criminal backgrounds to be excluded from certain positions?

No. If an employer is prohibited under federal or state law from hiring an individual who has been previously convicted of a crime, the employer remains obligated to continue to follow federal or state law. If a background check is legally required before beginning work, Ban the Box does not change that legal requirement.

Are there private employers that are exempt from the new law?

Yes. The Ban the Box law provides that private employers are exempt under the new law if the employer is specifically directed to conduct a criminal history background check or the employer

is directed to gather information such that a criminal history background check can be done by a licensing authority.

Can a private employer that is exempt under the new law inform applicants that they may be disqualified from employment for having previously committed a crime?

Yes. Exempt private employers may have an application that states that applicants may be disqualified from employment. An employer can provide information on their application form that individuals who have a particular criminal history background will be disqualified from employment by the employer.

At what point in time during the interview process can an employer obtain criminal history information from an applicant?

The answer depends on whether the employer is going to interview candidates before determining who to hire for the open position.

If the employer does conduct interviews before an applicant under consideration is hired, the employer should initiate a criminal background check after it has decided to interview the candidate.

If the employer doesn't conduct interviews before hiring an applicant, the employer may initiate a criminal background check after it extends a conditional offer of employment to the applicant.

If my business is based in another state, am I subject to the requirements of Minnesota's Ban the Box law at my Minnesota plant location?

Yes. Ban the Box applies to the Minnesota operations of companies that operate in multiple states.

We are an employer with operations in several states that uses one electronic application; can we use our electronic application if we inform applicants residing in Minnesota that they don't have to answer criminal background history questions?

Yes. A multi-state employer doesn't need to abandon its practice of using one electronic application, provided that the electronic application provides language on the application that is clear and unambiguous that Minnesota law provides that applicants don't have to answer criminal background history questions.

Can an employer be liable for discrimination under state or federal law if the employer complies with the Ban the Box law?

Yes. The use of criminal background information by an employer to eliminate candidates for employment may constitute a discriminatory practice if the policy has a disproportionate impact for a class of individuals, the employer does not use a targeted screen and the employer fails to provide the applicant with an opportunity to respond to the criminal background information obtained on the applicant.

The discussion of how a criminal background check policy may violate anti-discrimination laws is beyond the scope of this FAQ document. However, a good discussion on this issue can be found within the [EEOC Technical Assistance Guidance on the Use of Arrest and Convictions Records](#), published on April 25, 2012.

How is the Ban the Box law enforced?

The Minnesota Department of Human Rights (MDHR) is charged with enforcing this law, as there is no private cause of action. MDHR is seeking to engage in a comprehensive education program to bring about compliance with employers.

What are the penalties for violating the Ban the Box law?

During 2014, the first year that the law is in force, the commissioner will provide a written warning to any employers found in violation, before any fines are levied. If a first violation is not remedied within 30 days of the issuance of a warning, the commissioner may impose up to a \$500 fine, not to exceed \$500 in a calendar month.

For violations that occur in 2015, the penalties are as follows:

- For employers that employ 10 or fewer persons at a site, the penalty is up to \$100 for each violation, not to exceed \$100 in a calendar month.
- For employers that employ 11 to 20 persons at a site, the penalty is up to \$500 for each violation, not to exceed \$500 in a calendar month.
- For employers that employ more than 20 persons at one or more sites, the penalty is up to \$500 for each violation, not to exceed \$2,000 in a calendar month.

B. The State's Authority to License Businesses and Occupations

Dandamudi v. Tisch, ___ F.3d ___, 2012 WL 2763281 (2d Cir. 2012)

Background: States and their colonial predecessors have had authority to license businesses and occupations. A study authored by Marc T. Law and Mindy S. Marks, *Effects of Occupational Licensing Laws on Minorities: Evidence from the Progressive Era*, 52 J.L. & ECON. 351 (2009),

reports that states began to license occupations during the Progressive Era in the late 1800s and early 1900s. More recently, states have broadened their control of occupational licensing. *See* Morris M. Kleiner, Licensing Occupations: Ensuring Quality or Restricting Competition? (2006), at 1, noting: “During the early 1950s, only about 4.5 percent of the [U.S.] labor force was covered by licensing laws at the state level. That number had grown to almost 18 percent of the U.S. workforce in the late 1980s, with an even larger number if city and county licenses for occupations are included.” Studies from the 1970s found that occupational licensing regulations disadvantage women, blacks, ethnic and nationality groups, and Jews. Today, as the following cases show, states are using licensing laws to augment federal laws that prohibit the employment of unlawful aliens. As you read, consider whether these states have legitimate reasons for these regulations. Also, consider whether states are using legitimate means to effectuate their intent to preserve the labor market for citizens and authorized aliens.

Before: WESLEY, HALL, Circuit Judges, UNDERHILL, District Judge.

WESLEY, Circuit Judge:

This case involves a state regulatory scheme that seeks to prohibit some legally admitted aliens from doing the very thing the federal government indicated they could do when they came to the United States—work. Plaintiffs–Appellees are a group of nonimmigrant aliens who have been authorized by the federal government to reside and work as pharmacists in the United States. All currently reside in New York and are licensed pharmacists there. Plaintiffs obtained pharmacist’s licenses from New York pursuant to a statutory waiver to New York Education Law §6805(1)(6)’s requirement that only U.S. Citizens or Legal Permanent Residents (“LPRs”) are eligible to obtain a pharmacist’s license in New York. The waiver provision was set to expire in 2009. In response, plaintiffs sued various state officials responsible for enforcing the law in the United States District Court for the Southern District of New York.

Plaintiffs allege that § 6805(1)(6) is unconstitutional because it violates the Equal Protection and Supremacy Clauses of the United States Constitution. In a thorough and well-reasoned opinion, the district court granted plaintiffs’ motion for summary judgment and permanently enjoined defendants from enforcing the law. *See Adusumelli v. Steiner*, 740 F.Supp.2d 582 (S.D.N.Y.2010).

On appeal, New York asks us to abrogate the Supreme Court’s general rule that state statutes that discriminate based on alienage are subject to strict scrutiny review. The state argues that the statute at issue here, which discriminates against nonimmigrant aliens should be reviewed only to determine if there is a rational basis that supports it.

In our view, however, a state statute that discriminates against aliens who have been lawfully admitted to reside and work in the United States should be viewed in the same light under the Equal Protection Clause as one which discriminates against aliens who enjoy the right to reside

here permanently. Applying strict scrutiny, therefore, and finding, as the state concedes, that there are no compelling reasons for the statute's discrimination based on alienage, we hold the New York statute to be unconstitutional. We affirm the district court's grant of summary judgment for plaintiffs.

I. BACKGROUND

Most of the plaintiffs have H-1B temporary worker visas. Under the Immigration and Nationality Act ("INA"), H-1B visas may be given to aliens who come "temporarily to the United States to perform services ... in a specialty occupation." 8 U.S.C. § 1101(a)(15)(H)(i)(b). The remaining plaintiffs have what is known as "TN" status. "TN" status is a temporary worker status created by federal law pursuant to the North American Free Trade Agreement ("NAFTA"). NAFTA permits "a citizen of Canada or Mexico who seeks temporary entry as a business person to engage in business activities at a professional level" to enter the United States and work here pursuant to the requirements of the TN status. 8 C.F.R. § 214.6(a).

These provisions technically grant plaintiffs admission to the United States for a finite period. Because plaintiffs' status grants them the right to reside and work in the United States only temporarily, plaintiffs are part of the group of aliens the immigration law refers to as nonimmigrants. 8 U.S.C. § 1101(a)(15). And, although plaintiffs had to indicate that they did not intend to stay here permanently to obtain their visas, the truth is that many (if not all) actually harbor a hope (a dual intention) that some day they will acquire the right to stay here permanently.

The BIA [Board of Immigration Appeals] and the State Department both recognize this doctrine of dual intent, which allows aliens to express an intention to remain in the United States temporarily (to satisfy the requirements of their temporary visas) while also intending to remain permanently, which allows them to apply for an adjustment of status. *Matter of Hosseinpour*, 15 I. & N. Dec. 191 (BIA 1975); 70 No. 42 Interpreter Releases 1444, 1456-58 (Nov. 1, 1993).

For purposes of both the H-1B and TN visas, the initial period during which the visa-holder can legally remain and work in the United States is three-years. 8 C.F.R. §§ 214.2(h)(9)(iii)(A)(1) (H-1B visa), 214.6(e) (TN status). Each visa status also permits a three-year extension of the initial period. *Id.* at §§ 214.2(h)(15)(ii)(B), 214.6(h). But an alien with an H-1B visa is limited to one such extension, essentially restricting H-1B status to a six-year period.^{FN2} *Id.* at § 214.2(h)(15)(ii)(B)(1).

In practice, however, federal law permits many aliens with TN or H-1B status to maintain their temporary worker authorization for a period greater than six years. All plaintiffs in this case, for example, have been legally authorized to reside and work in the United States for more than six years. And, six plaintiffs have been authorized to reside and work in the United States for more than ten years.

FN2. Although not applicable in the instant case, an H-1B visa holder who is involved in a “DOD research and development or co-production project” may maintain his H-1B visa status for a total of 10 years. 8 C.F.R. § 214.2(h)(15)(ii)(B)(2).

Several factors contribute to the difference between the technical limitations on H-1B and TN status and the length of time these aliens remain authorized to reside and work in the United States. Many aliens who receive temporary worker authorization are former students who entered the United States with a student visa and who have made their home in the United States for many years before entering the professional world.**FN3**

FN3. Initially entering the United States on a student visa extends the amount of time a nonimmigrant alien can remain in the United States because the time limitations for H-1B status and TN status are not impacted by time previously spent residing in the United States pursuant to a student visa.

Many nonimmigrant aliens are also often eligible to apply for LPR status. This process is typically quite slow, and the federal government therefore regularly issues Employment Authorization Documents (“EADs”), which extend the time period during which these aliens are eligible to work in the United States while they await their green cards. 8 C.F.R. § 274a.12 (c)(9).

Twenty-two plaintiffs have applied for Permanent Resident status. Sixteen have received EADs because they have exhausted the six-year maximum authorization provided by H-1B status.

Based on their visa status, all plaintiffs currently reside in the United States legally and have permission to work here. All are pharmacists who were granted a pharmacist’s license (albeit a “limited” one) pursuant to a previous version of the New York statute at issue here. Section 6805(1)(6), in its current incarnation, provides that to be eligible for a pharmacist’s license in New York, an applicant must be either a U.S. Citizen or a LPR. The statute bars all other aliens, including those with work-authorization who legally reside in the United States, from becoming licensed pharmacists.

II. DISCUSSION

New York argues that neither the Equal Protection Clause nor the Supremacy Clause prevents a state from prohibiting a group of aliens who are legally authorized to reside and work in the United States from working in certain professions. The state relies principally on two decisions from our sister circuits. See *League of United Latin Am. Citizens (LULAC) v. Bredesen*, 500 F.3d 523, 531–34, 536–37 (6th Cir. 2007); *LeClerc v. Webb*, 419 F.3d 405, 415 (5th Cir.2005), reh’g en banc denied, 444 F.3d 428 (2006).

The Fifth and Sixth Circuits viewed nonimmigrant aliens as distinct from aliens with LPR status and applied a rational scrutiny test to determine if the state statutes in question ran afoul of the Equal Protection Clause. In both cases, the courts “decline[d] to extend” the protections of LPRs to certain nonimmigrants. LULAC, 500 F.3d at 533; LeClerc, 419 F.3d at 419.

We disagree; the Supreme Court has repeatedly affirmed the general principle that alienage is a suspect classification and has only ever created two exceptions to that view. We decline to create a third in a case where the statute discriminates against aliens who have been granted the legal right to reside and work in the United States. Under a strict scrutiny analysis, § 6805(1)(6) of the New York Education Law violates the Equal Protection Clause.

The Equal Protection Clause

The Fourteenth Amendment provides that states may not “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Under the Fourteenth Amendment, a law that “impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class” is reviewed under the strict scrutiny standard. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) (emphasis added) (footnote omitted); see *Weinstein v. Albright*, 261 F.3d 127, 140 (2d Cir.2001).

There is no question that the Fourteenth Amendment applies to all aliens. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 215, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). Indeed, the Supreme Court has long held that states cannot discriminate on the basis of alienage. “Aliens as a class are a prime example of a discrete and insular minority,” the Court reasoned in *Graham v. Richardson*, “[and] the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.” 403 U.S. 365, 372, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) (internal quotation marks omitted).

In *Graham*, the Court struck down two state statutes that prevented immigrants from receiving public assistance. *Id.* at 376, 91 S.Ct. 1848. The statutes erected different barriers—a Pennsylvania law barred non-citizens from a welfare program, while an Arizona law required that aliens reside in the state for fifteen years before they could collect money from the state—both achieved the same result. *Id.* at 367–68, 91 S.Ct. 1848.

Thus, aliens were denied access to a benefit available to citizens. *Graham* held this “two class” system unconstitutional. *Id.* at 371, 91 S.Ct. 1848.

Graham is considered the lodestar of the Court’s alienage discrimination doctrine, but the opinion invokes a case decided decades before. In *Takahashi v. Fish and Game Commission*, the Supreme Court struck down a California statute that denied fishing licenses to any “person ineligible [for] citizenship.” 334 U.S. 410 (1948). The law originally targeted Japanese

fishermen, but the state legislature feared that such a clearly discriminatory classification might run afoul of the Equal Protection Clause and amended the statute to prohibit immigrants “ineligible [for] citizenship” from obtaining fishing licenses.

The provision drew a distinction between groups based solely on the members’ immigration status without any mention of race or nationality. The Court held that treating groups differently based on the members’ alienage was akin to discriminating against a group because of their race or color. “The protection of [the Fourteenth Amendment] has been held to extend to aliens as well as to citizens,” the Court reasoned, “[and] all persons lawfully in this country shall abide ... on an equality of legal privileges with all citizens.” *Id.* at 419–20, 68 S.Ct. 1138 (emphasis added).

The *Graham* Court saw Pennsylvania and Arizona’s restrictions on welfare as exacting the same toll as California’s unconstitutional fishing-license regime; the Court thus followed *Takahashi* to hold that the welfare statutes were subject to strict scrutiny. *Graham*, 403 U.S. at 372, 91 S.Ct. 1848.

In the years after *Graham*, the Court continued to apply strict scrutiny to statutes discriminating on the basis of alienage. It invalidated a New York statute that prohibited immigrants from working in the civil service, *Sugarman v. Dougall*, 413 U.S. 634 (1973), a Connecticut statute that barred immigrants from sitting for the bar, *In re Griffiths*, 413 U.S. 717 (1973), a Puerto Rico law that denied licenses to immigrant engineers, *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976), and a New York law that required immigrants to pledge to become citizens before they could receive financial aid, *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

In each case, the Court began its discussion by reasserting its commitment to the holding in *Graham*: laws that single out aliens for disparate treatment are presumptively unconstitutional absent a showing that the classification was “necessary” to fulfill a constitutionally “permissible” and “substantial” purpose. *In re Griffiths*, 413 U.S. at 721–22.

The Court has recognized only two exceptions to *Graham*’s rule. The first exception allows states to exclude aliens from political and governmental functions as long as the exclusion satisfies a rational basis review. In *Foley v. Connelie*, the Court upheld a statute that prohibited aliens from working as police officers. 435 U.S. 291 (1978).

The second exception crafted by the Court allows states broader latitude to deny opportunities and benefits to undocumented aliens. See, e.g., *Plyler*, 457 U.S. at 219, 102 S.Ct. 2382; see also *DeCanas v. Bica*, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976), superseded by statute on other grounds as stated in *Chamber of Comm. v. Whiting*, — U.S. —, 131 S.Ct. 1968, 179 L.Ed.2d 1031 (2011).

In *Plyler*, the Court declined to apply strict scrutiny to a statute that prohibited undocumented alien children from attending public school. 457 U.S. at 223, 102 S.Ct. 2382. The Court acknowledged that Graham placed a heavy burden on state statutes targeting lawful aliens, but reasoned that undocumented aliens fell outside of Graham’s reach because “their presence in this country in violation of federal law is not a ‘constitutional irrelevancy.’” The Court held that the plaintiffs’ unlawful status eliminated them from the suspect class of aliens generally; nevertheless, the Court applied a heightened rational basis standard to the Texas law denying free public education to undocumented alien children and found the law unconstitutional.

The state acknowledges that neither exception applies here. Without an existing basis for distinguishing Graham’s requirement that such statutes are strictly scrutinized, New York proposes a third exception—the Fourteenth Amendment’s strongest protections should apply only to virtual citizens, like LPRs, and not to other lawfully admitted aliens who require a visa to remain in this country. Defendants argue that the Supreme Court’s strict scrutiny analysis of classifications based on “alienage” is inapplicable to classifications of nonimmigrant aliens and that only rational basis review of the statute is required.

The state reasons that the Supreme Court has never explicitly applied strict scrutiny review to a statute discriminating against nonimmigrant aliens. That is true, but that argument ignores the underlying reasoning of the Court in its prior decisions as well as the fact that the Court has never held that lawfully admitted aliens are outside of Graham’s protection.

Indeed, the Court has never distinguished between classes of legal resident aliens. The state’s argument that suspect class protection extends no further than to LPRs simply has no mooring in the High Court’s prior ventures into this area.

New York disagrees and urges us to follow the lead of the Fifth and Sixth Circuits, both of which drew a distinction between LPRs and citizens, on the one hand, and other lawfully admitted aliens, on the other. In *LeClerc*, the Fifth Circuit upheld a Louisiana Supreme Court rule that required applicants for admission to the Louisiana State Bar to be citizens or LPRs. 419 F.3d at 422. The majority noted that “[l]ike citizens, [permanent] resident aliens may not be deported, are entitled to reside permanently in the United States, may serve ... in the military, ... and pay taxes on the same bases as citizens.” *Id.* at 418.

In *LULAC*, the Sixth Circuit upheld a Tennessee law that conditioned issuance of a driver’s license on proof of United States citizenship or LPR status. 500 F.3d at 533. The Sixth Circuit, like the Fifth, held that nonimmigrant aliens are not a suspect class because, unlike citizens and LPRs, they “are admitted to the United States only for the duration of their authorized status, are not permitted to serve in the U.S. military, are subject to strict employment restrictions, incur differential tax treatment, and may be denied federal welfare benefits.” *Id.*; see also *LeClerc*, 419 F.3d at 418–19.

The state would have us join these courts and narrow *Graham*'s holding to reach only those aliens who are indistinguishable from citizens. This argument, however, misconstrues both law and fact. Ultimately, for three reasons, we reject the state's argument that this Court should follow the rationale of the Fifth and Sixth Circuits.

First, the Supreme Court's listing in *Graham* of the similarities between citizens and aliens refuted the state's argument that it did have a compelling reason for its law, but this language does not articulate a test for determining when state discrimination against any one subclass of lawful immigrants is subject to strict scrutiny. Second, nonimmigrant aliens are but one subclass of aliens, and the Supreme Court recognizes aliens generally as a discrete and insular minority without significant political clout. Third, even if this Court were to determine that the appropriate level of scrutiny by which to analyze the discrimination should be based on the nonimmigrant aliens' similarity (or proximity) to citizens, we would still apply strict scrutiny in this case because nonimmigrant aliens are sufficiently similar to citizens that discrimination against them in the context presented here must be strictly scrutinized.

Despite the fact that the Supreme Court has never cabined its precedent in this area to distinguish between discrimination against LPRs and discrimination against other lawfully present aliens and has never distinguished *Takahashi*, the Fifth and Sixth Circuits justified narrowing *Graham* by resting their analysis on the closing words of *Graham*'s discussion of the Equal Protection Clause. In that passage, the Court noted: "Aliens like citizens pay taxes and may be called into the armed forces. Unlike the short-term residents in *Shapiro v. Thompson*, 394 U.S. 618 (1969), aliens may live within a state for many years, work in the state and contribute to the economic growth of the state." *Graham*, 403 U.S. at 376, 91 S.Ct. 1848 (internal quotation marks omitted).

Viewing that language from *Graham* as an analytical tool, however, reveals the danger of separating the words of an opinion from the context in which they were employed. *Graham* drew a comparison between LPRs and citizens to refute the states' arguments that there was a compelling interest in the restrictive legislation—the states had limited funds and the benefits in question should go to citizens to the exclusion of LPRs. *Id.* The states contended that they had a legitimate interest in preserving welfare funds for their citizens—individuals who participated in economic activity within the state and thereby generated tax revenue that supported the benefits.

The Court was quick to reply that "a State's desire to preserve limited welfare benefits for its own citizens is inadequate to justify [the state's discriminatory laws]." *Id.* at 374, 91 S.Ct. 1848. It noted that legal aliens are in many ways indistinguishable from citizens and then provided a few examples of that fact:

[T]he justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens. Aliens like citizens pay taxes and may be called into the armed forces. Unlike the short-term residents

in Shapiro, aliens may live within a state for many years, work in the state and contribute to the economic growth of the state. *Id.*

The Court in essence pointed out that, because LPRs and citizens have much in common, treating them differently does not pass muster under the Fourteenth Amendment.

The converse of this rationale, however, does not become a litmus test for determining whether a particular group of aliens is a suspect class. A group of aliens need not be identical or even virtually identical to citizens to be fully protected by the Fourteenth Amendment. Indeed, citizens and aliens may be sufficiently similar merely because they are both lawful residents.

Nor do we think that the list of similarities is meant as a litmus test for lower courts to apply to a subclass of lawfully admitted aliens for purposes of determining how similar they are to citizens before applying strict scrutiny—the greatest level of Fourteenth Amendment protection—to analyze discrimination against that subclass.

Nothing in the Supreme Court’s precedent counsels us to “judicially craft[] a subset of aliens, scaled by how [we] perceive the aliens’ proximity to citizenship.” *LeClerc v. Webb*, 444 F.3d 428, 429 (5th Cir.2006) (Higginbotham, J., dissenting from the denial of reh’g en banc).

But even if the state’s argument—that Supreme Court precedent allows for a distinction based on a subclass’s similarity to citizens—had some traction, we conclude strict scrutiny still applies. Nonimmigrants do pay taxes, often on the same terms as citizens and LPRs, and certainly on income earned in the United States. See 26 U.S.C. § 7701(b); see also *LeClerc*, 419 F.3d at 427 n. 1 (Stewart, J., dissenting).

Further, any claimed distinction based on permanency of residence is equally disingenuous. Although it is certainly true that nonimmigrants must indicate an intent not to remain permanently in the United States, this ignores the dual intent doctrine—nonimmigrant aliens are lawfully permitted to express an intent to remain temporarily (to obtain and maintain their work visas) as well as an intent to remain permanently (when they apply for LPR status). *LeClerc*, 419 F.3d at 429 (Stewart, J., dissenting). And the final distinction—limited work permission—is wholly irrelevant where, as here, the state seeks to prohibit aliens from engaging in the very occupation for which the federal government granted the alien permission to enter the United States.

Because most of the distinctions the state would have us make between LPRs and nonimmigrants are either inapplicable or without constitutional relevance, we agree with the district court that the state’s argument “boil[s] down to one potentially important difference—nonimmigrants have not yet obtained permission to reside in the United States permanently—and a slew of other differences of uncertain relevance.” *Adusumelli*, 740 F.Supp.2d at 592.

The core of the state’s argument (and the analytical pivot of *LeClerc* and *LULAC*) is “transience.” The state argues that the nonimmigrant’s transient immigration status distinguishes nonimmigrant aliens from LPRs and introduces legitimate state concerns that would allow for rational basis review of the statute.

This focus on transience is overly formalistic and wholly unpersuasive. The aliens at issue here are “transient” in name only. Certainly the status under which they were admitted to the United States was of limited duration. But the reality is quite different. A great number of these professionals remain in the United States for much longer than six years and many ultimately apply for, and obtain, permanent residence. These practicalities are not irrelevant. They demonstrate that there is little or no distinction between LPRs and the lawfully admitted nonimmigrant plaintiffs here. Therefore, even if the Supreme Court’s precedent were read to require a determination that the subclass of aliens at issue is similar to LPRs or citizens, strict scrutiny would apply.

The Supreme Court has repeatedly announced a general rule that classifications based on alienage are suspect and subject to strict scrutiny review. As Judge Gilman advocated in his *LULAC* dissent, we should “tak[e] the Supreme Court at its word.” 500 F.3d at 542. Neither the state’s reasoning nor that of the Fifth and Sixth Circuit majority opinions’ persuades us that creating a third exception to the general rule that alienage classifications are suspect is warranted here. Therefore, we hold that the subclass of aliens known as nonimmigrants who are lawfully admitted to the United States pursuant to a policy granting those aliens the right to work in this country are part of the suspect class identified by *Graham*. Any discrimination by the state against this group is subject to strict scrutiny review.

The statute here, which prohibits nonimmigrant aliens from obtaining a pharmacist’s license in New York, is not narrowly tailored to further a compelling government interest. As noted above, appellants concede that New York has no compelling justification for barring the licensed pharmacist plaintiffs from practicing in the state. Further, we agree with the district court that there is no evidence “that transience amongst New York pharmacists threatens public health or that nonimmigrant pharmacists, as a class, are in fact considerably more transient than LPR and citizen pharmacists.” Citizenship and Legal Permanent Residency carry no guarantee that a citizen or LPR professional will remain in New York (or the United States for that matter), have funds available in the event of malpractice, or have the necessary skill to perform the task at hand.

The statute is also far from narrowly tailored. As the Court in *Flores de Otero* pointed out, there are other ways (i.e., malpractice insurance) to limit the dangers of potentially transient professionals. 426 U.S. at 606, 96 S.Ct. 2264. As such, the statute unconstitutionally discriminates against plaintiffs in violation of their Fourteenth Amendment rights.

As the Supreme Court noted in *Takahashi*, “[t]he assertion of an authority to deny to aliens the

opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work.” Takahashi, 334 U.S. at 416, 68 S.Ct. 1138. New York cannot, in effect, drive from the state nonimmigrants who have federal permission to enter the United States to work. New York Education Law § 6805(1)(6) is unconstitutional.

III. CONCLUSION

The district court’s order of September 30, 2010 granting summary judgment to plaintiffs is hereby AFFIRMED.

Phillips v. UAW Int’l, 149 F.Supp.3d 790 (E.D. Mich. 2016)

OPINION AND ORDER GRANTING DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT

DAVID M. LAWSON, United States District Judge

Plaintiff Tanganeka “Tina” Phillips, while employed as a casino worker by MGM Grand Detroit Casino (“MGM”), became involved in union activity with her local affiliate of the United Automobile, Aerospace and Agricultural Implement Workers of America (“UAW”), which represented casino workers at MGM. She performed paid work for the local, Local 7777 (while employed by MGM), but was never formally employed by the International Union. Nonetheless, she has brought claims in the present case against the UAW and two of its officials for race discrimination based on a hostile work environment theory under Title VII of the Civil Rights Act of 1964 and the corresponding Michigan statute.

The defendants have moved for summary judgment, arguing that a union cannot be held liable for a hostile-work-environment claim as a matter of law; the International Union was not the plaintiff’s employer, so her claim under Title VII must fail; and even if the plaintiff could bring such a claim, the conduct of the defendants was not sufficiently severe or pervasive to create a hostile work environment. The defendants also argue that the claims against the individual defendants, Brian Johnson and David Kagels, cannot survive because Title VII does not authorize a claim against the employer’s agents. The Court heard the parties’ arguments in open court on February 22, 2016.

The defendants’ arguments that no hostile environment claims could be brought against a labor union, or that the facts presented would not support such a claim, miss the mark. The pivotal question here is whether the plaintiff has offered facts to show that she can be considered an employee of the International Union under the applicable common law master-servant tests and within the meaning of Title VII. The Court concludes that she has come up short on that showing, and therefore the Court will grant the defendants’ motion and dismiss the case.

I. Facts

A. Background

Phillips, an African-American woman, was employed by MGM as a cage cashier and later as an intermediate banker. She worked for MGM from June 28, 1999 until she resigned her employment on September 11, 2015, as a result of a settlement agreement with MGM in this case. In 2002 she became chairperson of a bargaining unit represented by Local 7777, an affiliate of defendant UAW. Defendant UAW organized the MGM casino employees in 2000, forming Local 7777 in 2001. Local 7777 represents approximately 900 MGM bargaining unit employees working at table games, slot machines, cash registers, and VIP rooms. Defendants David Kagels and Brian Johnson are servicing representatives of the UAW who were assigned to provide service and assistance to various local unions, including Local 7777.

The UAW and Local 7777 are members of the Detroit Casino Council (“DCC”), a consortium of four unions representing different sectors of the workforce at the three casinos in Detroit. The DCC, in turn, is a party to a series of collective bargaining agreements with each of the Detroit casinos. As an MGM employee, Phillips was covered by the CBA between the DCC and MGM. Phillips became a member of Local 7777 in 2001. She was elected as the bargaining member at large in 2002, and six months later she was appointed, and later elected, as the Local 7777 casino chairperson. Phillips remained the elected casino chairperson until she resigned from MGM in September 2015. The casino chairperson handles employee grievances, resolves disputes between members and MGM, ensures that MGM complies with the CBA, and participates in negotiations.

B. Relationship Between Local and International Unions

The UAW, as well as all local unions affiliated with the UAW, are governed by the UAW Constitution. The UAW Constitution describes the relationship between the UAW and local unions, identifying the latter as autonomous entities that are separate from the International Union. Local unions have their own elected officers, authority, and responsibilities. In addition to an executive board, the UAW is also staffed by international representatives, referred to within the UAW as “servicing representatives.” Servicing representatives are assigned to work with local unions, providing assistance or “service” to them as needed or requested by the local unions. Under the UAW Constitution, servicing representatives do not oversee the affairs of local unions, nor do they review the activities of local union officials. The servicing representatives have no authority to direct a local union on matters of staffing, hours, or pay for local union officers or representatives. Nor do they have the authority to supervise local union officers or representatives in the conduct of their duties, or to appoint or remove them from office.

Defendant Brian Johnson has been a servicing representative since February of 2000. In May

2012, he was assigned to represent employees in the gaming industry in Detroit. In 2010, defendant David Kagels was an administrative assistant to UAW Vice President Joe Ashton, and in 2014 he was appointed as the Director of the Gaming Department. One of his responsibilities in that position was to negotiate CBAs on behalf of the UAW with casinos throughout the country, including the Detroit casinos. In 2011, the DCC began negotiations with MGM for a new CBA. Kagels was the lead negotiator on behalf of the UAW. In 2012, Kagels also served as the UAW's lead negotiator during the MGM VIP department's negotiations with MGM over terms and conditions covering VIP service employees.

Unless a local union has been placed under an administratorship, which is a rare event, the International Union does not control or supervise the affairs of local unions. An administratorship is permitted "where necessary to: (a) prevent or correct corruption or financial malpractice; (b) assure the performance of collective bargaining agreements or other duties as a bargaining representative; (c) restore democratic procedures within any chartered subordinate body; or, (d) otherwise assure carrying out the legitimate objective of this International Union by such subordinate body." UAW Const. art. 12, § 3.

On September 24, 2015, about two weeks after Philips resigned from MGM, the UAW Executive Board held a hearing to consider placing Local 7777 under an administratorship for failure to comply with an executive board decision regarding Local 7777's 2013 triennial election. Subsequently, Local 7777 was placed under an administratorship.

The hierarchy of Local 7777 is not clear from the record, but it appears to consist of the following individuals during the relevant time: President Venus Jeter; Vice President Shimeca McClendon-Jackson; MGM Casino Chairperson Phillips; MGM Bargaining Member at Large Dwight (Dwight) Braxton; and a number of MGM shop stewards. When union members perform union business, Local 7777 paid "lost time" to its officers and representatives to reimburse them for pay they would have received from their casino employer had they not been performing union business. Additionally, union members could be engaged to work as temporary organizers by the UAW, as the plaintiff was between 2006 and 2013. It appears that when union members are organizing on behalf of the UAW, they receive compensation from their local unions, rather than from the UAW directly.

C. The Plaintiff's Relationship with the Local and International Unions

The plaintiff's most frequent duty as casino chairperson was to handle grievances. Under the CBA, the grievance procedure involved a four-step process. Step one was handled by a shop steward, step two by the bargaining member at large, and step three by the casino chairperson. Local 7777 had a further practice of referring all unresolved grievances to a UAW servicing representative, such as Brian Johnson, for a "step 3.5" meeting. The servicing representative may then decide whether to settle the grievance, withdraw it, or advance it to the final step, which was binding arbitration.

The plaintiff alleges that Johnson met with Local 7777 president Jeter, insisting that her hours, as

well as others, needed to be reduced. Before that meeting, the plaintiff spent two days each week working on grievances for Local 7777, but as needed would work more. The plaintiff was paid hourly for this work by Local 7777. After Johnson's meeting with the Local 7777 president, the plaintiff was restricted to two days each week to complete union business. If more work was required, it was done on her own time, and for no pay. Before those changes, the plaintiff routinely was allowed to work more days as necessary without issue.

D. The Alleged Discriminatory Conduct

1. The VIP Negotiations

In 2012, Kagels served as the UAW's lead negotiator during the VIP department's negotiations with MGM over terms and conditions covering VIP service employees. The negotiating team included the plaintiff, Brian Johnson, Dewight Braxton, and a number of VIP employees. The parties reached a temporary agreement on March 2013, but, according to Kagels, the plaintiff attempted to undermine the negotiations after she changed her mind on a certain contract term. Kagels stated that he did not feel that her participation on future campaigns was in the best interest of the UAW.

The plaintiff alleges that during those negotiations, Kagels said he would like to fire a number of named people, all of whom were African-American. He also allegedly said that several UAW representatives, all of whom were not African-American, hated the plaintiff and Local 7777 members. At one of the meetings, the UAW representatives, the plaintiff, Johnson, Kagels, and representative Keith Nearing allegedly pulled the plaintiff out of the meeting and began arguing about Braxton, who apparently had filed a charge against Johnson. Johnson was upset because he viewed the charge as threatening his job. Johnson allegedly said that the UAW needed to put a "Black" on staff to calm things down and asked if the plaintiff was interested. The plaintiff did not identify any other statements by Kagels that were racially provocative or discriminatory.

2. The April 3.5 Meeting

In April 2013, Brian Johnson requested a meeting with the plaintiff to discuss grievances before 3.5 meetings with MGM employees. The plaintiff characterized the meeting as unusual because she rarely met with Johnson before 3.5 meetings. The plaintiff says that she asked Braxton to attend because she did not feel comfortable meeting with Johnson alone. At the meeting, Johnson allegedly pulled out a stack of grievances, sat them on the desk, picked up the first grievance, and without inquiring about the nature of the grievance, asked the plaintiff the race of the grievant. The plaintiff asked "what does that got to do with the grievance?" Johnson responded, "Would you just answer the damn question?" The plaintiff said the grievant was "Black." Johnson flipped the file over and asked the plaintiff the race of the next grievant. Again, the plaintiff questioned what race had to do with the grievance, to which Johnson said, "Would you

just answer the fucking question, Tina?” The plaintiff refused to disclose the race of any more of the grievants.

Johnson turned to Braxton and asked him to provide the race of each of the grievants, which he did. Once Johnson knew the race of a grievant, he separated the files into two piles. The only questions Johnson asked at this meeting were the race of the grievants. When Johnson finished separating the grievances into two piles, he rubber-banded them and said he would meet the plaintiff and Braxton in the casino. The plaintiff alleges that at a later meeting (which then plaintiff did not attend), Johnson instructed Tara McIntosh (Director of Human Resources at MGM), to send one of the two piles to arbitration and to withdraw all of the grievances in the other pile.

The record does not substantiate that allegation, however. McIntosh averred that Johnson never asked her to withdraw a pile of grievances, nor had Johnson, to her knowledge, ever represented a grievance in a racially discriminatory manner. Moreover, the defendants offered evidence that of the twelve grievances discussed at the meeting, only two were withdrawn: one on behalf of one Caucasian employee and one African-American employee; and excepting a grievance that was settled, Johnson appealed to mediation or arbitration on all of the other grievances involving an employee suspension or termination—including the grievance filed on behalf of an African-American employee.

3. The November 2013 Meeting

In a November 2013 meeting between the plaintiff and Johnson, which included Local vice-president Shimeca McClendon-Jackson, Johnson allegedly said, “I’m sick of these fucking grievances,” and “I’m tired of these fucking dealers. They don’t want to come to work, they’re fucking lazy.” The plaintiff alleges that the meeting concluded with Johnson being physically removed from her office by Keith Nearingdner.

Nearingdner denies physically removing Johnson from the plaintiff’s office. According to Jackson, since 2012 she has observed Johnson “scream[ing] and yell[ing] at African Americans[,] calling [them] incompetent and being overly critical of [their] work due to [their] race.” She asserts that during the same time period, Johnson treated non-African-American union members differently, in a reserved and respectful tone.

The plaintiff and Jackson also recount Johnson declaring that “the problem with this Local is that there’s too many black people.” He also allegedly said that “there needs to be more Whites on the executive board.”

....

Dewight Braxton and Shimeca McClendon-Jackson also filed lawsuits against the defendants in this case based on similar theories. The cases are pending in this district before other judges, although Judge George Steeh granted summary judgment to the defendants in Braxton’s case on January 4, 2016. The defendants similarly move for summary judgment against all the plaintiff’s claims here.

II. Discussion

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). When reviewing the motion record, “[t]he court must view the evidence and draw all reasonable inferences in favor of the non-moving party, and determine ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’”

Hostile Work Environment

The defendants argue that the plaintiff has not offered sufficient evidence to establish the elements of a hostile work environment claim. There is no question that Title VII “offers employees protection from a ‘workplace [] permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment...’ “Barrett v. Whirlpool Corp., 556 F.3d 502, 514 (6th Cir.2009) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)) (alteration in original).

A plaintiff alleging that she was subjected to a hostile work environment based on race in violation of Title VII must offer evidence showing that “(1) [s]he belongs to a protected group; (2) [s]he was subject to unwelcome harassment; (3) the harassment was based on race; (4) the harassment affected a term, condition, or privilege of employment and (5) defendant knew or should have known about the harassment and failed to take action.” Moore v. KUKA Welding Sys. & Robot Corp., 171 F.3d 1073, 1078–79 (6th Cir.1999).

The plaintiff points to evidence of at least three incidents over the years, which she says characterize the employment environment in the union workplace. First, the 2012 VIP negotiations where Johnson said we need to put a “Black” on staff to calm things down and asked the plaintiff if she wanted the job. Second, the April 2013 meeting where Johnson called a meeting with the plaintiff and methodically separated union grievants’ files by race. The plaintiff testified in her deposition that she asked Braxton to attend because she did not feel safe to be alone with Johnson. Third, the November 2013 meeting where Johnson had to be physically removed from the plaintiff’s office.

The record includes statements by members of the executive board recounting Johnson exclaiming “the problem with this Local is that there’s too many black people.” And Ms. Jackson stated that she had witnessed Johnson screaming and yelling at African-American union members, but communicating with non-African-American union members in a reserved and respectful tone. The Local 7777 executive board wrote multiple letters to the UAW complaining about the treatment they were enduring.

The defendants’ argument is essentially that the events did not happen or that these were mere offensive utterances. The defendants also filed a notice of supplemental authority to inform the Court that another judge in this district granted their motion for summary judgment in Braxton’s

case against these same defendants. The court there found that the UAW was not the plaintiff's employer, and that the environment created by defendant was not severe or pervasive. *Braxton v. UAW Int'l*, 2016 WL 28825 (E.D.Mich. Jan. 4, 2016).

However, when determining hostility, context matters. See *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (“The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.”).

Consequently, “where individual instances of [racial] harassment do not on their own create a hostile environment, the accumulated effect of such incidents may result in a Title VII violation.” *Williams v. General Motors Corp.*, 187 F.3d 553, 563 (6th Cir.1999). And, as the Sixth Circuit has recently reminded us, “whether harassment was so severe and pervasive as to constitute a hostile work environment [is] ‘quintessentially a question of fact.’” *Smith v. Rock–Tenn Servs., Inc.*, 813 F.3d 298, 310, 2016 WL 520073, at *8 (6th Cir. Feb. 10, 2016) (quoting *Jordan v. City of Cleveland*, 464 F.3d 584, 597 (6th Cir.2006)).

The plaintiff describes events, when considered as a whole, that would permit a jury to conclude that the defendants created a hostile work environment based on race. Whether the alleged conduct was harassment so severe or pervasive as to constitute a hostile work environment is “quintessentially a question of fact,” which a jury should decide. *Smith*, 813 F.3d at 310, 2016 WL 520073, at *8.

Labor Union's Liability for Hostile Work Environment Claim

The plaintiff argues that under Title VII, a labor union in its representational role can be liable to a union member for creating a hostile work environment. The Sixth Circuit has not addressed that issue, but there is persuasive authority suggesting otherwise, and good reason to conclude that the plaintiff's argument is not supported by the statutory text.

Title VII generally prohibits “an employer [from] “discriminat[ing] against any individual with respect to [her] compensation, terms, conditions, or privileges or employment, because of such individual's...race.” 42 U.S.C. § 2000e–2(a)(1) (emphasis added).

The statute also prevents “a labor organization [from] exclud[ing] or...expel[ling] from its membership, or otherwise... discriminat[ing] against, any individual because of [her] race.” 42 U.S.C. § 2000e–2(c)(1).

The plaintiff has conflated these two sections, suggesting that a labor union's liability under

section (c) can be based on a hostile work environment theory of discrimination. However, “[t]he hostile work environment theory grows out of 42 U.S.C. § 2000e–2(a)(1)’s language.” *Kasper v. City of Middletown*, 352 F.Supp.2d 216, 233–34 (D.Conn.2005).

The plaintiff cites *Dowd v. United Steelworkers of Am., Local No. 286*, 253 F.3d 1093 (8th Cir.2001), in support of her position. Indeed, in that case, the Eighth Circuit determined that the phrase “or otherwise to discriminate against” in section 2000e–2(c) could authorize a claim for a hostile work environment against a union. *Id.* at 1102. But the origin of the hostile environment theory as found in the text of Title VII does not lead to that conclusion.

In *Dowd*, the plaintiffs crossed a union picket line at a Goodyear tire plant and were subjected to severe racial slurs by union members in the presence of shop stewards. 253 F.3d at 1096–97. Even after the three-week strike ended, the hostile conduct and racial slurs persisted, even including hostile comments made over the employer’s intercom system. *Id.* at 1097. Some union members began wearing tee shirts with one of the plaintiff’s names in the sights of a gun, and others wore shirts with the plaintiff’s name combined with racial slurs. *Ibid.* The *Dowd* court stated that “[t]he touchstone for a Title VII hostile environment claim is whether ‘the workplace is permeated with’ discriminatory intimidation, ridicule and insult’ that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.’” *Dowd*, 253 F.3d at 1101–02 (emphasis added) (quoting *Quick v. Donaldson Co.*, 90 F.3d 1372, 1378 (8th Cir.1996) (quoting *Harris*, 510 U.S. at 21, 114 S.Ct. 367)). The court found that “a reasonable juror [could] conclude that the union authorized or encouraged the unlawful harassment.” *Id.* at 1103.

By anchoring its holding that a hostile environment claim emerges from the “otherwise... discriminate” language in section (c), the court ignored the actual textual origin of that theory. The hostile environment theory is based not merely on the prohibition against discrimination, but on discrimination “with respect to...compensation, terms, conditions, or privileges of employment,” a phrase that is found the section (a), which regulates the conduct of employers, and not in section (c), which applies to labor unions. The Supreme Court has explained how that complete phrase undergirds the hostile environment theory, most recently in *Vance v. Ball State University*, —U.S. —, 133 S.Ct. 2434, 186 L.Ed.2d 565 (2013):

Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e–2(a)(1). This provision obviously prohibits discrimination with respect to employment decisions that have direct economic consequences, such as termination, demotion, and pay cuts. But not long after Title VII was enacted, the lower courts held that Title VII also reaches the creation or perpetuation of a discriminatory work environment.

In the leading case of *Rogers v. EEOC*, 454 F.2d 234 (1971), the Fifth Circuit recognized a cause of action based on this theory. See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65–66, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (describing development of hostile environment claims based on race). The *Rogers* court reasoned that “the phrase ‘terms, conditions, or privileges of employment’ in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.” 454 F.2d at 238. The court observed that “[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.” *Ibid.*

...

When the issue eventually reached this Court, we agreed that Title VII prohibits the creation of a hostile work environment. See *Meritor*, *supra*, at 64–67, 106 S.Ct. 2399. In such cases, we have held, the plaintiff must show that the work environment was so pervaded by discrimination that the terms and conditions of employment were altered. See, e.g., *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

Certainly, labor unions can be liable under Title VII for discriminating on the basis of race against individuals seeking union membership or participating in union activities, or classifying members by race, or referring members for work opportunities on the basis of race, or causing an employer to discriminate against an individual on the basis of race. 42 U.S.C. § 2000e–2(c)(1)–(3); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 667, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987); *Farmer v. ARA Serv., Inc.*, 660 F.2d 1096, 1104 (6th Cir.1981); *Wrobbel v. Int’l Bhd. of Elec. Workers, Local 17*, 638 F.Supp.2d 780, 793 (E.D.Mich.2009) (citing *Dixon v. Int’l Brotherhood of Police Officers*, 504 F.3d 73, 84–85 (1st Cir.2007)).

However, they may not be held accountable under 42 U.S.C. § 2000e–2(c) on a hostile work environment theory, because that section does not prohibit a labor union from “discriminat [ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment.”

That is not to say, however, that a labor union may not be liable under section (a) for creating a hostile environment as an employer. Although the Sixth Circuit has not spoken on this question, other circuits have held unanimously that unions can be sued in their capacity as employers. See *Ferroni v. Teamsters, Chauffeurs & Warehousemen Local No. 222*, 297 F.3d 1146, 1151 (10th Cir.2002) (deciding that a “labor organization that is sued by an employee alleging discrimination in the employment relationship should [not] be treated any differently than any other employer”); *Chavero v. Local 241, Div. of the Amalgamated Transit Union*, 787 F.2d 1154, 1155 (7th Cir.1986) (holding that “[u]nder Title VII a union can be both an ‘employer’ and a ‘labor organization’”).

There is support for this proposition in the statute. Title VII contemplates the existence of an employer-employee relationship with a labor organization in its definition of “employer”: The term ‘employer’ means a person engaged in an industry affecting commerce who has fifteen

or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include...a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26.

UAW's Status as Plaintiff's Employer

The UAW argues that it was never the plaintiff's employer, nor could it be. In support, the defendants cite several cases, which they contend establish the rule that as a matter of law an international union does not control affiliated local chapters, and each is a distinct entity... But that does not mean that an international union could never be an employer of an individual who also works for a local affiliate. Instead, the relationship must be examined according to the facts in each case to determine whether an employer-employee relationship exists.

Title VII defines "employer" to mean "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C. § 2000e(a). A labor organization is engaged in an industry affecting commerce if it has fifteen or more members and "is the certified representative of employees under the provisions of the National Labor Relations Act." 42 U.S.C. § 2000e(e)(1). The UAW satisfies both of these criteria, and qualifies as an "employer" under Title VII.

The question, however, is whether the plaintiff has offered sufficient facts that would allow a jury to conclude that she was the UAW's employee.

Title VII defines an employee as "an individual employed by an employer." 42 U.S.C. § 2000e(f). "The circularity of this definition renders it quite unhelpful in explaining whom Congress intended to include as an employee in the workplace." *Marie v. Am. Red Cross*, 771 F.3d 344, 352 (6th Cir.2014) (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992)). Therefore, when Congress uses the term "employee" without defining it with precision, courts should presume "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Id.* at 352 (quoting *Darden*, at 322–23, 112 S.Ct. 1344).

According to the Supreme Court,

[i]n determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and

paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

...

The Court has little trouble concluding that the plaintiff was an employee of Local 7777. See *Daggitt v. United Food & Commercial Workers Int'l Union, Local 304A*, 245 F.3d 981, 987–89 (8th Cir.2001) (holding that union stewards were employees of a union local, where the shop stewards received monetary benefits from the local union in the form of lost-time pay, for which the stewards received a W-2 form, and the local union president had the power to replace the stewards and fill shop steward vacancies in between elections).

However, that does not make her an employee of the UAW. “[A]lleged employee-employer relationships can be complex and may not fit neatly into one particular categorization.” Bryson, 656 F.3d at 355. Applying the factors discussed in *Darden*, as interpreted by the Sixth Circuit’s cases, the plaintiff cannot advance her hostile work environment claim unless she has presented evidence in the record showing that the UAW, not the local, “control [led] [her] job performance and ... employment opportunities.” Marie, 771 F.3d at 356.

The plaintiff has offered evidence that the International Union exerted some measure of control over how the local affiliates process grievances through step three of the process, as well as other activities of the local affiliate.

...

The plaintiff conducted her union work in an office at the local union hall, using supplies and a computer furnished by the local. Her main duties were resolving disputes between the local members and MGM, and processing grievances through the first three steps of the dispute-resolution process. It is true that the International Union took over the grievance process at step four, and if the grievances were written up poorly, the UAW’s servicing representative could send them back for further work.

But that does not amount to the “ability to control job performance and... employment opportunities.” Marie, 771 F.3d at 356. Nor does it amount to control over which grievances are accepted at the initial stages. The UAW retains control over which grievances will be taken to mediation or arbitration in step four, but that feature of the procedure does not “control” the local chairperson’s discretion or job performance in the earlier steps of the process. In fact, the plaintiff acknowledged that the International Union did not direct the local or its employees on which grievances to file.

Darden’s common law agency test, applied to the undisputed facts disclosed by the record in this case taken in the light most favorable to the plaintiff, does not support the plaintiff’s contention that she was an employee of the UAW within the meaning of Title VII. Therefore, the plaintiff may not proceed on a claim against the defendants for creating a hostile work environment under

42 U.S.C. § 2000e-2(a).

Accordingly, it is ORDERED that the defendants' motion for summary judgment [dkt. #34] is GRANTED.

HODGES v. UNITED STATES, 203 U.S. 1 (1906)

BACKGROUND APPEARS IN FOOTNOTE 2, HIGHLIGHTED AS FOLLOWS:

[2] The indictment charged that “the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, being then and there persons of African descent, and citizens of the United States and of the State of Arkansas, had then and there made and entered into contracts and agreements with James A. Davis and James S. Hodges, persons then and there doing business under the name of Davis & Hodges, as copartners carrying on the business of manufacturers of lumber at White Hall, in said county, the said contracts being for the employment by said firm of the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, as laborers and workmen in and about their said manufacturing establishment, by which contracts the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, were on their part to perform labor and services at said manufactory and were to receive on the other hand for their labor and services compensation, the same being a right and privilege conferred upon them by the Thirteenth Amendment to the Constitution of the United States and the laws passed in pursuance thereof, and being a right similar to that enjoyed in said State by the white citizens thereof; and while the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, were in the enjoyment of said right and privilege the said defendants did knowingly, wilfully and unlawfully conspire as aforesaid to injure, oppress, threaten and intimidate them in the free exercise and enjoyment of said right and privilege, and because of their having so exercised the same and because they were citizens of African descent enjoying said right, by then and there notifying the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, that they must abandon said contracts and their said work at said mill and cease to perform any further labor thereat, or receive any further compensation for said labor, and by threatening in case they did not so abandon said work to injure them, and by thereafter then and there wilfully and unlawfully marching and moving in a body to and against the places of business of the said firm while the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, were engaged thereat and while they were in the performance of said contracts thereon, the said defendants being then and there armed with deadly weapons, threatening and intimidating the said workmen there employed, with the purpose of compelling them by violence and threats, and otherwise to remove from said place of business, to stop said work and to cease the enjoyment of said right and privilege, and by then and there wilfully, deliberately and unlawfully compelling said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, to quit said work and abandon said place and cease the free enjoyment of all advantages under said contracts, the same being so done by said defendants

and each of them for the purpose of driving the said Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, from said place of business and from their labor because they were colored men and citizens of African descent, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court.

While the indictment was founded on sections 1977 and 5508, we have quoted other sections to show the scope of the legislation of Congress on the general question involved.

That prior to the three post bellum Amendments to the Constitution the National Government had no jurisdiction over a wrong like that charged in this indictment is conceded; that the Fourteenth and Fifteenth Amendments do not justify the legislation is also beyond dispute, for they, as repeatedly held, are restrictions upon state action, and no action on the part of the State is complained of. Unless, therefore, the Thirteenth Amendment vests in the Nation the jurisdiction claimed the remedy must be sought through state action and in state tribunals subject to the supervision of this court by writ of error in proper cases.

In the Slaughter House Cases, 16 Wall. 36, 76, in defining the privileges and immunities of citizens of the several States, this is quoted from the opinion of Mr. Justice Washington in *Corfield v. Coryell*, 4 Wash. Cir. Ct. 371, 380.

“The inquiry,’ he says, `is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by citizens of the several States which compose this union, from the time of their becoming free, independent and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the Government may prescribe for the general good of the whole.’”

And after referring to other cases this court added (p. 77):

“It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent Amendments no claim or pretense was set up that those rights depended on the Federal Government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States — such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation

of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal Government.”

Notwithstanding the adoption of these three Amendments, the National Government still remains one of enumerated powers, and the Tenth Amendment, which reads “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,” is not shorn of its vitality. True the Thirteenth Amendment grants certain specified and additional power to Congress, but any Congressional legislation directed against individual action which was not warranted before the Thirteenth Amendment must find authority in it. And in interpreting the scope of that Amendment it is well to bear in mind the words of Mr. Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 1, 188, which, though spoken more than four score years ago, are still the rule of construction of constitutional provisions:

“As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.”

The Thirteenth Amendment reads:

“SEC. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

“SEC. 2. Congress shall have power to enforce this article by appropriate legislation.”

The meaning of this is as clear as language can make it. The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another. While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the Nation. It is the denunciation of a condition and not a declaration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to the Nation it commits every race and every individual thereof. Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon are as much within its compass as slavery or involuntary servitude of the African. Of this Amendment it was said by Mr. Justice Miller in *Slaughter House Cases*, 16 Wall. 36, 69, “Its two short sections seem hardly to admit of construction.” And again: “To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this Government . . . requires an effort, to say the least of it.”

A reference to the definitions in the dictionaries of words whose meaning is so thoroughly understood by all seems an affectation, yet in Webster “slavery” is defined as “the state of entire subjection of one person to the will of another.” Even the secondary meaning given recognizes the fact of subjection, as “one who has lost the power of resistance; one who surrenders himself to any power whatever; as a slave to passion, to lust, to strong drink, to ambition,” and “servitude” is by the same authority declared to be “the state of voluntary or compulsory subjection to a master.”

It is said, however, that one of the disabilities of slavery, one of the indicia of its existence, was a lack of power to make or perform contracts, and that when these defendants, by intimidation and force, compelled the colored men named in the indictment to desist from performing their contract they to that extent reduced those parties to a condition of slavery, that is, of subjection to the will of defendants, and deprived them of a freeman’s power to perform his contract. But every wrong done to an individual by another, acting singly or in concert with others, operates pro tanto to abridge some of the freedom to which the individual is entitled. A freeman has a right to be protected in his person from an assault and battery. He is entitled to hold his property safe from trespass or appropriation, but no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery. Indeed, this is conceded by counsel for the Government, for in their brief (after referring to certain decisions of this court) it is said:

“With these decisions, and many others that might be cited, before us, it is vain to contend that the Federal Constitution secures to a citizen of the United States the right to work at a given occupation or particular calling free from injury, oppression, or interference by individual citizens.”

“Even though such right be a natural or inalienable right, the duty of protecting the citizen in the enjoyment of such right, free from individual interference, rests alone with the State.

“Unless, therefore, the additional element, to wit, the infliction of an injury upon one individual citizen by another, solely on account of his color, be sufficient ground to redress such injury the individual citizen suffering such injury must be left for redress of his grievance to the state laws.”

The logic of this concession points irresistibly to the contention that the Thirteenth Amendment operates only to protect the African race. This is evident from the fact that nowhere in the record does it appear that the parties charged to have been wronged by the defendants had ever been themselves slaves, or were the descendants of slaves. They took no more from the Amendment than any other citizens of the United States. But if, as we have seen, that denounces a condition possible for all races and all individuals, then a like wrong perpetrated by white men upon a Chinese, or by black men upon a white man, or by any men upon any man on account of his race, would come within the jurisdiction of Congress, and that protection of individual rights which prior to the Thirteenth Amendment was unquestionably within the jurisdiction solely of

the States, would by virtue of that Amendment be transferred to the Nation, and subject to the legislation of Congress.

But that it was not the intent of the Amendment to denounce every act done to an individual which was wrong if done to a free man and yet justified in a condition of slavery, and to give authority to Congress to enforce such denunciation, consider the legislation in respect to the Chinese. In slave times in the slave States not infrequently every free Negro was required to carry with him a copy of a judicial decree or other evidence of his right to freedom or be subject to arrest. That was one of the incidents or badges of slavery.

By the act of May 5, 1892, Congress required all Chinese laborers within the limits of the United States to apply for a certificate, and any one who after one year from the passage of the act should be found within the jurisdiction of the United States without such certificate, might be arrested and deported. In *Fong Yue Ting v. United States*, 149 U.S. 698, the validity of the Chinese deportation act was presented, elaborately argued, and fully considered by this court. While there was a division of opinion, yet at no time during the progress of the litigation, and by no individual, counsel, or court connected with it, was it suggested that the requiring of such a certificate was evidence of a condition of slavery or prohibited by the Thirteenth Amendment.

One thing more: At the close of the civil war, when the problem of the emancipated slaves was before the Nation, it might have left them in a condition of alienage, or established them as wards of the Government like the Indian tribes, and thus retained for the Nation jurisdiction over them, or it might, as it did, give them citizenship. It chose the latter. By the Fourteenth Amendment it made citizens of all born within the limits of the United States and subject to its jurisdiction. By the Fifteenth it prohibited any State from denying the right of suffrage on account of race, color or previous condition of servitude, and by the Thirteenth it forbade slavery or involuntary servitude anywhere within the limits of the land. Whether this was or was not the wiser way to deal with the great problem is not a matter for the courts to consider. It is for us to accept the decision, which declined to constitute them wards of the Nation or leave them in a condition of alienage where they would be subject to the jurisdiction of Congress, but gave them citizenship, doubtless believing that thereby in the long run their best interests would be subserved, they taking their chances with other citizens in the States where they should make their homes.

For these reasons we think the United States court had no jurisdiction of the wrong charged in the indictment.

The judgments are reversed, and the case remanded with instructions to sustain the demurrer to the indictment.

MR. JUSTICE BROWN concurs in the judgments.

MR. JUSTICE HARLAN, with whom concurs MR. JUSTICE DAY, dissenting.[1]

The plaintiffs in error were indicted with eleven others in the District Court of the United States, Eastern District of Arkansas, for the crime of having knowingly, wilfully and unlawfully conspired to oppress, threaten and intimidate Berry Winn, Dave Hinton, Percy Legg, Joe Mardis, Joe McGill, Dan Shelton, Jim Hall and George Shelton, persons of African descent and citizens of the United States and of Arkansas, in the free exercise and enjoyment of the right and privilege — alleged to be secured to them respectively by the Constitution and laws of the United States — of disposing of their labor and services by contract and of performing the terms of such contract without discrimination against them, because of their race or color, and without illegal interference or by violent means.[2]

The indictment was based primarily upon section 5508 of the Revised Statutes, which provides:

“SEC. 5508. If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit or trust created by the Constitution or laws of the United States.” **[SEE P. 196 OF 8TH EDITION OF CASEBOOK— THAT LAW, PART OF THE KU KLUX KLAN ACT PASSED IN 1981, IS CODIFIED TODAY IN 42 U.S. CODE SECTION 1985(3).]**

Other sections of the statutes relating to civil rights, and referred to in the discussion at the bar, although not, perhaps, vital to the decision of the present case, are as follows:

“SEC. 1977. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”

[SEE P. 195 OF 8TH EDITION OF CASEBOOK— THAT LAW IS CODIFIED TODAY IN 42 U.S. CODE SECTION 1981). THIS LAW IS COMMONLY USED IN EMPLOYMENT DISCRIMINATION LAWSUITS TODAY, USUALLY ADDED TO A CLAIM OF RACE OR NATIONAL ORIGIN OR RELIGIOUS OR SEX DISCRIMINATION UNDER TITLE VII.]

“SEC. 1978. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and

convey real and personal property.”

“SEC. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

[SEE P. 196 OF 8TH EDITION OF CASEBOOK— THAT LAW IS CODIFIED TODAY IN 42 U.S. CODE SECTION 1983). THIS LAW IS COMMONLY USED IN EMPLOYMENT DISCRIMINATION LAWSUITS TODAY, USUALLY ADDED TO A CLAIM OF RACE OR NATIONAL ORIGIN OR RELIGIOUS OR SEX DISCRIMINATION UNDER TITLE VII.]

“SEC. 5510. Every person who, under color of any law statute, ordinance, regulation, or custom, subjects, or causes to be subjected, any inhabitant of any State or Territory to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both.”

[NOT IN THE CASEBOOK BECAUSE IT IS A CRIMINAL LAW, A CRIMINAL LAW DESIGNED TO REINFORCE THE ANTI-DISCRIMINATION LAWS IN THE FOREGOING PASSAGES. IT WAS ENFORCEABLE IN FEDERAL COURT, NOT STATE COURT, BECAUSE CONGRESS DID NOT TRUST SOUTHERN STATES TO PROTECT BLACKS. IT IS THIS PARTICULAR LAW THAT THE MAJORITY OPINION (ABOVE) RULED UNCONSTITUTIONAL BECAUSE IT VIOLATES STATES' RIGHTS—AND HERE, JUSTICE HARLAN IS STRONGLY DISSENTING, IN EFFECT, STATING THAT THE MAJORITY HAS OVERTUNED TO OUTCOME OF THE CIVIL WAR.]

In our consideration of the questions now raised it must be taken, upon this record, as conclusively established by the verdict and judgment —

That certain persons — the said Berry Winn and others above named with him — citizens of the United States, and of Arkansas, and of African descent, entered into a contract, whereby they agreed to perform for compensation service and labor in and about the manufacturing business in that State of a private individual;

That those persons, in execution of their contract, entered upon and were actually engaged in performing the work they agreed to do, when the defendants — the present plaintiffs in error —

knowingly and willfully conspired to injure, oppress, threaten and intimidate such laborers, solely because of their having made that contract and because of their race and color, in the free exercise of their right to dispose of their labor, and prevent them from carrying out their contract to render such service and labor;

That, in the prosecution of such conspiracy, the defendants, by violent means, compelled those laborers, simply “because they were colored men and citizens of African descent,” to quit their work and abandon the place at which they were performing labor in execution of their contract; and,

That, in consequence of those acts of the defendant conspirators, the laborers referred to were hindered and prevented, solely because of their race and color, from enjoying the right by contract to dispose of their labor upon such terms and to such persons as to them seemed best.

Was the right or privilege of these laborers thus to dispose of their labor secured to them “by the Constitution or laws of the United States”? If so, then this case is within the very letter of section 5508 of the Revised Statutes, and the judgment should be affirmed if that section be not unconstitutional.

But I need not stop to discuss the constitutionality of section 5508. It is no longer open to question, in this court, that Congress may, by appropriate legislation, protect any right or privilege arising from, created or secured by, or dependent upon, the Constitution or laws of the United States. That is what that section does. It purports to do nothing more.

In *Ex parte Yarbrough*, 110 U.S. 651, it was distinctly adjudged that section 5508 was a valid exercise of power by Congress. In *United States v. Reese*, 92 U.S. 214, 217, decided at October term, 1875, this court, speaking by Chief Justice Waite, said: “Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected.”

In *Motes v. United States*, 178 U.S. 458, 462, the language of the court was: “We have seen that by section 5508, of the Revised Statutes it is made an offense against the United States for two or more persons to conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States — the punishment prescribed being a fine of not more than \$5,000, imprisonment not more than ten years, and ineligibility to any office or place of honor, profit or trust created by the Constitution or laws of the United States. [**THIS WAS A SUCCESSFUL CIVIL LAW ENFORCEMENT AGAINST KU KLUX KLAN MEMBERS FOR TERRORIZING BLACKS.**] And by section 5509 it is provided that if in committing the above offense any other felony or misdemeanor be committed, the offender shall suffer such punishment as is attached to

such felony or misdemeanor by the laws of the State in which the offense is committed.

I come now to the main question — whether a conspiracy or combination to forcibly prevent citizens of African descent, solely because of their race and color, from disposing of their labor by contract upon such terms as they deem proper and from carrying out such contract, infringes or violates a right or privilege created by, derived from or dependent upon the Constitution of the United States.

Before the Thirteenth Amendment was adopted the existence of freedom or slavery within any State depended wholly upon the constitution and laws of such State. However abhorrent to many was the thought that human beings of African descent were held as slaves and chattels, no remedy for that state of things as it existed in some of the States could be given by the United States in virtue of any power it possessed prior to the adoption of the Thirteenth Amendment.

That condition, however, underwent a radical change when that Amendment became a part of the supreme law of the land and as such binding upon all the States and all the people, as well as upon every branch of government, Federal and state. By the Amendment it was ordained that “neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction”; and “Congress shall have power to enforce this article by appropriate legislation.” Although in words and form prohibitive, yet, in law, by its own force, that Amendment destroyed slavery and all its incidents and badges, and established freedom. It also conferred upon every person within the jurisdiction of the United States (except those legally imprisoned for crime) the right, without discrimination against them on account of their race, to enjoy all the privileges that inhere in freedom.

It went further, however, and, by its second section, invested Congress with power, by appropriate legislation, to enforce its provisions. To that end, by direct, primary legislation, Congress may not only prevent the reestablishing of the institution of slavery, pure and simple, but may make it impossible that any of its incidents or badges should exist or be enforced in any State or Territory of the United States. It therefore became competent for Congress, under the Thirteenth Amendment, to make the establishing of slavery, as well as all attempts, whether in the form of a conspiracy or otherwise, to subject anyone to the badges or incidents of slavery offenses against the United States, punishable by fine or imprisonment, or both. And legislation of that character would certainly be appropriate for the protection of whatever rights were given or created by the Amendment.

So, legislation making it an offense against the United States to conspire to injure or intimidate a citizen in the free exercise of any right secured by the Constitution is broad enough to embrace a conspiracy of the kind charged in the present indictment.

The colored laborers against whom the conspiracy in question was directed owe their freedom as

well as their exemption from the incidents and badges of slavery alone to the Constitution of the United States. Yet it is said that their right to enjoy freedom and to be protected against the badges and incidents of slavery is not secured by the Constitution or laws of the United States.

...

It was supposed that the eradication of slavery and involuntary servitude of every form and description required that the slave should be made a citizen and placed on an entire equality before the law with the white citizen, and, therefore, that Congress had the power, under the Amendment, to declare and effectuate these objects. . . .

Conceding this to be true (which I think it is), Congress then had the right to go further and to enforce its declaration by passing laws for the prosecution and punishment of those who should deprive, or attempt to deprive, any person of the rights thus conferred upon them. Without having this power, Congress could not enforce the Amendment.

It cannot be doubted, therefore, that Congress had the power to make it a penal offense to conspire to deprive a person of, or to hinder him in, the exercise and enjoyment of the rights and privileges conferred by the Thirteenth Amendment and the laws thus passed in pursuance thereof.

But this power does not authorize Congress to pass laws for punishment of ordinary crimes and offenses against persons of the colored race or any other race. That belongs to the state government alone. All ordinary murders, robberies, assaults, thefts and offenses whatsoever are cognizable only in the state courts, unless, indeed, the State should deny to the class of persons referred to equal protection of the laws. . . . To illustrate: If in a community or neighborhood composed principally of whites, a citizen of African descent, or of the Indian race, not within the exception of the Amendment, should propose to lease and cultivate a farm, and a combination should be formed to expel him and prevent him from the accomplishment of his purpose on account of his race or color, it cannot be doubted that this would be a case within the power of Congress to remedy and redress. It would be a case of interference with the person's exercise of his equal rights as a citizen because of his race.

But if that person should be injured in his person or property by any wrongdoer for the mere felonious or wrongful purpose of malice, revenge, hatred or gain, without any design to interfere with his rights of citizenship or equality before the laws, as being a person of a different race and color from the white race, it would be an ordinary crime, punishable by the state laws only."

The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like

burdens and incapacities, were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses. . . . We must not forget that the province and scope of the Thirteenth and Fourteenth Amendments are different; the former simply abolished slavery; the latter prohibited the States from abridging the privileges or immunities of citizens of the United States; from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws.

The Amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the Thirteenth Amendment it has only to do with slavery and its incidents.

Under the Fourteenth Amendment it has power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty or property without due process of law, or to deny to any of them the equal protection of the laws.

Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not; under the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against state regulations or proceedings.”

One of the important aspects in the present discussion of the Civil Rights Cases, is that the court there proceeded distinctly upon the ground that although the constitution and statutes of a State may not be repugnant to the Thirteenth Amendment, nevertheless, Congress, by legislation of a direct and primary character, may, in order to enforce the Amendment, reach and punish individuals whose acts are in hostility to rights and privileges derived from or secured by or dependent upon that Amendment.

These views were explicitly referred to and reaffirmed in the recent case of *Clyatt v. United States*, 197 U.S. 207. That was an indictment against a single individual for having unlawfully and knowingly returned, forcibly and against their will, two persons from Florida to Georgia, to be held in the latter State in a condition of peonage, in violation of the statutes of the United States, (Rev. Stat. 1900, 5526). A person arbitrarily or forcibly held against his will for the purpose of compelling him to render personal services in discharge of a debt, is in a condition of peonage. It was not claimed in that case that peonage was sanctioned by or could be maintained under the constitution or laws either of Florida or Georgia.

The argument there on behalf of the accused was, in part, that the Thirteenth Amendment was directed solely against the States and their laws, and that its provisions could not be made applicable to individuals whose illegal conduct was not authorized, permitted or sanctioned by some act, resolution, order, regulation or usage of the State.

That argument was rejected by every member of this court, and we all agreed that Congress had power, under the Thirteenth Amendment, not only to forbid the existence of peonage, but to make it an offense against the United States for any person to hold, arrest, return or cause to be held, arrested or returned, or who in any manner aided in the arrest or return of another person, to a condition of peonage.

The Clyatt case proceeded upon the ground that, although the Constitution and laws of the State might be in perfect harmony with the Thirteenth Amendment, yet the compulsory holding of one individual by another individual for the purpose of compelling the former by personal service to discharge his indebtedness to the latter created a condition of involuntary servitude or peonage, was in derogation of the freedom established by that Amendment, and, therefore, could be reached and punished by the Nation. Is it consistent with the principle upon which that case rests to say that an organized body of individuals who forcibly prevent free citizens, solely because of their race, from making a living in a legitimate way, do not infringe any right secured by the National Constitution, and may not be reached or punished by the Nation?

One who is shut up by superior or overpowering force, constantly present and threatening, from earning his living in a lawful way of his own choosing, is as much in a condition of involuntary servitude as if he were forcibly held in a condition of peonage. In each case his will is enslaved, because illegally subjected, by a combination that he cannot resist, to the will of others in respect of matters which a freeman is entitled to control in such way as to him seems best.

If the Thirteenth Amendment established freedom, and conferred, without the aid of legislation, the right to be free from the badges and incidents of slavery, and if the disability to make or enforce contracts for one's personal services was a badge of slavery, as it existed when the Thirteenth Amendment was adopted, how is it possible to say that the combination or conspiracy charged in the present indictment, and conclusively established by the verdict and judgment, was not in hostility to rights secured by the Constitution?

These general principles, it is to be regretted, are now modified, so as to deny to millions of citizen-laborers of African descent, deriving their freedom from the Nation, the right to appeal for National protection against lawless combinations of individuals who seek, by force, and solely because of the race of such laborers, to deprive them of the freedom established by the Constitution of the United States, so far as that freedom involves the right of such citizens, without discrimination against them because of their race, to earn a living in all lawful ways, and to dispose of their labor by contract. I cannot assent to an interpretation of the Constitution which denies National protection to vast numbers of our people in respect of rights derived by them from the Nation.

The interpretation now placed on the Thirteenth Amendment is, I think, entirely too narrow and is hostile to the freedom established by the supreme law of the land. It goes far towards

neutralizing many declarations made as to the object of the recent Amendments of the Constitution, a common purpose of which, this court has said, was to secure to a people theretofore in servitude, the free enjoyment, without discrimination merely on account of their race, of the essential rights that appertain to American citizenship and to freedom.

As the Nation has destroyed both slavery and involuntary servitude everywhere within the jurisdiction of the United States and invested Congress with power, by appropriate legislation, to protect the freedom thus established against all the badges and incidents of slavery as it once existed; as the disability to make valid contracts for one's services was, as this court has said, an inseparable incident of the institution of slavery which the Thirteenth Amendment destroyed; and as a combination or conspiracy to prevent citizens of African descent, solely because of their race, from making and performing such contracts, is thus in hostility to the rights and privileges that inhere in the freedom established by that Amendment, I am of opinion that the case is within section 5508, and that the judgment should be affirmed.

For these reasons, I dissent from the opinion and judgment of the court.

[1] **Dissent announced May 28, 1906, but not filed until October 24, 1906.**

ETSITTY v. UTAH TRANSIT AUTHORITY (10th. Cir. 2007)

I. Introduction

Krystal Etsitty, a transsexual and former employee of Utah Transit Authority (“UTA”), sued UTA and Betty Shirley, her former supervisor, pursuant to 42 U.S.C. § 2000e-2(a)(1) (“Title VII”) and 42 U.S.C. § 1983. In her complaint, she alleged the defendants terminated her because she was a transsexual and because she failed to conform to their expectations of stereotypical male behavior. She alleged that terminating her on this basis constituted gender discrimination in violation of both Title VII and the Equal Protection Clause of the Fourteenth Amendment. The defendants filed a motion for summary judgment and the district court granted the motion. In doing so, it determined transsexuals are not a protected class for purposes of Title VII and the prohibition against sex stereotyping recognized by some courts should not be applied to transsexuals. It also concluded that even if a transsexual could state a Title VII claim under a sex stereotyping theory, there was no evidence in this case that Etsitty was terminated for failing to conform to a particular gender stereotype. Etsitty appeals the district court's order granting summary judgment to the defendants. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, this court affirms the district court's grant of summary judgment.

II. Background

Etsitty is a transsexual who has been diagnosed with Adult Gender Identity Disorder. Although Etsitty was born as a biological male and given the name “Michael,” she identifies herself as a woman and has always believed she was born with the wrong anatomical sex organs. Even

before she was diagnosed with a gender identity disorder, Etsitty lived and dressed as a woman outside of work and used the female name of “Krystal.” Eventually, Etsitty began to see an endocrinologist who prescribed her female hormones to prepare for a sex reassignment surgery in the future. Etsitty made the decision at that time to live full time as a woman. While she has begun the transition from male to female by taking female hormones, she has not yet completed the sex reassignment surgery. Thus, Etsitty describes herself as a “pre-operative transgendered individual.”

Nearly four years after Etsitty had begun taking female hormones, she applied for a position as a bus operator with UTA. She was hired and, after successfully completing a six-week training course, was assigned to a position as an extra-board operator. As an operator on the extra board, Etsitty was not assigned to a permanent route or shift. Instead, she would fill in for regular operators who were on vacation or called in sick. As a result, Etsitty drove many of UTA's 115 to 130 routes in the Salt Lake City area over approximately ten weeks as an extra-board operator. While on their routes, UTA employees use public restrooms.

Throughout her training period at UTA, Etsitty presented herself as a man and used male restrooms. Soon after being hired, however, she met with her supervisor, Pat Chatterton, and informed him that she was a transsexual. She explained that she would begin to appear more as a female at work and that she would eventually change her sex. Chatterton expressed support for Etsitty and stated he did not see any problem with her being a transsexual. After this meeting, Etsitty began wearing makeup, jewelry, and acrylic nails to work. She also began using female restrooms while on her route.

Shirley, the operations manager of the UTA division where Etsitty worked, heard a rumor that there was a male operator who was wearing makeup. She spoke with Chatterton and he informed her Etsitty was a transsexual and would be going through a sex change. When Chatterton told her this, Shirley expressed concern about whether Etsitty would be using a male or female restroom. Shirley told Chatterton she would speak with Human Resources about whether Etsitty's restroom usage would raise any concerns for UTA.

Shirley then called Bruce Cardon, the human resources generalist for Shirley's division, and they decided to set up a meeting with Etsitty. At the meeting, Shirley and Cardon asked Etsitty where she was in the sex change process and whether she still had male genitalia. Etsitty explained she still had male genitalia because she did not have the money to complete the sex change operation. Shirley expressed concern about the possibility of liability for UTA if a UTA employee with male genitalia was observed using the female restroom. Shirley and Cardon also expressed concern that Etsitty would switch back and forth between using male and female restrooms.

Following their meeting with Etsitty, Shirley and Cardon placed Etsitty on administrative leave and ultimately terminated her employment. Shirley explained the reason Etsitty was terminated

was the possibility of liability for UTA arising from Etsitty's restroom usage. Cardon similarly explained to Etsitty that the reason for her termination was UTA's inability to accommodate her restroom needs. Shirley felt it was not possible to accommodate Etsitty's restroom usage because she typically used public restrooms along her routes rather than restrooms at the UTA facility. Shirley also testified she did not believe it was appropriate to inquire into whether people along UTA routes would be offended if a transsexual with male genitalia were to use the female restrooms. On the record of termination, Shirley indicated Etsitty would be eligible for rehire after completing sex reassignment surgery. At the time of the termination, UTA had received no complaints about Etsitty's performance, appearance, or restroom usage.

Etsitty filed suit against UTA and Shirley, alleging they had engaged in unlawful gender discrimination, in violation of Title VII and the Equal Protection Clause of the Fourteenth Amendment. She claimed she was terminated because she was a transsexual and because she failed to conform to UTA's expectations of stereotypical male behavior. The defendants filed a motion for summary judgment, arguing transsexuals are not a protected class under Title VII or the Equal Protection Clause and that Etsitty was not terminated for failing to conform to male stereotypes. The district court granted the motion. In doing so, it agreed transsexuals are not a protected class and concluded there was no evidence that Etsitty was terminated for any reason other than Shirley's stated concern about Etsitty's restroom usage.

III. Analysis

This court reviews a district court's decision to grant summary judgment *de novo*. *Green v. New Mexico*, 420 F.3d 1189, 1192 (10th Cir.2005). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In making the determination of whether summary judgment was appropriate, this court views all the evidence and draws all reasonable inferences in favor of the nonmoving party. *Green*, 420 F.3d at 1192.

A. Title VII

In the Title VII context, this court applies the three-part burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *Plotke v. White*, 405 F.3d 1092, 1099 (10th Cir.2005). Under this framework, the plaintiff must first establish a *prima facie* case of prohibited employment action. *Id.* If the plaintiff does so, the burden shifts to the employer to articulate a "legitimate, nondiscriminatory reason for its adverse employment action." *Id.* (quotations omitted). If the employer satisfies this burden, "summary judgment is warranted unless the employee can show there is a genuine issue of material fact as to whether the proffered reasons are pretextual." Because this court concludes transsexuals are not a protected class under Title VII and because Etsitty has failed to raise a genuine issue of material fact as to whether UTA's asserted non-discriminatory reason for

her termination is pretextual, this court concludes the district court properly granted summary judgment on Etsitty's Title VII claims.

1. Prima Facie Claim

Title VII provides that “[i]t shall be an unlawful employment practice for an employer . to discharge any individual, or otherwise to discriminate against any individual . because of such individual's . sex.” 42 U.S.C. § 2000e-2(a)(1). While Title VII is a remedial statute which should be liberally construed, see *Jackson v. Cont’l Cargo-Denver*, 183 F.3d 1186, 1189 (10th Cir.1999), it should not be treated as a “general civility code” and should be “directed only at discrimination because of sex.” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998). Thus, the threshold question in this case is whether Etsitty's claim can properly be construed as a claim that she was terminated or discriminated against “because of sex.” If it cannot, as UTA argues and the district court held, Etsitty has not presented an actionable legal claim under Title VII and summary judgment was properly granted. The question of whether, and to what extent, a transsexual may claim protection from discrimination under Title VII is a question this court has not previously addressed.

On appeal, Etsitty presents two separate legal theories in support of her contention that she was discriminated against because of sex in violation of Title VII. First, she argues discrimination based on an individual’s identity as a transsexual is literally discrimination because of sex and that transsexuals are therefore a protected class under Title VII as transsexuals. Alternatively, she argues that even if Title VII does not prohibit discrimination on the basis of a person’s transsexuality, she is nevertheless entitled to protection under Title VII because she was discriminated against for failing to conform to sex stereotypes. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, establishing that Title VII's reference to “sex” encompasses both the biological differences between men and women and gender discriminations, i.e., discrimination based on a failure to conform to stereotypical gender norms).

a. Transsexuals as a Protected Class

Etsitty first argues she is protected under Title VII from discrimination based on her status as a transsexual. She argues that because a person's identity as a transsexual is directly connected to the sex organs she possesses, discrimination on this basis must constitute discrimination because of sex.

Although this court has not previously considered whether transsexuals are a protected class under Title VII, other circuits to specifically address the issue have consistently held they are not.

See *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir.1984); *Sommers v. Budget Mktg.*,

Inc., 667 F.2d 748, 749-50 (8th Cir.1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir.1977). In *Ulane*, the Seventh Circuit explained that the definition of sex should be given its “common and traditional interpretation” for purposes of interpreting Title VII. 742 F.2d at 1086. Based on this traditional definition, the court held the statute's prohibition on sex discrimination means only that it is “unlawful to discriminate against women because they are women and men because they are men.” *Id.* at 1085. Because the plaintiff in *Ulane* could show only that she was discriminated against as a transsexual, rather than as a woman or a man, the court concluded Title VII could provide no protection. *Id.* at 1086-87.

This court agrees with *Ulane* and the vast majority of federal courts to have addressed this issue and concludes discrimination against a transsexual based on the person’s status as a transsexual is not discrimination because of sex under Title VII. In reaching this conclusion, this court recognizes it is the plain language of the statute and not the primary intent of Congress that guides our interpretation of Title VII. See *Oncale*, 523 U.S. at 79, 118 S.Ct. 998 (“[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”). Nevertheless, there is nothing in the record to support the conclusion that the plain meaning of “sex” encompasses anything more than male and female. In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual. Rather, like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female.

While *Etsitty* argues for a more expansive interpretation of sex that would include transsexuals as a protected class, she acknowledges that few courts have been willing to adopt such an interpretation. Even the Sixth Circuit, which extended protection to transsexuals under the *Price Waterhouse* theory discussed below, explained that an individual’s status as a transsexual should be irrelevant to the availability of Title VII protection. *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004). Further, this court has explicitly declined to extend Title VII protections to discrimination based on a person's sexual orientation. See *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir.2005). Although there is certainly a distinction between a class delineated by sexual orientation and a class delineated by sexual identity, *Medina* nevertheless demonstrates this court's reluctance to expand the traditional definition of sex in the Title VII context.

Scientific research may someday cause a shift in the plain meaning of the term “sex” so that it extends beyond the two starkly defined categories of male and female. See *Schroer v. Billington*, 424 F.Supp.2d 203, 212-13 & n. 5 (D.D.C.2006) (noting “complexities stem[ming] from real variations in how the different components of biological sexuality . interact with each other, and in turn, with social psychological, and legal conceptions of gender”); cf. *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir.1995) (stating that the possibility that sexual identity may be biological suggests reevaluating whether transsexuals are a protected class for purposes of the

Equal Protection Clause). At this point in time and with the record and arguments before this court, however, we conclude discrimination against a transsexual because she is a transsexual is not “discrimination because of sex.” Therefore, transsexuals are not a protected class under Title VII and Etsitty cannot satisfy her prima facie burden on the basis of her status as a transsexual.² See Plotke, 405 F.3d at 1099 (requiring plaintiff to show she belonged to a protected class as part of her prima facie showing).

b. Price Waterhouse Theory

Etsitty next argues that even if transsexuals are not entitled to protection under Title VII as transsexuals, she is nevertheless entitled to protection as a biological male who was discriminated against for failing to conform to social stereotypes about how a man should act and appear. She argues that although courts have previously declined to extend Title VII protection to transsexuals based on a narrow interpretation of “sex,” this approach has been supplanted by the more recent rationale of Price Waterhouse. Etsitty contends that after Price Waterhouse, an employer’s discrimination against an employee based on the employee’s failure to conform to stereotypical gender norms is discrimination “because of sex” and may provide a basis for an actionable Title VII claim.

In Price Waterhouse, the plaintiff was a woman who was denied partnership in an accounting firm at least in part because she was “macho,” “somewhat masculine,” and “overcompensated for being a woman.” 490 U.S. at 235, 109 S.Ct. 1775 (quotations omitted). One partner advised her she could improve her chances for partnership if she would “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” *Id.* (quotation omitted). In concluding the plaintiff had met her burden of establishing gender played a motivating part in the employment decision, a plurality of the court explained that “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” *Id.* at 250, 109 S.Ct. 1775; see also *id.* at 272-73, 109 S.Ct. 1775 (O’Connor, J., concurring in the judgment) (shifting burden to employer where plaintiff established her failure to conform to stereotypes was a substantial factor in the employment decision). The court stated that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.” *Id.* at 251, 109 S.Ct. 1775.

A number of courts have relied on Price Waterhouse to expressly recognize a Title VII cause of action for discrimination based on an employee’s failure to conform to stereotypical gender norms. See, e.g., *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 262-64 (3d Cir.2001); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874-75 (9th Cir.2001); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n. 4 (1st Cir.1999); *Doe by Doe v. City of Belleville*, 119 F.3d 563, 580-81 (7th Cir.1997), vacated on other grounds, 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998). In fact, the Sixth Circuit recently relied on Price Waterhouse to recognize a cause of action for a transsexual claiming protection under Title VII.

See *Smith*, 378 F.3d at 572-75; *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir.2005). In so holding, the court explained that just as an employer who discriminates against women for not wearing dresses or makeup is engaging in sex discrimination under the rationale of *Price Waterhouse*, “employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.” *Smith*, 378 F.3d at 574; cf. *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir.2000) (concluding a transsexual could state a claim for sex discrimination under Equal Credit Opportunity Act by analogizing to Title VII); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir.2000) (relying on Title VII case law to conclude that violence against a transsexual was violence because of gender under the Gender Motivated Violence Act).

This court need not decide whether discrimination based on an employee's failure to conform to sex stereotypes always constitutes discrimination “because of sex” and we need not decide whether such a claim may extend Title VII protection to transsexuals who act and appear as a member of the opposite sex. Instead, because we conclude *Etsitty* has not presented a genuine issue of material fact as to whether UTA's stated motivation for her termination is pretextual, we assume, without deciding, that such a claim is available and that *Etsitty* has satisfied her prima facie burden.

2. Legitimate Nondiscriminatory Reason

Assuming *Etsitty* has established a prima facie case under the *Price Waterhouse* theory of gender stereotyping, the burden then shifts to UTA to articulate a legitimate, nondiscriminatory reason for *Etsitty*'s termination. *Plotke*, 405 F.3d at 1099. At this stage of the *McDonnell Douglas* framework, UTA does not “need to litigate the merits of the reasoning, nor does it need to prove that the reason relied upon was bona fide, nor does it need to prove that the reasoning was applied in a nondiscriminatory fashion.” *EEOC v. Flasher Co.*, 986 F.2d 1312, 1316 (10th Cir.1992). Rather, UTA need only “explain its actions against the plaintiff in terms that are not facially prohibited by Title VII.” *Jones v. Denver Post Corp.*, 203 F.3d 748, 753 (10th Cir.2000) (quotation omitted).

UTA has explained its decision to discharge *Etsitty* was based solely on her intent to use women's public restrooms while wearing a UTA uniform, despite the fact she still had male genitalia. The record also reveals UTA believed, and *Etsitty* has not demonstrated otherwise, that it was not possible to accommodate her bathroom usage because UTA drivers typically use public restrooms along their routes rather than restrooms at the UTA facility. UTA states it was concerned the use of women's public restrooms by a biological male could result in liability for UTA. This court agrees with the district court that such a motivation constitutes a legitimate, nondiscriminatory reason for *Etsitty*'s termination under Title VII.

Etsitty argues UTA's concern regarding which restroom she would use cannot qualify as a

facially non-discriminatory reason because the use of women's restrooms is an inherent part of Etsitty's status as a transsexual and, thus, an inherent part of her non-conforming gender behavior. Therefore, she argues, terminating her because she intended to use women's restrooms is essentially another way of stating that she was terminated for failing to conform to sex stereotypes.

Title VII's prohibition on sex discrimination, however, does not extend so far. It may be that use of the women's restroom is an inherent part of one's identity as a male-to-female transsexual and that a prohibition on such use discriminates on the basis of one's status as a transsexual. As discussed above, however, Etsitty may not claim protection under Title VII based upon her transsexuality *per se*. Rather, Etsitty's claim must rest entirely on the Price Waterhouse theory of protection as a man who fails to conform to sex stereotypes. However far Price Waterhouse reaches, this court cannot conclude it requires employers to allow biological males to use women's restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes. Cf. *Nichols*, 256 F.3d at 875 n. 7 (explaining that not all gender-based distinctions are actionable under Title VII and that “there is [no] violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards”).

The critical issue under Title VII “is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” *Oncale*, 523 U.S. at 80, 118 S.Ct. 998 (quotation omitted). Because an employer's requirement that employees use restrooms matching their biological sex does not expose biological males to disadvantageous terms and does not discriminate against employees who fail to conform to gender stereotypes, UTA's proffered reason of concern over restroom usage is not discriminatory on the basis of sex. Thus, it is not “facially prohibited by Title VII” and may satisfy UTA's burden on the second part of the McDonnell Douglas framework.

3. Pretext

Once UTA has advanced a legitimate, nondiscriminatory reason for Etsitty's termination, the burden shifts back to Etsitty to “show there is a genuine issue of material fact as to whether the proffered reason []is] pretextual.” *Plotke*, 405 F.3d at 1099. “A plaintiff demonstrates pretext by showing either that a discriminatory reason more likely motivated the employer or that the employer's proffered explanation is unworthy of credence.” *Stinnett v. Safeway, Inc.*, 337 F.3d 1213, 1218 (10th Cir.2003) (quotation omitted). Such a showing may be made by revealing “such weaknesses, implausibilities, inconsistencies, incoherence, or contradictions, in the employer's proffered legitimate reasons for its action that a reasonable factfinder could infer that the employer did not act for the asserted non-discriminatory reasons.” *Jencks v. Modern Woodmen of Am.*, 479 F.3d 1261, 1267 (10th Cir.2007) (quotation omitted). Although this court must resolve all doubts in Etsitty's favor, “[m]ere conjecture that the employer's explanation is pretext is insufficient to defeat summary judgment.” *Anderson v. Coors Brewing*

Co., 181 F.3d 1171, 1179 (10th Cir.1999).

In support of Etsitty's contention that she was terminated for failing to conform to gender stereotypes and not because of UTA's concern regarding her restroom usage, she relies primarily on the testimony of Shirley and Cardon. Specifically, she points to Shirley's deposition testimony in which she stated, "We both felt that there was an image issue out there for us, that we could have a problem with having someone who, even though his appearance may look female, he's still a male because he still had a penis." Additionally, Cardon testified, "We have expectations of operators and how they appear to the public. [I]f we see something that is considered radical or could be interpreted by the public as being inappropriate, we talk to the operators about that and expect them to have a professional appearance." Etsitty argues these statements provide sufficient evidence to allow a rational jury to conclude she was terminated because she was a biological male who did not act and appear as UTA believed a man should.

If these statements stood alone, they may constitute sufficient evidence of pretext to preclude summary judgment. A complete review of the deposition testimony, however, indicates otherwise. Although the specific statements cited by Etsitty address Etsitty's appearance, they fall within the larger context of an explanation of UTA's concerns regarding Etsitty's restroom usage. Immediately after Shirley mentions Etsitty's appearance, she explains the problem with this appearance is that she may not be able to find a unisex bathroom on the route and that liability may arise if Etsitty was using female restrooms. When Cardon was asked what he found unprofessional about Etsitty's appearance, he similarly responded with concerns about her restroom usage. Thus, the isolated and tangential comments about Etsitty's appearance are insufficient to alone permit an inference of pretext. Instead, the testimony of Shirley and Cardon, viewed in its entirety and in context, provides further support for UTA's assertion that Etsitty was terminated not because she failed to conform to stereotypes about how a man should act and appear, but because she was a biological male who intended to use women's public restrooms.

In addition to the statements made by Shirley and Cardon, Etsitty argues UTA's asserted reason for her termination must be pretextual because UTA had no reason to be concerned regarding her use of women's restrooms. In support of this claim, Etsitty makes the following arguments: (1) UTA could not be subject to liability, as a matter of law, for allowing a male-to-female transsexual employee to use women's restrooms; (2) UTA had received no complaints regarding Etsitty's restroom usage; (3) UTA made no attempt to investigate whether there were unisex restrooms available; and (4) because Etsitty looked and acted like a woman, no one would know she was not biologically female and therefore could not take offense to her use of women's restrooms.

None of the arguments raised by Etsitty is sufficient to raise a genuine issue as to whether UTA's asserted concern regarding her use of the women's restrooms is pretext. Although Etsitty states in her brief that there is no evidence she intended to use female restrooms, she admitted at oral

argument that she was required to use female restrooms and that she informed Shirley of this at their meeting prior to her termination. Thus, UTA's belief that Etsitty intended to use female restrooms was well-grounded. While Etsitty contends this fact should not have given rise to her termination, her argument is more akin to a challenge to UTA's business judgment than a challenge to its actual motivation. Nevertheless, “[t]he relevant inquiry is not whether [the defendant's] proffered reasons were wise, fair or correct, but whether [it] honestly believed those reasons and acted in good faith upon those beliefs.” *Exum v. United States Olympic Comm.*, 389 F.3d 1130, 1138 (10th Cir.2004) (quotation omitted) (alterations in original).

While this court may disagree with UTA that a male-to-female transsexual's intent to use women's restrooms should be grounds for termination before complaints have arisen, there is insufficient evidence to permit an inference that UTA did not actually terminate Etsitty for this reason. To the contrary, all of the evidence suggests UTA did in fact terminate Etsitty because of its concerns about her restroom usage. Both at the time of Etsitty's termination and in subsequent deposition testimony, Shirley consistently explained the termination decision in terms of her concerns regarding liability for UTA and the inability of UTA to accommodate Etsitty's restroom needs. Although Shirley and Cardon specifically asked Etsitty whether she possessed male genitalia, such an inquiry is not the “smoking gun” Etsitty suggests. Rather, the record is clear that this inquiry was only relevant to UTA's evaluation of whether Etsitty's restroom usage could become a problem.

UTA's legitimate explanation is not made implausible by any of the circumstantial evidence relied on by Etsitty in her brief. The fact UTA had not yet received complaints about Etsitty's restroom usage at the time of the termination does not mean UTA could not have been concerned about such complaints arising in the future, especially where Etsitty had only recently begun using the women's restroom. Similarly, Etsitty has pointed to nothing in the record to indicate the feasibility of an investigation into the availability of unisex restrooms along each of UTA's routes or the likelihood complaints would arise. Therefore, in this case, Shirley's failure to conduct such an investigation has little, if any, bearing on the veracity of her stated concern.

Etsitty's reliance on *Cruzan v. Special School District # 1* to call into question UTA's asserted motivation is also misplaced. 294 F.3d 981 (8th Cir.2002). In *Cruzan*, the Eighth Circuit held that a male-to-female transsexual's use of the women's employee restroom does not create a hostile work environment for purposes of a Title VII sexual harassment claim. *Id.* at 984. Even if such a rule were to be adopted in this circuit and applied to actions arising outside the employment context, however, it would say nothing about whether UTA was nevertheless genuinely concerned about the possibility of liability and public complaints. The question of whether UTA was legally correct about the merits of such potential lawsuits is irrelevant. See *Exum*, 389 F.3d at 1137 (“To show pretext, the plaintiff must call into question the honesty or good faith of the [employer].”)

Finally, Etsitty argues that because UTA typically resolves complaints about its employees'

restroom usage simply by requiring the employees to stop using the restroom for which the complaint was received, Etsitty was treated differently than similarly situated employees. See *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1232 (10th Cir.2000) (noting plaintiff may show pretext “by providing evidence that he was treated differently from other similarly-situated, nonprotected employees”). The prior complaints received by UTA, however, involved problems with the cleanliness of the restrooms and with UTA employees congregating around a hotel swimming pool. An employee's use of bathrooms designated for the opposite sex is sufficiently different from these prior problems as to make UTA's treatment of restroom complaints in the past of little significance to the question of pretext in the case at bar.

Thus, there is no evidence in the record of any “weaknesses, implausibilities, inconsistencies, incoherence, or contradictions” in UTA's asserted legitimate, nondiscriminatory reason for Etsitty's termination. *Jencks*, 479 F.3d at 1267 (quotation omitted). Etsitty has therefore failed to raise a genuine issue as to whether UTA's proffered reason is pretextual and the district court properly granted summary judgment on Etsitty's Title VII claim.

B. Equal Protection

With respect to Etsitty's Equal Protection claims brought pursuant to § 1983, she makes no arguments aside from her Title VII claim that she was discriminated against because of sex. Instead, she simply makes the conclusory statement that the elements of a disparate treatment claim are the same whether the claim is brought under § 1983 or Title VII. See *Maldonado v. City of Altus*, 433 F.3d 1294, 1307 (10th Cir.2006) (“In disparate-treatment discrimination suits, the elements of a plaintiff's case are the same whether that case is brought under §§ 1981 or 1983 or Title VII.” (quotations and alterations omitted)), overruled on other grounds, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 2414-15, 165 L.Ed.2d 345 (2006). Because Etsitty does not argue there was a violation of the Equal Protection Clause separate from her Title VII sex discrimination claim, her Equal Protection claim fails for the same reasons discussed above. Cf. *Brown*, 63 F.3d at 971 (holding transsexual plaintiff was not a member of a protected class for purposes of the Equal Protection Clause).

IV. Conclusion

For the foregoing reasons, this court affirms the district court's grant of summary judgment to the defendants.

FOOTNOTES

1. Etsitty contends it is unnecessary for this court to engage in the McDonnell Douglas analysis because it is “undisputed” that UTA had a discriminatory motive. See *Heim v. Utah*, 8 F.3d 1541, 1546 (10th Cir.1993) (noting McDonnell Douglas burden-shifting analysis is inapplicable where there is direct evidence of discrimination). When viewed in context,

however, the evidence directly supports only the conclusion that Etsitty was terminated because of UTA's concerns regarding her restroom usage, a motive which is not discriminatory for reasons further discussed below. Because Etsitty cannot establish an “existing policy which itself constitutes discrimination,” her claim of unlawful discrimination rests on indirect evidence and the McDonnell Douglas analysis applies. See *Jones v. Denver Post Corp.*, 203 F.3d 748, 752 (10th Cir.2000) (quotation omitted).

2. This court is aware of the difficulties and marginalization transsexuals may be subject to in the workplace. The conclusion that transsexuals are not protected under Title VII as transsexuals should not be read to allow employers to deny transsexual employees the legal protection other employees enjoy merely by labeling them as transsexuals. See *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir.2004) (“Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender nonconformity.”). If transsexuals are to receive legal protection apart from their status as male or female, however, such protection must come from Congress and not the courts. See *Ulane v. E. Airlines*, 742 F.2d 1081, 1087 (7th Cir.1984) (“[I]f the term ‘sex’ as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress.”).

3. Although Etsitty identifies herself as a woman, her Price Waterhouse claim is based solely on her status as a biological male. Etsitty does not claim protection under Title VII as a woman who fails to conform to social stereotypes about how a woman should act and appear.

MURPHY, Circuit Judge.

Young v. United Parcel Service, 153 S.Ct. 1338 (2015)

Justice BREYER delivered the opinion of the Court.

The Pregnancy Discrimination Act makes clear that Title VII’s prohibition against sex discrimination applies to discrimination based on pregnancy. It also says that employers must treat “women affected by pregnancy ... the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work.” 42 U.S.C. § 2000e(k). We must decide how this latter provision applies in the context of an employer’s policy that accommodates many, but not all, workers with nonpregnancy-related disabilities.

In our view, the Act requires courts to consider the extent to which an employer’s policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work. And here—as in all cases in which an individual plaintiff seeks to show disparate treatment through indirect evidence—it requires courts to consider any legitimate,

nondiscriminatory, nonpretextual justification for these differences in treatment. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

Ultimately the court must determine whether the nature of the employer's policy and the way in which it burdens pregnant women shows that the employer has engaged in intentional discrimination. The Court of Appeals here affirmed a grant of summary judgment in favor of the employer. Given our view of the law, we must vacate that court's judgment.

We begin with a summary of the facts. The petitioner, Peggy Young, worked as a part-time driver for the respondent, United Parcel Service (UPS). Her responsibilities included pickup and delivery of packages that had arrived by air carrier the previous night. In 2006, after suffering several miscarriages, she became pregnant. Her doctor told her that she should not lift more than 20 pounds during the first 20 weeks of her pregnancy or more than 10 pounds thereafter.

UPS required drivers like Young to be able to lift parcels weighing up to 70 pounds (and up to 150 pounds with assistance). UPS told Young she could not work while under a lifting restriction. Young consequently stayed home without pay during most of the time she was pregnant and eventually lost her employee medical coverage.

Young subsequently brought this federal lawsuit. We focus here on her claim that UPS acted unlawfully in refusing to accommodate her pregnancy-related lifting restriction. Young said that her co-workers were willing to help her with heavy packages. She also said that UPS accommodated other drivers who were "similar in their ... inability to work." She accordingly concluded that UPS must accommodate her as well.

UPS responded that the "other persons" whom it had accommodated were (1) drivers who had become disabled on the job, (2) those who had lost their Department of Transportation (DOT) certifications, and (3) those who suffered from a disability covered by the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, 42 U.S.C. § 12101 et seq. UPS said that, since Young did not fall within any of those categories, it had not discriminated against Young on the basis of pregnancy but had treated her just as it treated all "other" relevant "persons."

Title VII of the Civil Rights Act of 1964 forbids a covered employer to "discriminate against any individual with respect to ... terms, conditions, or privileges of employment, because of such individual's ... sex." 78 Stat. 253, 42 U.S.C. § 2000e-2(a)(1).

In 1978, Congress enacted the Pregnancy Discrimination Act, 92 Stat. 2076, which added new language to Title VII's definitions subsection.

The first clause of the 1978 Act specifies that Title VII's "ter[m] 'because of sex' ... include[s] ... because of or on the basis of pregnancy, childbirth, or related medical conditions." § 2000e(k). The second clause says that

“women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work....” Ibid.

This case requires us to consider the application of the second clause to a “disparate-treatment” claim—a claim that an employer intentionally treated a complainant less favorably than employees with the “complainant’s qualifications” but outside the complainant’s protected class. *McDonnell Douglas*, supra, at 802, 93 S.Ct. 1817. We have said that “[l]iability in a disparate-treatment case depends on whether the protected trait actually motivated the employer’s decision.” *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52, 124 S.Ct. 513, 157 L.Ed.2d 357 (2003) (ellipsis and internal quotation marks omitted). We have also made clear that a plaintiff can prove disparate treatment either (1) by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or (2) by using the burden-shifting framework set forth in *McDonnell Douglas*. See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985).

In *McDonnell Douglas*, we considered a claim of discriminatory hiring. We said that, to prove disparate treatment, an individual plaintiff must “carry the initial burden” of “establishing a prima facie case” of discrimination by showing “(i) that he belongs to a ... minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.”

If a plaintiff makes this showing, then the employer must have an opportunity “to articulate some legitimate, non-discriminatory reason for” treating employees outside the protected class better than employees within the protected class. If the employer articulates such a reason, the plaintiff then has “an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant [i.e., the employer] were not its true reasons, but were a pretext for discrimination.” *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

We note that employment discrimination law also creates what is called a “disparate-impact” claim. In evaluating a disparate-impact claim, courts focus on the effects of an employment practice, determining whether they are unlawful irrespective of motivation or intent. See *Raytheon*, supra, at 52–53, 124 S.Ct. 513; see also *Ricci v. DeStefano*, 557 U.S. 557, 578, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009). But *Young* has not alleged a disparate-impact claim.

In July 2007, *Young* filed a pregnancy discrimination charge with the Equal Employment Opportunity Commission (EEOC). In September 2008, the EEOC provided her with a right-to-sue letter. See 29 CFR § 1601.28 (2014). *Young* then filed this complaint in Federal District Court. She argued, among other things, that she could show by direct evidence that UPS had

intended to discriminate against her because of her pregnancy and that, in any event, she could establish a prima facie case of disparate treatment under the McDonnell Douglas framework.

After discovery, UPS filed a motion for summary judgment. See Fed. Rule Civ. Proc. 56(a). In reply, Young pointed to favorable facts that she believed were either undisputed or that, while disputed, she could prove. They include the following:

1. Young worked as a UPS driver, picking up and delivering packages carried by air.
2. Young was pregnant in the fall of 2006.
3. Young's doctor recommended that she "not be required to lift greater than 20 pounds for the first 20 weeks of pregnancy and no greater than 10 pounds thereafter."
4. UPS required drivers such as Young to be able to "[l]ift, lower, push, pull, leverage and manipulate ... packages weighing up to 70 pounds" and to "[a]ssist in moving packages weighing up to 150 pounds."
5. UPS' occupational health manager, the official "responsible for most issues relating to employee health and ability to work" at Young's UPS facility, told Young that she could not return to work during her pregnancy because she could not satisfy UPS' lifting requirements.
6. The manager also determined that Young did not qualify for a temporary alternative work assignment.
7. UPS, in a collective-bargaining agreement, had promised to provide temporary alternative work assignments to employees "unable to perform their normal work assignments due to an on-the-job injury."
8. The collective-bargaining agreement also provided that UPS would "make a good faith effort to comply ... with requests for a reasonable accommodation because of a permanent disability" under the ADA.
9. The agreement further stated that UPS would give "inside" jobs to drivers who had lost their DOT certifications because of a failed medical exam, a lost driver's license, or involvement in a motor vehicle accident.
10. When Young later asked UPS' Capital Division Manager to accommodate her disability, he replied that, while she was pregnant, she was "too much of a liability" and could "not come back" until she "was no longer pregnant."
11. Young remained on a leave of absence (without pay) for much of her pregnancy.
12. Young returned to work as a driver in June 2007, about two months after her baby was born.

As direct evidence of intentional discrimination, Young relied, in significant part, on the statement of the Capital Division Manager (10 above). As evidence that she had made out a prima facie case under McDonnell Douglas, Young relied, in significant part, on evidence showing that UPS would accommodate workers injured on the job (7), those suffering from ADA disabilities (8), and those who had lost their DOT certifications (9). That evidence, she said, showed that UPS had a light-duty-for-injury policy with respect to numerous “other persons,” but not with respect to pregnant workers.

Young introduced further evidence indicating that UPS had accommodated several individuals when they suffered disabilities that created work restrictions similar to hers. UPS contests the correctness of some of these facts and the relevance of others.

But because we are at the summary judgment stage, and because there is a genuine dispute as to these facts, we view this evidence in the light most favorable to Young, the nonmoving party.

13. Several employees received accommodations while suffering various similar or more serious disabilities incurred on the job. See App. 400–401 (10–pound lifting limitation); *id.*, at 635 (foot injury); *id.*, at 637 (arm injury).

14. Several employees received accommodations following injury, where the record is unclear as to whether the injury was incurred on or off the job. See *id.*, at 381 (recurring knee injury); *id.*, at 655 (ankle injury); *id.*, at 655 (knee injury); *id.*, at 394 & minus;398 (stroke); *id.*, at 425, 636–637 (leg injury).

15. Several employees received “inside” jobs after losing their DOT certifications. See *id.*, at 372 (DOT certification suspended after conviction for driving under the influence); *id.*, at 636, 647 (failed DOT test due to high blood pressure); *id.*, at 640–641 (DOT certification lost due to sleep apnea diagnosis).

16. Some employees were accommodated despite the fact that their disabilities had been incurred off the job. See *id.*, at 446 (ankle injury); *id.*, at 433, 635–636 (cancer).

17. According to a deposition of a UPS shop steward who had worked for UPS for roughly a decade, *id.*, at 461, 463, “the only light duty requested [due to physical] restrictions that became an issue” at UPS “were with women who were pregnant,” *id.*, at 504.

The District Court granted UPS’ motion for summary judgment. It concluded that Young could not show intentional discrimination through direct evidence. Nor could she make out a prima facie case of discrimination under McDonnell Douglas. The court wrote that those with whom Young compared herself—those falling within the on-the-job, DOT, or ADA categories—were too different to qualify as “similarly situated comparator [s].” The court added that, in any event, UPS had offered a legitimate, nondiscriminatory reason for failing to accommodate pregnant women, and Young had not created a genuine issue of material fact as to whether that reason was pretextual.

On appeal, the Fourth Circuit affirmed. It wrote that “UPS has crafted a pregnancy-blind policy” that is “at least facially a ‘neutral and legitimate business practice,’ and not evidence of UPS’s discriminatory animus toward pregnant workers.”

Young filed a petition for certiorari essentially asking us to review the Fourth Circuit’s interpretation of the Pregnancy Discrimination Act. In light of lower-court uncertainty about the interpretation of the Act, we granted the petition. Compare *Ensley–Gaines v. Runyon*, 100 F.3d 1220, 1226 (C.A.6 1996), with *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204, 206–208 (C.A.5 1998); *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 640–643 (C.A.6 2006); *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 547–552 (C.A.7 2011); *Spivey v. Beverly Enterprises, Inc.*, 196 F.3d 1309, 1312–1314 (C.A.11 1999).

....

We note that statutory changes made after the time of Young’s pregnancy may limit the future significance of our interpretation of the Act. In 2008, Congress expanded the definition of “disability” under the ADA to make clear that “physical or mental impairment[s] that substantially limi[t]” an individual’s ability to lift, stand, or bend are ADA-covered disabilities. ADA Amendments Act of 2008, 122 Stat. 3555, codified at 42 U.S.C. §§ 12102(1)-(2). As interpreted by the EEOC, the new statutory definition requires employers to accommodate employees whose temporary lifting restrictions originate off the job. See 29 CFR pt. 1630, App., § 1630.2(j)(1)(ix). We express no view on these statutory and regulatory changes.

II

The parties disagree about the interpretation of the Pregnancy Discrimination Act’s second clause. As we have said, see Part I–B, *supra*, the Act’s first clause specifies that discrimination “‘because of sex’ “ includes discrimination “because of ... pregnancy.” But the meaning of the second clause is less clear; it adds: “[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work.” 42 U.S.C. § 2000e(k) (emphasis added).

Does this clause mean that courts must compare workers only in respect to the work limitations that they suffer? Does it mean that courts must ignore all other similarities or differences between pregnant and nonpregnant workers? Or does it mean that courts, when deciding who the relevant “other persons” are, may consider other similarities and differences as well? If so, which ones?

The differences between these possible interpretations come to the fore when a court, as here, must consider a workplace policy that distinguishes between pregnant and nonpregnant workers in light of characteristics not related to pregnancy. Young poses the problem directly in her reply brief when she says that the Act requires giving “the same accommodations to an employee with

a pregnancy-related work limitation as it would give that employee if her work limitation stemmed from a different cause but had a similar effect on her inability to work.”

Suppose the employer would not give “that [pregnant] employee” the “same accommodations” as another employee, but the employer’s reason for the difference in treatment is that the pregnant worker falls within a facially neutral category (for example, individuals with off-the-job injuries). What is a court then to do?

The parties propose very different answers to this question. Young and the United States believe that the second clause of the Pregnancy Discrimination Act “requires an employer to provide the same accommodations to workplace disabilities caused by pregnancy that it provides to workplace disabilities that have other causes but have a similar effect on the ability to work.” In other words, Young contends that the second clause means that whenever “an employer accommodates only a subset of workers with disabling conditions,” a court should find a Title VII violation if “pregnant workers who are similar in the ability to work” do not “receive the same [accommodation] even if still other non-pregnant workers do not receive accommodations.”

UPS takes an almost polar opposite view. It contends that the second clause does no more than define sex discrimination to include pregnancy discrimination. Under this view, courts would compare the accommodations an employer provides to pregnant women with the accommodations it provides to others within a facially neutral category (such as those with off-the-job injuries) to determine whether the employer has violated Title VII.

A

We cannot accept either of these interpretations. Young asks us to interpret the second clause broadly and, in her view, literally. As just noted, she argues that, as long as “an employer accommodates only a subset of workers with disabling conditions,” “pregnant workers who are similar in the ability to work [must] receive the same treatment even if still other nonpregnant workers do not receive accommodations.” Brief for Petitioner 28. She adds that, because the record here contains “evidence that pregnant and nonpregnant workers were not treated the same,” that is the end of the matter, she must win; there is no need to refer to *McDonnell Douglas*. Brief for Petitioner 47.

The problem with Young’s approach is that it proves too much. It seems to say that the statute grants pregnant workers a “most-favored-nation” status. As long as an employer provides one or two workers with an accommodation—say, those with particularly hazardous jobs, or those whose workplace presence is particularly needed, or those who have worked at the company for many years, or those who are over the age of 55—then it must provide similar accommodations to all pregnant workers (with comparable physical limitations), irrespective of the nature of their jobs, the employer’s need to keep them working, their ages, or any other criteria.

Lower courts have concluded that this could not have been Congress' intent in passing the Pregnancy Discrimination Act. See, e.g., *Urbano*, 138 F.3d, at 206–208; *Reeves*, 446 F.3d, at 641; *Serednyj*, 656 F.3d, at 548–549; *Spivey*, 196 F.3d, at 1312–1313.

We agree with UPS to this extent: We doubt that Congress intended to grant pregnant workers an unconditional most-favored-nation status. The language of the statute does not require that unqualified reading. The second clause, when referring to nonpregnant persons with similar disabilities, uses the open-ended term “other persons.” It does not say that the employer must treat pregnant employees the “same” as “any other persons” (who are similar in their ability or inability to work), nor does it otherwise specify which other persons Congress had in mind.

B.

Before Congress passed the Pregnancy Discrimination Act, the EEOC issued guidance stating that “[d]isabilities caused or contributed to by pregnancy ... are, for all job-related purposes, temporary disabilities” and that “the availability of ... benefits and privileges ... shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.” 29 CFR § 1604.10(b) (1975). Indeed, as early as 1972, EEOC guidelines provided: “Disabilities caused or contributed to by pregnancy ... are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment.” 37 Fed. Reg. 6837 (1972) (codified in 29 CFR § 1604.10(b) (1973)).

Soon after the Act was passed, the EEOC issued guidance consistent with its pre-Act statements. The EEOC explained: “Disabilities caused or contributed to by pregnancy ... for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions.” See § 1604.10(b) (1979). Moreover, the EEOC stated that “[i]f other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function.” 29 CFR pt. 1604, App., p. 918.

This post-Act guidance, however, does not resolve the ambiguity of the term “other persons” in the Act's second clause. Rather, it simply tells employers to treat pregnancy-related disabilities like nonpregnancy-related disabilities, without clarifying how that instruction should be implemented when an employer does not treat all nonpregnancy-related disabilities alike.

More recently—in July 2014—the EEOC promulgated an additional guideline apparently designed to address this ambiguity. That guideline says that “[a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (e.g., a policy of providing light duty only to workers injured on the job).” 2 EEOC Compliance Manual § 626–I(A)(5), p. 626:0009 (July 2014). The EEOC also provided an example of disparate treatment that would violate the Act:

“An employer has a policy or practice of providing light duty, subject to availability, for any employee who cannot perform one or more job duties for up to 90 days due to injury, illness, or a condition that would be a disability under the ADA. An employee requests a light duty assignment for a 20–pound lifting restriction related to her pregnancy. The employer denies the light duty request.” *Id.*, at 626:0013, Example 10.

The EEOC further added that “an employer may not deny light duty to a pregnant employee based on a policy that limits light duty to employees with on-the-job injuries.” *Id.*, at 626:0028.

The Solicitor General argues that we should give special, if not controlling, weight to this guideline. He points out that we have long held that “the rulings, interpretations and opinions” of an agency charged with the mission of enforcing a particular statute, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”

But we have also held that the “weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade, if lacking power to control.” *Skidmore*, *supra*, at 140, 65 S.Ct. 161. These qualifications are relevant here and severely limit the EEOC’s July 2014 guidance’s special power to persuade.

III

The statute lends itself to an interpretation other than those that the parties advocate and that the dissent sets forth. Our interpretation minimizes the problems we have discussed, responds directly to *Gilbert*, and is consistent with longstanding interpretations of Title VII.

In our view, an individual pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the *McDonnell Douglas* framework. That framework requires a plaintiff to make out a *prima facie* case of discrimination. But it is “not intended to be an inflexible rule.” *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978). Rather, an individual plaintiff may establish a *prima facie* case by “showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under” Title VII. *Id.*, at 576, 98 S.Ct. 2943 (internal quotation marks omitted). The burden of making this showing is “not onerous.” *Burdine*, 450 U.S., at 253, 101 S.Ct. 1089. In particular, making this showing is not as burdensome as succeeding on “an ultimate finding of fact as to” a discriminatory employment action. *Furnco*, *supra*, at 576, 98 S.Ct. 2943. Neither does it require the plaintiff to show that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways. See *McDonnell Douglas*, 411 U.S., at 802, 93 S.Ct. 1817 (burden met where plaintiff showed that employer hired other “qualified” individuals outside the protected class); *Furnco*, *supra*, at 575–577, 98 S.Ct. 2943 (same); *Burdine*, *supra*, at 253, 101 S.Ct. 1089 (same). Cf. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (similar).

Thus, a plaintiff alleging that the denial of an accommodation constituted disparate treatment under the Pregnancy Discrimination Act's second clause may make out a prima facie case by showing, as in *McDonnell Douglas*, that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others "similar in their ability or inability to work."

The employer may then seek to justify its refusal to accommodate the plaintiff by relying on "legitimate, nondiscriminatory" reasons for denying her accommodation. 411 U.S., at 802, 93 S.Ct. 1817. But, consistent with the Act's basic objective, that reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ("similar in their ability or inability to work") whom the employer accommodates. After all, the employer in *Gilbert* could in all likelihood have made just such a claim.

If the employer offers an apparently "legitimate, non-discriminatory" reason for its actions, the plaintiff may in turn show that the employer's proffered reasons are in fact pretextual. We believe that the plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.

The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers.

Here, for example, if the facts are as *Young* says they are, she can show that UPS accommodates most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations. *Young* might also add that the fact that UPS has multiple policies that accommodate nonpregnant employees with lifting restrictions suggests that its reasons for failing to accommodate pregnant employees with lifting restrictions are not sufficiently strong—to the point that a jury could find that its reasons for failing to accommodate pregnant employees give rise to an inference of intentional discrimination.

This approach, though limited to the Pregnancy Discrimination Act context, is consistent with our longstanding rule that a plaintiff can use circumstantial proof to rebut an employer's apparently legitimate, nondiscriminatory reasons for treating individuals within a protected class differently than those outside the protected class. See *Burdine*, *supra*, at 255, n. 10, 101 S.Ct. 1089.

IV

Under this interpretation of the Act, the judgment of the Fourth Circuit must be vacated. A party is entitled to summary judgment if there is "no genuine dispute as to any material fact and the

movant is entitled to judgment as a matter of law.” Fed. Rule Civ. Proc. 56(a). We have already outlined the evidence Young introduced. See Part I–C, *supra*. Viewing the record in the light most favorable to Young, there is a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from Young’s. In other words, Young created a genuine dispute of material fact as to the fourth prong of the McDonnell Douglas analysis.

Young also introduced evidence that UPS had three separate accommodation policies (on-the-job, ADA, DOT). Taken together, Young argued, these policies significantly burdened pregnant women. See App. 504 (shop steward’s testimony that “the only light duty requested [due to physical] restrictions that became an issue” at UPS “were with women who were pregnant”). The Fourth Circuit did not consider the combined effects of these policies, nor did it consider the strength of UPS’ justifications for each when combined. That is, why, when the employer accommodated so many, could it not accommodate pregnant women as well?

We do not determine whether Young created a genuine issue of material fact as to whether UPS’ reasons for having treated Young less favorably than it treated these other nonpregnant employees were pretextual. We leave a final determination of that question for the Fourth Circuit to make on remand, in light of the interpretation of the Pregnancy Discrimination Act that we have set out above.

* * *

For the reasons above, we vacate the judgment of the Fourth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, with whom Justice KENNEDY and Justice THOMAS join, dissenting.

Faced with two conceivable readings of the Pregnancy Discrimination Act, the Court chooses neither. It crafts instead a new law that is splendidly unconnected with the text and even the legislative history of the Act. To “treat” pregnant workers “the same ... as other persons,” we are told, means refraining from adopting policies that impose “significant burden[s]” upon pregnant women without “sufficiently strong” justifications. *Ante*, at 1354. Where do the “significant burden” and “sufficiently strong justification” requirements come from? Inventiveness posing as scholarship—which gives us an interpretation that is as dubious in principle as it is senseless in practice.

Justice KENNEDY, dissenting.

It seems to me proper, in joining Justice SCALIA’s dissent, to add these additional remarks. The dissent is altogether correct to point out that petitioner here cannot point to a class of her co-workers that was accommodated and that would include her but for the particular limitations imposed by her pregnancy. Many other workers with health-related restrictions were not

accommodated either. And, in addition, there is no showing here of animus or hostility to pregnant women.

But as a matter of societal concern, indifference is quite another matter. There must be little doubt that women who are in the work force—by choice, by financial necessity, or both—confront a serious disadvantage after becoming pregnant. They may find it difficult to continue to work, at least in their regular assignment, while still taking necessary steps to avoid risks to their health and the health of their future children. This is why the difficulties pregnant women face in the workplace are and do remain an issue of national importance.

“Historically, denial or curtailment of women’s employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second.” *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 736, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (quoting *The Parental and Medical Leave Act of 1986: Joint Hearing before the Subcommittee on Labor–Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., 100* (1986)). Such “attitudes about pregnancy and childbirth ... have sustained pervasive, often law-sanctioned, restrictions on a woman’s place among paid workers.” *AT & T Corp. v. Hulteen*, 556 U.S. 701, 724, 129 S.Ct. 1962, 173 L.Ed.2d 898 (2009) (GINSBURG, J., dissenting). Although much progress has been made in recent decades and many employers have voluntarily adopted policies designed to recruit, accommodate, and retain employees who are pregnant or have young children, see *Brief for U.S. Women’s Chamber of Commerce et al. as Amici Curiae 10–14*, pregnant employees continue to be disadvantaged—and often discriminated against—in the workplace, see *Brief of Law Professors et al. as Amici Curiae 37–38*.

Recognizing the financial and dignitary harm caused by these conditions, Congress and the States have enacted laws to combat or alleviate, at least to some extent, the difficulties faced by pregnant women in the work force. Most relevant here, Congress enacted the Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e(k), which defines discrimination on the basis of pregnancy as sex discrimination for purposes of Title VII and clarifies that pregnant employees “shall be treated the same” as nonpregnant employees who are “similar in their ability or inability to work.” The PDA forbids not only disparate treatment but also disparate impact, the latter of which prohibits “practices that are not intended to discriminate but in fact have a disproportionate adverse effect.” *Ricci v. DeStefano*, 557 U.S. 557, 577, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009). Congress further enacted the parental-leave provision of the Family and Medical Leave Act of 1993, 29 U.S.C. § 2612(a)(1)(A), which requires certain employers to provide eligible employees with 12 workweeks of leave because of the birth of a child. And after the events giving rise to this litigation, Congress passed the ADA Amendments Act of 2008, 122 Stat. 3553, which expands protections for employees with temporary disabilities.

As the parties note, *Brief for Petitioner 37–43*; *Brief for Respondent 21–22*; *Brief for United States as Amicus Curiae 24–25*, these amendments and their implementing regulations, 29 CFR § 1630 (2015), may require accommodations for many pregnant employees, even though

pregnancy itself is not expressly classified as a disability. Additionally, many States have enacted laws providing certain accommodations for pregnant employees. See, e.g., Cal. Govt.Code Ann. § 12945 (West 2011); La.Rev.Stat. Ann. § 23:342(4) (West 2010); W. Va.Code Ann. § 5–11B–2 (Lexis Supp. 2014); see also California Fed. Sav. & Loan Assn. v. Guerra, 479 U.S. 272, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987) (holding that the PDA does not pre-empt such statutes). These Acts honor and safeguard the important contributions women make to both the workplace and the American family.

Today the Court addresses only one of these legal protections: the PDA’s prohibition of disparate treatment. For the reasons well stated in Justice SCALIA’s dissenting opinion, the Court interprets the PDA in a manner that risks “conflation of disparate impact with disparate treatment” by permitting a plaintiff to use a policy’s disproportionate burden on pregnant employees as evidence of pretext. In so doing, the Court injects unnecessary confusion into the accepted burden-shifting framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

With these remarks, I join Justice SCALIA’s dissent.

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

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 attorney’s 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.FN1 But the amount was reduced to \$5.52 million to

account for Dr. Berry's 33% of the fault.^{FN2} The district court entered judgment against Lakeview Medical and LAA.

[In solido means “for the whole.” So, if several people are found liable for a debt or a judgment, they owe complete payment— meaning that if one party is legally excused from payment, the entire debt or judgment might be reapportioned to the creditors, and their actual amount of payment might increase. Here, because the appeals court dismissed Lakeview's 25% share of the net judgment of \$5.52 million, then Dr. Preau and Dr. Dennis might owe an increased amount.]

Here is how the **Kadlec** court concluded its opinion:

The district court entered judgment consistent with how the jury allocated fault among the entities it found to be legally responsible for the plaintiffs' injuries. The jury's allocation was as follows: Dr. Dennis 20%; Dr. Preau 5%; Lakeview Medical 25%; Kadlec 17%; and Dr. Berry 33%. We have affirmed the liability finding of the jury against the LAA defendants. But now that we have reversed the judgment against Lakeview Medical, the question arises whether there must be a reapportionment of fault with a corresponding change to damages assessed against the LAA defendants. It is possible that this is unnecessary, if under Louisiana law we can simply compare the fault percentages of the remaining parties. But Louisiana law might also require a reapportionment of fault and, therefore, a fresh determination of damages. Because there was no briefing on this issue, we vacate the judgment against the LAA defendants and remand the case to the district court to determine what, if anything, needs to be redone on the apportionment and damages issues, and then to enter judgment against the LAA defendants accordingly.

IV. Conclusion

The judgment of the district court is REVERSED in part, VACATED in part, and REMANDED for proceedings consistent with this opinion.

Soroka v. Dayton Hudson Corp.

1 Cal.Rptr.2d 77

Cal.App. 1 Dist., 1991.

October 25, 1991 (Approx. 12 pages)

I. FACTS

Respondent Dayton Hudson Corporation owns and operates Target Stores throughout California and the United States.^{FN3} Job applicants for store security officer (SSO) positions must, as a condition of employment, take a psychological test that Target calls the “Psychscreen.” An SSO's main function is to observe, apprehend and arrest suspected shoplifters. An SSO is not

armed, but carries handcuffs and may use force against a suspect in self-defense. Target views good judgment and emotional stability as important SSO job skills. It intends the Psychscreen to screen out SSO applicants who are emotionally unstable, who may put customers or employees in jeopardy, or who will not take direction and follow Target procedures.

[FN3](#). For convenience, the opinion refers to Dayton Hudson Corporation, doing business as Target Stores, as “Target.”

The Psychscreen is a combination of the Minnesota Multiphasic Personality Inventory and the California Psychological Inventory. Both of these tests have been used to screen out emotionally unfit applicants for public safety positions such as police officers, correctional officers, pilots, air traffic controllers and nuclear power plant operators.^{[FN4](#)} The test is composed of 704 true-false questions. At Target, the test administrator is told to instruct applicants to answer every question.

[FN4](#). We view the duties and responsibilities of these public safety personnel to be substantially different from those of store security officers.

The test includes questions about an applicant’s religious attitudes, such as: “[¶] 67. I feel sure that there is only one true religion.... [¶] 201. I have no patience with people who believe there is only one true religion.... [¶] 477. My soul sometimes leaves my body.... [¶] 483. A minister can cure disease by praying and putting his hand on your head.... [¶] 486. Everything is turning out just like the prophets of the Bible said it would.... [¶] 505. I go to church almost every week. [¶] 506. I believe in the second coming of Christ.... [¶] 516. I believe in a life hereafter.... [¶] 578. I am very religious (more than most people).... [¶] 580. I believe my sins are unpardonable.... [¶] 606. I believe there is a God.... [¶] 688. I believe there is a Devil and a Hell in afterlife.”

The test includes questions that might reveal an applicant’s sexual orientation, such as: “[¶] 137. I wish I were not bothered by thoughts about sex.... [¶] 290. I have never been in trouble because of my sex behavior.... [¶] 339. I have been in trouble one or more times because of my sex behavior.... [¶] 466. My sex life is satisfactory.... [¶] 492. I am very strongly attracted by members of my own sex.... [¶] 496. I have often wished I were a girl. (Or if you are a girl) I have never been sorry that I am a girl.... [¶] 525. I have never indulged in any unusual sex practices.... [¶] 558. I am worried about sex matters.... [¶] 592. I like to talk about sex.... [¶] 640. Many of my dreams are about sex matters.”^{[FN5](#)}

[FN5](#). Soroka challenges many different types of questions on appeal. However, we do not find it necessary to consider questions other than those relating to religious beliefs and sexual orientation.

An SSO’s completed test is scored by the consulting psychologist firm of Martin-McAllister. The firm interprets test responses and rates the applicant on five traits: emotional stability, interpersonal style, addiction potential, dependability and reliability, and socialization—i.e., a tendency to follow established rules. Martin-McAllister sends a form to Target rating the

applicant on these five traits and recommending whether to hire the applicant. Hiring decisions are made on the basis of these recommendations, although the recommendations may be overridden. Target does not receive any responses to specific questions. It has never conducted a formal validation study of the Psychscreen, but before it implemented the test, Target tested 17 or 18 of its more successful SSO's.

Appellants Sibi Soroka, Susan Urry and William d'Arcangelo were applicants for SSO positions when they took the Psychscreen. All three were upset by the nature of the Psychscreen questions. Soroka was hired by Target. Urry—a Mormon— and d'Arcangelo were not hired. In August 1989, Soroka filed a charge that use of the Psychscreen discriminated on the basis of race, sex, religion and physical handicap with the Department of Fair Employment and Housing.

Having exhausted their administrative remedies, Soroka, Urry and d'Arcangelo filed a class action against Target in September 1989 to challenge its use of the Psychscreen. The complaint was amended twice. The second amended complaint alleged that the test asked invasive questions that were not job-related. Soroka alleged causes of action for violation of the constitutional right to privacy, invasion of privacy, disclosure of confidential medical information, fraud, negligent misrepresentation, intentional and negligent infliction of emotional distress, violation of the Fair Employment and Housing Act, violation of [sections 1101 and 1102 of the Labor Code](#), and unfair business practices. This complaint prayed for both damages and injunctive relief.

In June 1990, Soroka moved for a preliminary injunction to prohibit Target from using the Psychscreen during the pendency of the action. A professional psychologist submitted a declaration opining that use of the test was unjustified and improper, resulting in faulty assessments to the detriment of job applicants. He concluded that its use violated basic professional standards and that it had not been demonstrated to be reliable or valid as an employment evaluation. For example, one of the two tests on which the Psychscreen was based was designed for use only in hospital or clinical settings. Soroka noted that two of Target's experts had previously opined that the Minnesota Multiphasic Personality Inventory was virtually useless as a preemployment screening device. It was also suggested that the Psychscreen resulted in a 61 percent rate of false positives— that is, that more than 6 in 10 qualified applicants for SSO positions were not hired.

Target's experts submitted declarations contesting these conclusions and favoring the use of the Psychscreen as an employment screening device. Some Target officials believed that use of this test has increased the quality and performance of its SSOs. However, others testified that they did not believe that there had been a problem with the reliability of SSO applicants before the Psychscreen was implemented. Target's vice president of loss prevention was unable to link changes in asset protection specifically to use of the Psychscreen. In rebuttal, Soroka's experts were critical of the conclusions of Target's experts. One rebuttal expert noted that some of the intrusive, non-job-related questions had been deleted from a revised form of the test because they

were offensive, invasive and added little to the test's validity.

The trial court denied Soroka's motion to certify the class and granted Target's motion to deny class certification. The court concluded that the case was not an appropriate one for certification because of the predominantly individual nature of the claims. It found no well-defined community of interest among class members. The court also denied the motion because it could not conclude that the class would be fairly and adequately represented by Soroka, Urry, d'Arcangelo and their counsel, although it noted that counsel was extremely qualified in employment litigation. The court stated that because Soroka's answers to the Psychscreen test that he took had twice been made public, that disclosure would likely be an issue of substantial import to the invasion of privacy claims at trial.

.....

The trial court also denied Soroka's motion for preliminary injunction. It ruled that he had not demonstrated a reasonable probability of prevailing on the merits of the constitutional or statutory claims at a trial. The court found that Target demonstrated a legitimate interest in psychologically screening applicants for security positions to minimize the potential danger to its customers and others. It also found that Target's practice of administering this test to SSO applicants was not unreasonable.^{FN6} Finally, the trial court denied both parties' motions for summary adjudication. This appeal followed.^{FN7}

[FN6.](#) The trial court did find that the test was being administered unnecessarily to some applicants and was thus unreasonable as to those persons. The court issued a partial preliminary injunction prohibiting Target from giving the test to those applicants whom Target had decided did not pass a pretest threshold in the hiring process.

[1][2] First, Soroka contends that the trial court erred in not issuing a preliminary injunction. He argues that, contrary to the trial court's findings, he is likely to prevail on the merits of both his constitutional and statutory claims. When a trial court decides whether to issue a preliminary injunction, it must consider the likelihood that the plaintiffs will prevail on the merits at trial. On appeal from an order denying a preliminaryinjunction, we do not ordinarily decide the merits of the complaint, but determine only whether the trial court abused its discretion in denying the injunction. ([Wilkinson v. Times Mirror Corp. \(1989\) 215 Cal.App.3d 1034, 1039-1040, 264 Cal.Rptr. 194.](#)) The appellants bear the burden of making a clear showing of abuse. ([Socialist Workers etc. Committee v. Brown \(1975\) 53 Cal.App.3d 879, 889, 125 Cal.Rptr. 915.](#)) We must review the evidence in the light most favorable to the prevailing party, drawing all reasonable inferences in its favor and resolving conflicts in the evidence in favor of the trial court's order. ([People ex rel. Gillespie v. Neu \(1989\) 209 Cal.App.3d 1066, 1072-1073, 257 Cal.Rptr. 778.](#)) Generally, courts should resolve dispositive statutory issues before reaching constitutional issues. ([Wolston v. Reader's Digest Assn., Inc. \(1979\) 443 U.S. 157, 160-161 fn. 2, 99 S.Ct. 2701, 2703-2704 fn. 2, 61 L.Ed.2d 450; Rancho La Costa, Inc. v. Superior Court \(1980\) 106](#)

[Cal.App.3d 646, 653 fn. 4, 165 Cal.Rptr. 347](#), cert. den. [450 U.S. 902, 101 S.Ct. 1336, 67 L.Ed.2d 326.](#)) However, as the statutory and constitutional claims before us stem from the same alleged offensive questions and must ultimately be resolved in the trial court, we will address both herein. ([Ibid.](#))

A. Constitutional Claim

First, Soroka argues that he is likely to prevail at trial on his constitutional right to privacy claim. The parties dispute the standard to be applied to determine whether Target's violation of Soroka's privacy was justified. In order to understand the various legal issues underlying this contention, a review of the basic legal concepts that guide us is in order.

1. The Right to Privacy

[3][4] The California Constitution explicitly protects our right to privacy. ([White v. Davis \(1975\) 13 Cal.3d 757, 773, 120 Cal.Rptr. 94, 533 P.2d 222](#); [Alarcon v. Murphy \(1988\) 201 Cal.App.3d 1, 5, 248 Cal.Rptr. 26](#); see [Cal. Const., art. I, § 1.](#)) [Article I, section 1](#) provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and **defending life and liberty, acquiring, possessing, and protecting property** [Prof. LeRoy notes that this language appears in other state constitutions], and pursuing and obtaining safety, happiness, and privacy." "By this provision, California accords privacy the constitutional status of an inalienable right, on a par with defending life and possessing property." ([Luck v. Southern Pacific Transportation Co. \(1990\) 218 Cal.App.3d 1, 15, 267 Cal.Rptr. 618](#), cert. den. [498 U.S. 939, 111 S.Ct. 344, 112 L.Ed.2d 309](#); see [Vinson v. Superior Court \(1987\) 43 Cal.3d 833, 841, 239 Cal.Rptr. 292, 740 P.2d 404.](#)) Before this constitutional amendment was enacted, California courts had found a state and federal constitutional right to privacy even though such a right was not enumerated in either constitution, and had consistently given a broad reading to the right to privacy. Thus, the elevation of the right to privacy to constitutional stature was intended to expand, not contract, privacy rights. ([Id.](#), [218 Cal.App.3d at pp. 16-17, 267 Cal.Rptr. 618.](#))

Target concedes that the Psychscreen constitutes an intrusion on the privacy rights of the applicants, although it characterizes this intrusion as a limited one. However, even the constitutional right to privacy does not prohibit all incursion into individual privacy. ([Luck v. Southern Pacific Transportation Co., supra, 218 Cal.App.3d at p. 20, 267 Cal.Rptr. 618](#) [employee drug testing case]; see [Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. \(Nov. 7, 1972\) pp. 27-28.](#)) The parties agree that a violation of the right to privacy may be justified, but disagree about the standard to be used to make this determination. At trial, Target persuaded the court to apply a reasonableness standard because Soroka was an applicant, rather than a Target employee. (See [Wilkinson v. Times Mirror Corp., supra, 215 Cal.App.3d at pp. 1046-1052, 264 Cal.Rptr. 194.](#)) On appeal, Soroka and the ACLU contend that Target must show more than reasonableness— that it must demonstrate a

compelling interest— to justify its use of the Psychscreen. (See [White v. Davis, supra, 13 Cal.3d at pp. 775-776, 120 Cal.Rptr. 94, 533 P.2d 222](#); [Luck v. Southern Pacific Transportation Co., supra, 218 Cal.App.3d at p. 20, 267 Cal.Rptr. 618.](#))

2. Applicants vs. Employees

Soroka and the ACLU contend that job applicants are entitled to the protection of the compelling interest test, just as employees are. The trial court disagreed, employing a reasonableness standard enunciated in a decision of Division Three of this District which distinguished between applicants and employees. ([Wilkinson v. Times Mirror Corp., supra, 215 Cal.App.3d 1034, 264 Cal.Rptr. 194.](#))

In [Wilkinson](#), a book publisher required job applicants to submit to drug urinalysis as part of its pre-employment physical examination. ([Wilkinson v. Times Mirror Corp., supra, 215 Cal.App.3d at pp. 1037-1039, 264 Cal.Rptr. 194.](#)) The appellate court rejected the applicants' contention that the compelling interest test should apply to determine whether the publisher's invasion of their privacy interests was justified under [article I, section 1](#). ([Id., at pp. 1046-1052, 264 Cal.Rptr. 194.](#)) Instead, the court fashioned and applied a lesser standard based on whether the challenged conduct was reasonable. ([Id., at pp. 1047-1048, 264 Cal.Rptr. 194.](#)) When setting this standard, the most persuasive factor for the [Wilkinson](#) court appears to have been that the plaintiffs were applicants for employment rather than employees. "Any individual who chooses to seek employment necessarily also chooses to disclose certain personal information to prospective employers, such as employment and educational history, and to allow the prospective employer to verify that information." ([Id., at p. 1048, 264 Cal.Rptr. 194.](#)) This applicant-employee distinction was pivotal for the [Wilkinson](#) court. "Simply put, applicants for jobs ... have a choice; they may consent to the limited invasion of their privacy resulting from the testing, or may decline both the test and the conditional offer of employment." ([Id., at p. 1049, 264 Cal.Rptr. 194.](#))

Our review of the ballot argument satisfies us that the voters did not intend to grant less privacy protection to job applicants than to employees. The ballot argument specifically refers to job applicants when it states that Californians "are required to report some information, regardless of our wishes for privacy or our belief that there is no public need for the information. Each time we ... interview for a job, ... a dossier is opened and an informational profile is sketched." (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972) p. 27, emphasis added; see [Wilkinson v. Times Mirror Corp., supra, 215 Cal.App.3d at p. 1041, 264 Cal.Rptr. 194.](#)) Thus, the major underpinning of [Wilkinson](#) is suspect.

Appellate court decisions predating [Wilkinson](#) have also applied the compelling interest standard in cases involving job applicants. (See [Central Valley Ch. 7th Step Foundation, Inc. v. Younger \(1989\) 214 Cal.App.3d 145, 151, 162-165, 262 Cal.Rptr. 496](#) [arrest records distributed to public

employers]; [Central Valley Chap. 7th Step Foundation v. Younger \(1979\) 95 Cal.App.3d 212, 237-240, 157 Cal.Rptr. 117](#) [arrest records distributed to public employers].) Target attempts to distinguish these cases as ones involving public, not private, employers, but that is a distinction without a difference in the context of the state constitutional right to privacy. (See [Luck v. Southern Pacific Transportation Co., supra, 218 Cal.App.3d at pp. 17-19, 267 Cal.Rptr. 618.](#)) Private and public employers alike are bound by the terms of the privacy provisions of [article I, section 1](#). (*Id.*, at p. 19, 267 Cal.Rptr. 618; [Semore v. Pool \(1990\) 217 Cal.App.3d 1087, 1093-1094, 266 Cal.Rptr. 280](#); see [Rojo v. Kliger \(1990\) 52 Cal.3d 65, 89-90, 276 Cal.Rptr. 130, 801 P.2d 373](#); see also [Wilkinson v. Times Mirror Corp., supra, 215 Cal.App.3d at pp. 1040-1044, 264 Cal.Rptr. 194](#) [[article I, section 1](#) limits private entities].)

The legislative history and the prior California law are sufficient to convince us that no distinction should be made between the privacy rights of job applicants and employees. Additionally, a close examination of the rationale of the [Wilkinson](#) decision provides yet another reason to depart from its ruling. [Wilkinson](#) relied, in part, on an analysis of a recent privacy case from the California Supreme Court. In [Schmidt v. Superior Court \(1989\) 48 Cal.3d 370, 256 Cal.Rptr. 750, 769 P.2d 932](#), the high court upheld a rule limiting residence in a private mobilehome park to persons 25 years of age or older. (*Id.*, at p. 391, 256 Cal.Rptr. 750, 769 P.2d 932.) Among the various challenges rejected were constitutional claims of violations of equal protection and of “familial privacy.”

.....

Target argues that this court has already embraced [Wilkinson’s](#) reasonableness standard and its distinction between applicants and employees. In [Luck v. Southern Pacific Transportation Co., supra, 218 Cal.App.3d 1, 267 Cal.Rptr. 618](#), this Division held that an employer’s termination of a computer operator who refused to submit to drug urinalysis constituted a violation of the employee’s right to privacy. (*Id.*, at pp. 15-24, 267 Cal.Rptr. 618.) In a footnote, we noted that [Wilkinson](#) applied the reasonableness test in a case involving a job applicant. (*Id.*, at p. 20, *fn. 13*, 267 Cal.Rptr. 618.) We distinguished [Wilkinson](#), stating that as the plaintiff in [Luck](#) was an “employee, rather than a job applicant, we are satisfied that the termination of her employment was a sufficient burden on her right to privacy to merit application of the compelling interest test.” (*Ibid.*) Target contends that this footnote constitutes an acceptance of [Wilkinson’s](#) reasonableness standard and an endorsement of a privacy distinction between job applicants and employees. We disagree. The cited language noted the holding in [Wilkinson](#) and found that case factually distinguishable; it did not embrace the [Wilkinson](#) analysis. As we found the compelling interest standard to apply to the employee before us in [Luck](#), we were not required to consider—and did not determine—whether the same or a different standard would have applied had the plaintiff been a job applicant. (See, e.g., [Luck v. Southern Pacific Transportation Co., supra, at p. 19, 267 Cal.Rptr. 618](#) [inconclusive footnotes cannot support legal conclusions].)

In conclusion, we are satisfied that any violation of the right to privacy of job applicants must be

justified by a compelling interest. This conclusion is consistent with the voter’s expression of intent when they amended [article I, section 1](#) to make privacy an inalienable right and with subsequent decisions of the California Supreme Court. (See [White v. Davis, supra, 13 Cal.3d at p. 775, 120 Cal.Rptr. 94, 533 P.2d 222](#); [Luck v. Southern Pacific Transportation Co., supra, 218 Cal.App.3d at p. 20, 267 Cal.Rptr. 618](#) [employee drug testing case]; see also Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen.Elec. (Nov. 7, 1972) pp. 27-28.)

.....

3. Nexus Requirement

Soroka and the ACLU also argue that Target has not demonstrated that its Psychscreen questions are job-related— i.e., that they provide information relevant to the emotional stability of its SSO applicants. Having considered the religious belief and sexual orientation questions carefully, we find this contention equally persuasive.

Although the state right of privacy is broader than the federal right, California courts construing [article I, section 1](#) have looked to federal precedents for guidance. (See, e.g., [Luck v. Southern Pacific Transportation Co., supra, 218 Cal.App.3d at pp. 21-23, 267 Cal.Rptr. 618.](#)) Under the lower federal standard, employees may not be compelled to submit to a violation of their right to privacy unless a clear, direct nexus exists between the nature of the employee’s duty and the nature of the violation. ([Id., at p. 24, 267 Cal.Rptr. 618.](#)) We are satisfied that this nexus requirement applies with even greater force under [article I, section 1](#).

Again, we turn to the voter’s interpretation of [article I, section 1](#). The ballot argument—the only legislative history for the privacy amendment—specifically states that one purpose of the constitutional right to privacy is to prevent businesses “from collecting ... unnecessary information about us...” ([White v. Davis, supra, 13 Cal.3d at p. 774, 120 Cal.Rptr. 94, 533 P.2d 222](#), emphasis added; see [Wilkinson v. Times Mirror Corp., supra, 215 Cal.App.3d at p. 1040, 264 Cal.Rptr. 194.](#)) It also asserts that the right to privacy would “preclude the collection of extraneous or frivolous information.” (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972) p. 28, emphasis added.) Thus, the ballot language requires that the information collected be necessary to achieve the purpose for which the information has been gathered. This language convinces us that the voters intended that a nexus requirement apply.

The California Supreme Court has also recognized this nexus requirement. When it found that public employees could not be compelled to take a polygraph test, it criticized the questions asked as both highly personal and unrelated to any employment duties. (See [Long Beach City Employees Assn. v. City of Long Beach \(1986\) 41 Cal.3d 937, 945, 227 Cal.Rptr. 90, 719 P.2d 660.](#)) It found that a public employer may require its workers to answer some questions, but only

those that specifically, directly and narrowly relate to the performance of the employee's official duties. (*Id.*, at p. 947, 227 Cal.Rptr. 90, 719 P.2d 660.) This nexus requirement also finds support in the seminal case from our high court on the right to privacy, which characterizes as one of the principal mischiefs at which [article I, section 1](#) was directed "the overbroad collection ... of unnecessary personal information...." (*White v. Davis*, *supra*, 13 Cal.3d at p. 775, 120 Cal.Rptr. 94, 533 P.2d 222, emphasis added.) If the information Target seeks is not job-related, that collection is overbroad, and the information unnecessary.

[Wilkinson](#) attempted to address this nexus requirement but its conclusion is inconsistent with federal law, which affords less protection than that provided by the state constitutional privacy amendment. [Wilkinson](#) held that an employer has a legitimate interest in not hiring individuals whose drug abuse may render them unable to perform their job responsibilities in a satisfactory manner. (*Wilkinson v. Times Mirror Corp.*, *supra*, 215 Cal.App.3d at p. 1053, 264 Cal.Rptr. 194.) Federal courts have held that this sort of generalized justification is not sufficient to justify an infringement of an employee's Fourth Amendment rights. (See *National Federation of Federal Employees v. Cheney* (D.C.Cir.1989) 884 F.2d 603, 614, cert. den. 493 U.S. 1056, 110 S.Ct. 864, 107 L.Ed.2d 948; *Harmon v. Thornburgh* (D.C.Cir.1989) 878 F.2d 484, 490, cert. den. sub nom., *Bell v. Thornburgh*, 493 U.S. 1056, 110 S.Ct. 865, 107 L.Ed.2d 949; see also *Luck v. Southern Pacific Transportation Co.*, *supra*, 218 Cal.App.3d at p. 23, 267 Cal.Rptr. 618.) If this justification is insufficient to satisfy a lesser Fourth Amendment test, then it cannot pass muster under the more stringent compelling interest test. (See *id.*, at p. 24, 267 Cal.Rptr. 618.)

4. Application of Law

Target concedes that the Psychscreen intrudes on the privacy interests of its job applicants. Having carefully considered [Wilkinson](#), we find its reasoning unpersuasive. As it is inconsistent with both the legislative history of [article I, section 1](#) and the case law interpreting that provision, we decline to follow it. Under the legislative history and case law, Target's intrusion into the privacy rights of its SSO applicants must be justified by a compelling interest to withstand constitutional scrutiny. Thus, the trial court abused its discretion by committing an error of law-applying the reasonableness test, rather than the compelling interest test. ^{FN8}

^{FN8}. We note that the trial court, faced with a single appellate case setting out the standard to be applied to a privacy violation alleged by a job applicant, did what it had to do-it applied that case. Trial courts must accept the law as declared by appellate courts. It is not a trial court's function to attempt to overrule decisions of a higher court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937.) However, as an appellate court, we are not compelled to apply the law as interpreted by a court of equivalent jurisdiction if we find that court's reasoning unpersuasive.

[8] While Target unquestionably has an interest in employing emotionally stable persons to be

SSOs, testing applicants about their religious beliefs and sexual orientation does not further this interest. (See [Luck v. Southern Pacific Transportation Co.](#), *supra*, 218 Cal.App.3d at p. 23, 267 Cal.Rptr. 618.) To justify the invasion of privacy resulting from use of the Psychscreen, Target must demonstrate a compelling interest and must establish that the test serves a job-related purpose. In its opposition to Soroka’s motion for preliminary injunction, Target made no showing that a person’s religious beliefs or sexual orientation have any bearing on the emotional stability or on the ability to perform an SSO’s job responsibilities. It did no more than to make generalized claims about the Psychscreen’s relationship to emotional fitness and to assert that it has seen an overall improvement in SSO quality and performance since it implemented the Psychscreen. This is not sufficient to constitute a compelling interest, nor does it satisfy the nexus requirement. Therefore, Target’s inquiry into the religious beliefs and sexual orientation of SSO applicants unjustifiably violates the state constitutional right to privacy.^{FN9} Soroka has established that he is likely to prevail on the merits of his constitutional claims.

....

B. Statutory Claims

Soroka also contends that he is likely to prevail on the merits of his statutory claims. He makes two statutory claims—one based on the Fair Employment and Housing Act (FEHA) and another based on the Labor Code. As we have already found that portions of the Psychscreen as administered to Target’s SSO applicants violate the constitutional right to privacy, it is not necessary for us to address the statutory issues to resolve the question of whether the preliminary injunction should issue. However, for the benefit of the trial court at the later trial, we will address these statutory claims.

1. Fair Employment and Housing Act

[9] Soroka contends that the trial court abused its discretion by concluding that he was unlikely to prevail on his FEHA claims. These claims are based on allegations that the questions require applicants to divulge information about their religious beliefs. In its ruling on Soroka’s motion for summary adjudication, the trial court found that he did not establish that Target’s hiring decisions were based on religious beliefs, nor that the questions asked in the Psychscreen were designed to reveal such beliefs.

In California, an employer may not refuse to hire a person on the basis of his or her religious beliefs. ([Gov.Code, § 12940](#), subd. (a); see [Gov.Code, § 12920](#).) Likewise, an employer is prohibited from making any non-job-related inquiry that expresses “directly or indirectly, any limitation, specification, or discrimination as to ... religious creed....” ([Gov.Code, § 12940](#), subd. (d).) FEHA guidelines provide that an employer may make any preemployment inquiry that does not discriminate on a basis enumerated in FEHA. However, inquiries that identify an individual on the basis of religious creed are unlawful unless pursuant to a permissible defense. ([Cal.Code](#)

[Regs., tit. 2, § 7287.3](#), subd. (b)(1); see [Gov.Code, § 12920](#).) Job-relatedness is an affirmative defense. (See [Cal.Code Regs., tit. 2, § 7286.7](#), subd. (c).) A means of selection that is facially neutral but that has an adverse impact on persons on the basis of religious creed is permissible only on a showing that the selection process is sufficiently related to an essential function of the job in question to warrant its use. (*Id.*, § 7287.4, subd. (e); see [Gov.Code, § 12920](#).)

The trial court committed an error of law when it found that questions such as “I feel sure that there is only one true religion,” “Everything is turning out just like the prophets of the Bible said it would,” and “I believe in the second coming of Christ” were not intended to reveal religious beliefs. Clearly, these questions were intended to— and did— inquire about the religious beliefs of Target’s SSO applicants. As a matter of law, these questions constitute an inquiry that expresses a “specification [of a] religious creed.” ([Gov.Code, § 12940](#), subd. (d).)

Once Soroka established a prima facie case of an impermissible inquiry, the burden of proof shifted to Target to demonstrate that the religious beliefs questions were job-related. (See [Gov.Code, § 12940](#), subd. (d) [improper questions are not job-related]; [Cal.Code Regs., tit. 2, §§ 7286.7](#), subd. (c), 7287.4, subd. (e); see also [Evid.Code, § 500](#) [defendant has burden of proof of each fact essential to defense asserted].) As we have already determined, Target has not established that the Psychscreen’s questions about religious beliefs have any bearing on that applicant’s ability to perform an SSO’s job responsibilities. (See pt. II.A.4., ante.) Therefore, Soroka has established the likelihood that he will prevail at trial on this statutory claim.^{FN10}

[FN10](#). Soroka also challenges questions relating to physical handicaps or conditions. As we find that use of the Psychscreen violates FEHA regulations against questioning about an applicant’s religious beliefs, we need not address these additional claims of error.

2. [Labor Code Sections 1101](#) and [1102](#)

Soroka also argues that the trial court abused its discretion by concluding that he was unlikely to prevail on his claims based on [sections 1101](#) and [1102 of the Labor Code](#). The trial court found that Soroka did not establish that the questions asked in the Psychscreen are designed to reveal an applicant’s sexual orientation. It also found that Soroka did not establish that Target’s hiring decisions are made on the basis of sexual orientation.

Under California law, employers are precluded from making, adopting or enforcing any policy that tends to control or direct the political activities or affiliations of employees. ([Lab.Code, § 1101](#), subd. (b).) Employers are also prohibited from coercing, influencing, or attempting to coerce or influence employees to adopt or follow or refrain from adopting or following any particular line of political activity by threatening a loss of employment. (*Id.*, [§ 1102](#).) These statutes have been held to protect applicants as well as employees. ([Gay Law Students Assn. v. Pacific Tel. & Tel. Co. \(1979\) 24 Cal.3d 458, 487, fn. 16, 156 Cal.Rptr. 14, 595 P.2d 592.](#))

[10] [Labor Code sections 1101](#) and [1102](#) protect an employee's fundamental right to engage in political activity without employer interference. ([Gay Law Students Assn. v. Pacific Tel. & Tel. Co.](#), *supra*, 24 Cal.3d at p. 487, 156 Cal.Rptr. 14, 595 P.2d 592.) The "struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity." (*Id.*, at p. 488, 156 Cal.Rptr. 14, 595 P.2d 592.) These statutes also prohibit a private employer from discriminating against an employee on the basis of his or her sexual orientation. (See [69 Ops.Cal.Atty.Gen. 80, 82 \(1986\)](#).)

The trial court committed an error of law when it determined that Psychscreen questions such as "I am very strongly attracted by members of my own sex" were not intended to reveal an applicant's sexual orientation. On its face, this question directly asks an applicant to reveal his or her sexual orientation. One of the five traits that Target uses the Psychscreen to determine is "socialization," which it defines as "the extent to which an individual subscribes to traditional values and mores and feels an obligation to act in accordance with them." Persons who identify themselves as homosexuals may be stigmatized as "willing to defy or violate" these norms, which may in turn result in an invalid test.

As a matter of law, this practice tends to discriminate against those who express a homosexual orientation. (See [Lab.Code, § 1101](#).) It also constitutes an attempt to coerce an applicant to refrain from expressing a homosexual orientation by threat of loss of employment. (See *id.*, [§ 1102](#).) Therefore, Soroka has established that he is likely to prevail at trial on this statutory basis, as well. ^{FN11}

***Lewis v. Heartland Inns of America, L.L.C.*, 591 F.3d 1033 (8th Cir. 2010)**

Before LOKEN, Chief Judge, MURPHY and BYE, Circuit Judges.

MURPHY, Circuit Judge.

Alleging that she lost a job she had done well, solely because of unlawful sex stereotyping, Brenna Lewis brought this action for sex discrimination and retaliation against her former employer Heartland Inns of America, its Director of Operations and its Human Resource Director (collectively Heartland) based on Title VII and state law. The district court granted summary judgment to Heartland. We reverse and remand.

I.

Heartland Inns operates a group of hotels, primarily in Iowa. Brenna Lewis began work for Heartland in July 2005 and successfully filled several positions for the chain for a year and a half before the actions at issue here. She started as the night auditor at Heartland's Waterloo Crossroads location; at that job she worked at the front desk from

11:00 p.m. to 7:00 a.m. There were also two other shifts for “guest service representatives”: the A shift from 7:00 a.m. to 3:00 p.m. and the B shift from 3:00 p.m. to 11:00 p.m. Lewis’ manager at Waterloo Crossroads, Linda Gowdy, testified that Lewis “did her job well” and that she had requested a pay raise for her. Heartland recorded two merit based pay raises for Lewis. The record also indicates that Gowdy received a customer comment praising Lewis.

On or about December 7, 2006, Lewis began working various part time front desk shifts at Heartland Inns located near Des Moines, including at Ankeny and Altoona. At both locations she was valued by her direct supervisors. Her manager at the Altoona hotel, Jennifer Headington, testified that Lewis “made a good impression[.]” She offered her a full time night auditor position after receiving telephone permission from Barbara Cullinan, Heartland’s Director of Operations. Lori Stifel, Lewis’ manager at the Ankeny hotel, testified in her deposition that Lewis did a “great job” in Ankeny, “fit into the [front desk] position really well” and was well liked by customers. Stifel received permission over the phone from Cullinan on December 15 to offer Lewis a full time A shift position. Neither Headington nor Stifel conducted an interview of Lewis before extending their offers, and the record does not reflect that Cullinan ever told them a subsequent interview would be necessary. Lewis accepted the offer for the A shift at Ankeny and began training with her predecessor, Morgan Hammer. At the end of December 2006 Lewis took over the job.

Lewis’ positive experience at Heartland changed only after Barbara Cullinan saw her working at the Ankeny desk. As the Director of Operations, Cullinan had responsibility for personnel decisions and reported directly to the general partner of Heartland. She had approved the hiring of Lewis for the Ankeny A shift after receiving Stifel’s positive recommendation. After seeing Lewis, however, Cullinan told Stifel that she was not sure Lewis was a “good fit” for the front desk. Cullinan called Stifel a few days later and again raised the subject of Lewis’ appearance. Lewis describes her own appearance as “slightly more masculine,” and Stifel has characterized it as “an Ellen DeGeneres kind of look.” Lewis prefers to wear loose fitting clothing, including men’s button down shirts and slacks. She avoids makeup and wore her hair short at the time. Lewis has been mistaken for a male and referred to as “tomboyish.”

Cullinan told Stifel that Heartland “took two steps back” when Lewis replaced Morgan Hammer who has been described as dressing in a more stereotypical feminine manner. As Cullinan expressed it, Lewis lacked the “Midwestern girl look.” Cullinan was heard to boast about the appearance of women staff members and had indicated that Heartland staff should be “pretty,” a quality she considered especially important for women working at the front desk. Cullinan also had advised a hotel manager not to hire a particular applicant because she was not pretty enough. The front desk job description in Heartland’s personnel manual does not mention appearance. It states only that a guest

service representative “[c]reates a warm, inviting atmosphere” and performs tasks such as relaying information and receiving reservations. **FN1**

FN1. Heartland has not tried to suggest that the “Midwestern girl look” or prettiness were bona fide occupational qualifications for its clerk job, as might conceivably be the case with the cheerleaders referenced in the dissent. Such an affirmative defense requires proof that the qualification is “necessary to the normal operation of that particular business or enterprise[.]” 42 U.S.C. § 2000e-2(e)(1). For example, “female sex appeal” is not a bona fide occupational qualification for flight attendants and ticket agents. See *Wilson v. Southwest Airlines Co.*, 517 F.Supp. 292 (N.D.Tex.1981).

In her conversation with Stifel about Brenna Lewis, Cullinan ordered Stifel to move Lewis back to the overnight shift. Stifel refused because Lewis had been doing “a phenomenal job at the front desk[.]” The following week, on January 9, 2007, Cullinan insisted that Lori Stifel resign. Around this time, Heartland informed its general managers that hiring for the front desk position would require a second interview. Video equipment was also purchased to enable Cullinan or Kristi Nosbisch, Heartland’s Human Resource Director, to see an applicant before extending any offer. When Lewis’ former manager at Altoona, Jennifer Headington, raised a question about the new arrangements, Cullinan answered that “[h]otels have to have a certain personification and appearance.”

Cullinan met with Brenna Lewis on January 23, 2007. At this point Lewis had held the front desk job for nearly a month after Cullinan’s initial approval of her hire for the position. The record contains no evidence of any customer dissatisfaction with Lewis or her service. Nevertheless, Cullinan told Lewis at the meeting that she would need a second interview in order to “confirm/endorse” her A shift position. Lewis was aware from Lori Stifel of what had been said about her appearance, and she protested that other staff members had not been required to have second interviews for the job. Lewis told Cullinan that she believed a second interview was being required only because she lacked the “Midwestern girl look.” She questioned whether the interview was lawful, and she cried throughout the meeting.

Cullinan wanted to know who had told Lewis about the comment and asked whether it was Lori Stifel. Thereafter Cullinan talked about the need for new managers when revenue is down like in Ankeny, where Stifel was the manager. Lewis responded that recent policy changes by Heartland, including bans on smoking and on pets, might explain the loss in revenue. Cullinan then encouraged Lewis to share more of her views about the new policies and took notes on what she said. Three days later, Lewis was fired.

Lewis does not challenge Heartland's official dress code, which imposes comparable standards of professional appearance on male and female staff members, and her termination letter did not cite any violation of its dress code. The theory of her case is that the evidence shows Heartland enforced a de facto requirement that a female employee conform to gender stereotypes in order to work the A shift. There was no such requirement in the company's written policies.

In its termination letter to Lewis, Heartland asserted that she had "thwart[ed] the proposed interview procedure" and exhibited "host[ility] toward Heartland's most recent policies[.]" Lewis denies those charges and denies that those were the real reasons for her discharge. There were no customer complaints about Lewis' performance as a desk clerk. Nor had there been any disciplinary action against her before she was fired. Lewis asserts that Heartland terminated her for not conforming to sex stereotypes and contends that this conduct violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Iowa Civil Rights Act of 1965 (ICRA), Iowa Code § 216.1 et seq.

II.

Heartland was not entitled to prevail on summary judgment unless it showed that plaintiff Brenna Lewis had not produced direct or circumstantial evidence which could reasonably support an inference of discrimination. *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir.2004). Title VII prohibits an employer from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of ... sex[.]" 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Discrimination occurs when sex "was a motivating factor for any employment practice, even though other factors also motivated the practice." *Id.* at § 2000e-2(m). Lewis agrees with Heartland that the burden shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), applies to analyze the viability of Heartland's summary judgment motion.

To make a prima facie case under the McDonnell Douglas framework, Lewis had to show that "(1) she was a member of the protected group; (2) she was qualified to perform the job; (3) she suffered an adverse employment action; and (4) circumstances permit an inference of discrimination." *Bearden v. Int'l Paper Co.*, 529 F.3d 828, 831 (8th Cir.2008). Such a showing creates a presumption of unlawful discrimination, requiring Heartland to produce a legitimate nondiscriminatory reason for its employment action. *Id.* at 831-32. The burden then returns to Lewis to prove that Heartland's proffered reason for firing her is pretextual. *Id.* at 832. The parties agree that Lewis' ICRA and federal claims are analytically indistinguishable. See *Quick v. Donaldson Co.*, 90 F.3d 1372, 1380 (8th Cir.1996).

Among the authorities relied on by Lewis is *Price Waterhouse v. Hopkins*, 490 U.S. 228,

109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), where the Supreme Court decided that sex stereotyping can violate Title VII when it influences employment decisions. Well before *Price Waterhouse*, however, courts had found sex specific impositions on women in customer service jobs such as this one illegal. Violations of Title VII occurred where a female lobby attendant was terminated for refusing to wear a sexually provocative uniform, see *EEOC v. Sage Realty Corp.*, 507 F.Supp. 599, 607-608 (S.D.N.Y.1981), where only women employees were compelled to wear uniforms, see *Carroll v. Talman Fed. Sav. & Loan Ass'n of Chic.*, 604 F.2d 1028 (7th Cir.1979), and where only female flight attendants were required to wear contact lenses instead of glasses, see *Laffey v. Northwest Airlines, Inc.*, 366 F.Supp. 763, 790 (D.D.C.1973), aff'd in part, vacated and remanded in part on other grounds, 567 F.2d 429 (D.C.Cir.1976). In a more recent example in the Ninth Circuit, an airline policy requiring female flight attendants to be comparatively thinner than male attendants was found discriminatory. See *Frank v. United Airlines, Inc.*, 216 F.3d 845, 855 (9th Cir. 2000).

In *Price Waterhouse*, where a female senior manager was denied partnership, partners involved in their decision had referred to her as “macho” and in need of “a course at charm school[.]” 490 U.S. at 235, 109 S.Ct. 1775. She was advised that to become a partner she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” *Id.* Such stereotypical attitudes violate Title VII if they lead to an adverse employment decision. *Id.* at 251, 109 S.Ct. 1775; *id.* at 259, 109 S.Ct. 1775 (White, J., concurring); *id.* at 272-73, 109 S.Ct. 1775 (O'Connor, J., concurring). The *Price Waterhouse* plurality's understanding that an employer might escape liability by showing that it would have made the same decision even without a discriminatory motive is no longer permissible because Congress provided otherwise, see 42 U.S.C. § 2000e-2(m), but the Court's conclusion that Title VII prohibits sex stereotyping endures. Like the plaintiff in *Price Waterhouse*, Lewis alleges that her employer found her unsuited for her job not because of her qualifications or her performance on the job, but because her appearance did not comport with its preferred feminine stereotype.

Other circuits have upheld Title VII claims based on sex stereotyping subsequent to *Price Waterhouse*. See, e.g., *Chadwick v. WellPoint, Inc.*, 561 F.3d 38 (1st Cir.2009); *Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir.2004); *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir.2004); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir.2001). These cases are instructive here despite the dissent's unexplained charge that similar reliance on *Price Waterhouse* is “unwarranted[.]”

The Sixth Circuit's *Smith* case concerned a fire fighter who was born male but subsequently came to identify as a woman. 378 F.3d at 568. When he began “to express a more feminine appearance” at work, he was told by colleagues that he was not “masculine enough[.]” *Id.* at 572. His superiors then “devise[d] a plan” to terminate him,

including an order that he submit to multiple psychological evaluations. *Id.* at 568-69. If he did not consent, “they could terminate Smith’s employment on the ground of insubordination.” *Id.* at 569. Lewis similarly alleges that Heartland imposed a second interview and then used her objection to it against her when its real reason for terminating her was because she lacked the “Midwestern girl look” and was not pretty enough to satisfy Cullinan. As the Sixth Circuit concluded in *Smith*, an adverse employment decision based on “gender non-conforming behavior and appearance” is impermissible under *Price Waterhouse*. *Id.* at 571-72.

Likewise, in *Chadwick*, the First Circuit found a decisionmaker’s explanation why the plaintiff had not received a promotion evidence that the decision was motivated by an illegal sex stereotype that women would prioritize child care responsibilities over paid employment. *Chadwick*, 561 F.3d at 42 (with four young children she had “too much on her plate”); see also *id.* at 44.

The Second Circuit similarly concluded in *Back* that the statement that a mother who received tenure “would not show the same level of commitment [she] had shown because [she] had little ones at home” “showed discriminatory intent in the tenure decision.” *Back*, 365 F.3d at 120. The Seventh Circuit found remarks characterizing conduct of a woman employee as “you’re being a blond[e] again today” “probative of sex discrimination in *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir.2004). Cullinan’s criticism of Lewis for lack of “prettiness” and the “Midwestern girl look” before terminating her may also be found by a reasonable factfinder to be evidence of wrongful sex stereotyping.

The district court recognized that sex stereotyping comments may be evidence of discrimination. *Lewis v. Heartland Inns of Am., LLC*, 585 F.Supp.2d 1046, 1059 (S.D.Iowa 2008). The focus of its decision was the mistaken view that a Title VII plaintiff must produce evidence that she was treated differently than similarly situated males. Our court has explicitly rejected that premise. *Young v. Warner-Jenkinson Co.*, 152 F.3d 1018, 1022 (8th Cir.1998). Other circuits have reached the same conclusion. See, e.g., *Back*, 365 F.3d at 121; *Bryant v. Aiken Reg’l Med. Ctrs. Inc.*, 333 F.3d 536, 545 (4th Cir.2003).

The Supreme Court has stated that “[t]he critical issue” in a sex discrimination case is “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) (Ginsburg, J., concurring). Neither these cases nor other Supreme Court precedents compel a woman alleging sex discrimination to prove that men were not subjected to the same challenged discriminatory conduct or to show that the discrimination affected

anyone other than herself. As the Sixth Circuit succinctly stated, “[a]fter Price Waterhouse, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex.” Smith, 378 F.3d at 574 (emphasis added).

Oncale illustrates how an employee may prove an adverse employment action because of sex without evidence that employees of the opposite sex were treated differently. Oncale was part of an eight man ship crew. Oncale, 523 U.S. at 77, 118 S.Ct. 998. Oncale could not show any female crew were treated differently since there were none. Evidence that he had been sexually harassed was nevertheless sufficient to support his Title VII claim because the harassment was because of his sex. As the Court explained, “comparative evidence about how [an] alleged harasser treated members of both sexes” is only one “evidentiary route” to prove discrimination, but a harasser’s “sex-specific and derogatory terms” can do the same. Id. at 80-81, 118 S.Ct. 998; see also Quick, 90 F.3d at 1378-79. As in Oncale, Lewis need only offer evidence that she was discriminated against because of her sex. The question is whether Cullinan’s requirements that Lewis be “pretty” and have the “Midwestern girl look” were because she is a woman. A reasonable factfinder could find that they were since the terms by their nature apply only to women.

Cullinan was a primary decisionmaker with authority to hire and fire employees. While several individuals also took part in the decision to terminate Lewis, they relied on Cullinan’s description of her January 23, 2007 conversation with Lewis. Cullinan consistently indicated that female front desk workers must be “pretty,” and she criticized Lewis’ lack of the “Midwestern girl look” in the same conversation in which she ordered Stifel to move Lewis back to the night audit. Cullinan authorized Stifel to hire Lewis over the phone, but demanded a “confirm/endorse” interview once she saw Lewis’ “tomboyish” appearance. She demanded Stifel’s resignation after she refused to remove Lewis from her position.

Evidence that Heartland’s reason for the termination were pretextual include the fact that Lewis had a history of good performance at Heartland. She had no prior disciplinary record and had received two merit based pay raises. The two individuals who supervised her during the majority of her employment at Heartland both stated that they had no problem with her appearance, and at least one customer had never seen customer service like that Lewis had provided. On this record, a factfinder could infer a discriminatory motive in Heartland’s actions to remove Lewis.

On the record here, a reasonable factfinder could disbelieve Heartland’s proffered reason for terminating Lewis. Heartland asserts that it fired Lewis because of the January 23 meeting when Cullinan informed her that she would need to submit to a second interview. Lewis and Cullinan, the only two individuals in the room, portray the

encounter in starkly different terms. On summary judgment we must construe the conversation in the light most favorable to Lewis, however. Lewis denies that she expressed hostility to Heartland's policies or spoke in a disrespectful way or took an argumentative stance or refused to participate in a second interview. It is also relevant that the meeting occurred after Cullinan had given Stifel the understanding that "[Lewis'] appearance ... was not what [she] wanted on the front desk" and after Stifel had shared that discussion with Lewis.

Shortly after Cullinan's conversation with Stifel about Lewis' appearance, Heartland procured video equipment so that Cullinan or Nosbisch could inspect a front desk applicant's look before any hiring. Heartland's termination letter to Lewis only relied on the January 23 meeting she had with Cullinan. Only later did Heartland allege poor job performance would justify her termination. Lewis asserts further that Heartland did not follow its own written termination procedure, which includes assessing the employee's previous disciplinary record (Lewis had none) and conducting an investigation before making the termination decision. Kristi Nosbisch, Heartland's equal employment officer responsible for directing investigations of employment discrimination, knew that Lewis had complained that Cullinan's requirements were illegal, but she nonetheless relied on Cullinan's account of their meeting without asking Lewis for her own.

At this stage of the case, the question is not whether Lewis will prevail on her claim but rather whether she has offered sufficient evidence from which a reasonable factfinder could find that she was discriminated against because of her sex. We conclude that she has, for "an employer who discriminates against women because ... they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex." Smith, 378 F.3d at 574. Companies may not base employment decisions for jobs such as Lewis' on sex stereotypes, just as Southwest Airlines could not lawfully hire as flight attendants only young, attractive, "charming" women "dressed in high boots and hot-pants [.]" Wilson, 517 F.Supp. at 294, 295 (quotation omitted). As the Supreme Court stated, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group[.]" Price Waterhouse, 490 U.S. at 251, 109 S.Ct. 1775.

LOKEN, Chief Judge, dissenting.

I respectfully dissent. Apparently, the majority would hold that an employer violates Title VII if it declines to hire a female cheerleader because she is not pretty enough, or a male fashion model because he is not handsome enough, unless the employer proves the affirmative defense that physical appearance is a bona fide occupational qualification. Like the district court, I conclude this is an unwarranted misreading of the plurality and concurring opinions in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104

L.Ed.2d 268 (1989). In my view, an employer’s decision to hire or fire based on a person’s physical appearance is not discrimination “because of ... sex” unless it is a pretext for disadvantaging women candidates, as the trial court found in *Price Waterhouse v. Hopkins*. As there is no evidence of that here, I would affirm for the reasons stated in the district court’s persuasive and thorough Order on Motion for Summary Judgment dated November 13, 2008.

LOWE V. ATLAS LOGISTICS, INC.

ORDER

AMY TOTENBERG, District Judge

Atlas Logistics Group Retail Services (Atlanta), LLC (“Atlas”) operates warehouses for the storage of products sold at a variety of grocery stores. So one could imagine Atlas’s frustration when a mystery employee began habitually defecating in one of its warehouses. To solve the mystery of the devious defecator, Atlas requested some of its employees, including Jack Lowe and Dennis Reynolds, to submit to a cheek swab. The cheek cell samples were then sent to a lab where a technician compared the cheek cell DNA to DNA from the offending fecal matter. Lowe and Dennis were not a match. With the culprit apparently still on the loose, Lowe and Dennis filed suit under the Genetic Information Nondiscrimination Act (“GINA”), 42 U.S.C. § 2000ff et seq., which generally prohibits employers from requesting genetic information from its employees.

The matter is before the Court on the parties’ Cross–Motions for Summary Judgment. The legal question before the Court is whether the information requested and obtained by Atlas was “genetic information” covered by GINA. For the reasons that follow, the Court concludes that it is. Thus, the Court GRANTS Plaintiffs’ Motion for Partial Summary Judgment and DENIES Defendant’s Motion for Summary Judgment.

II. FACTUAL BACKGROUND

Atlas provides long-haul transportation and storage services for the grocery industry. As part of its services, Atlas maintains warehouse facilities to store grocery items which are then distributed to grocery retailers. Beginning in 2012, an unknown number of Atlas employees began defecating in Atlas’s Bouldercrest Warehouse. The defecations occurred numerous times and necessitated the destruction of grocery products on at least one occasion.

Atlas attempted to remedy the defecation issue by asking its Loss Prevention Manager, Don

Hill, to conduct an investigation. Mr. Hill began his investigation by comparing employee work schedules to the timing and location of the defecation episodes in order to create a list of employees who may have been responsible. Plaintiffs Jack Lowe and Dennis Reynolds were two of the employees Mr. Hill identified.

Once Mr. Hill created the list of potential suspects, he hired Speckin Forensic Laboratories (“Speckin Labs”) to assist in the investigation. Hill retained Speckin Labs to perform a comparison of buccal swab samples to the fecal matter collected in the Warehouse. Atlas requested that the results of the comparison be transmitted to Atlas.

In order to perform the comparison, Speckin Labs suggested using Short Tandem Repeat analysis (“STR analysis”). STR analysis compares samples by analyzing “genetic spacers” at various sites. “Genetic spacers” are the space between an individual’s genes and vary drastically from person to person. STR analysis can be used to compare DNA from one sample to another for identification purposes. STR analysis cannot, however, determine an individual’s propensity for disease or disorder.

Speckin Labs sent Dr. Julie Howenstine to the Warehouse in October 2012 to collect buccal swab samples from Lowe and Reynolds. Lowe and Reynolds provided samples to Dr. Howenstine, who then sent the samples to GenQuest DNA Analysis Laboratory (“GenQuest”) via an intermediary, Semen and Sperm Detection, Inc.

Dr. Howenstine requested that GenQuest use the PowerPlex 21 System (“PowerPlex 21”) to perform the STR analysis of Lowe’s and Reynolds’s buccal swab samples. The PowerPlex 21 measures the length of spaces between two genes at twenty chromosome spaces to compare various DNA samples. The PowerPlex 21 produces an electropherogram, which graphs the PowerPlex 21’s analysis of DNA samples.

After performing the PowerPlex 21 analysis on Lowe’s and Reynolds’s DNA samples, GenQuest sent Dr. Howenstine the electropherogram with the PowerPlex 21 analysis’ findings. Using the data provided in the electropherogram, Dr. Howenstine compared the DNA samples of Lowe and Reynolds to the DNA of the fecal matter and determined that neither Lowe nor Reynolds were the culprits. Dr. Howenstine documented this mismatch in a letter to Mr. Hill on October 22, 2012.

On March 27, 2013, Lowe and Reynolds filed charges of discrimination with the Equal Employment Opportunity Commission (“EEOC”). The Plaintiffs alleged that Atlas violated the Genetic Information Nondiscrimination Act, 42 U.S.C. § 2000ff et seq. (“GINA”) because Atlas illegally requested and required them to provide their genetic information and illegally disclosed their genetic information. The EEOC dismissed Lowe’s and Reynolds’s charges against Atlas on April 24, 2013. Specifically, the Dismissal and Notice of Rights letters stated:

The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised in this charge.

The letters entitled Lowe and Reynolds to file suit within 90 days of April 24, 2013. On July 22, 2013, Lowe and Reynolds timely filed this action.

III. ANALYSIS

According to Plaintiffs Jack Lowe and Dennis Reynolds, the undisputed facts show that Atlas requested information about Speckin Labs’s comparison of Lowe’s and Reynolds’s DNA to the fecal sample. These facts, Plaintiffs argue, demonstrate that Atlas violated 42 U.S.C. § 2000ff–1(b), which makes it “an unlawful employment practice for an employer to request, require, or purchase genetic information with respect to an employee.” Plaintiffs therefore move for Partial Summary Judgment as to Atlas’s liability under this section of GINA.

Atlas responds and argues in its Motion for Summary Judgment that the information the company requested concerning Lowe’s and Reynolds’s DNA analysis does not constitute “genetic information” as defined in GINA. According to Defendant’s interpretation of GINA, “genetic information” refers only to information related to an individual’s propensity for disease. For this reason, Defendant moves for summary judgment as to all of Plaintiffs’ claims. The issue before the Court, therefore, is whether the term “genetic information” as used in GINA encompasses the information Atlas requested in this case.

As discussed below, the Court determines that the unambiguous language of GINA covers Atlas’s requests for Lowe’s and Reynolds’s genetic information and thus compels judgment in favor of Lowe and Reynolds. This case is not one of the rare instances where overwhelming extrinsic evidence demonstrates a legislative intent contrary to the text’s plain meaning. For these reasons, the Court grants Plaintiffs’ Motion for Partial Summary Judgment and denies Defendant’s Motion for Summary Judgment.

A. The Unambiguous Statutory Language of GINA

1 The Court begins its analysis with the language of GINA. GINA makes it “an unlawful employment practice for an employer to request, require, or purchase genetic information with respect to an employee.” 42 U.S.C. § 2000ff–1(b). Section 2000ff–1(b) lists six exceptions to this general prohibition, but Atlas admits that none of the statutory exceptions apply here. The parties also agree that Atlas is an “employer” and Lowe and

Reynolds are “employees” as defined by GINA. The parties’ disagreement centers on a single phrase in Section 2000ff–1(b): “genetic information.”

GINA defines genetic information as “with respect to any individual, information about (i) such individual’s genetic tests, (ii) the genetic tests of family members of such individual, and (iii) the manifestation of a disease or disorder in family members of such individual.” 42 U.S.C. § 2000ff(4). Parts (ii) and (iii) do not apply to Lowe and Reynolds’s claims, as the PowerPlex 21 analysis was not performed on DNA of their family members. Therefore, the DNA analysis would only qualify as “genetic information” under GINA if the analysis qualifies as a “genetic test.”

“Genetic test” is also defined in GINA. The statute defines “genetic test” as “an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes.” 42 U.S.C. § 2000ff(7). The extent of GINA’s guidance ends with its definition of “genetic test:” none of the words included in 42 U.S.C. § 2000ff(7) are further defined in GINA.

If all the Court considers is the language of GINA, the undisputed evidence in the record establishes that the DNA analysis at issue here clearly falls within the definition of “genetic test.” The parties agree that Dr. Howenstine conducted an “analysis” of Lowe’s and Reynolds’s DNA. And the undisputed evidence in the record shows that this analysis at a minimum detects genotypes and mutations. Because the parties agree that Atlas requested a comparison of Lowe’s and Reynolds’s DNA to the fecal DNA found in the warehouse, Atlas’s request and course of action appear to constitute a violation of 42 U.S.C. § 2000ff–1(b)’s prohibition against requesting genetic information from employees.

Defendant argues that this straightforward but broad interpretation of GINA is erroneous. Defendant urges the Court to interpret the “genetic test” language of GINA to exclude analyses of DNA, RNA, chromosomes, proteins, or metabolites if such analyses do not reveal an individual’s propensity for disease.

This proposed definition of “genetic tests”—a definition which limits genetic tests to those related to one’s propensity for disease—renders other language in GINA superfluous, and should thus be rejected.

Section 2000ff–1(b) makes it unlawful to request, require, or purchase genetic information, except in six contexts. Section 1(b)(6), in turn, expressly allows employers to request, require, or purchase some genetic information which has nothing to do with the propensity for disease. 42 U.S.C. § 2000ff–1(b)(6).

Specifically, an employer is not liable under GINA where it conducts a “DNA analysis ... for purposes of human remains identification, and requests or requires genetic information

of such employer's employees, but only to the extent that such genetic information is used for analysis of DNA identification markers for quality control to detect sample contamination." 42 U.S.C. § 2000ff-1(b)(6). This exception would be unnecessary if Atlas's construction of GINA were correct, because under Atlas's construction, the term "genetic information" already excludes DNA analyses for purposes of human remains identification—a type of analysis unrelated to testing for disease propensity.

Atlas's reliance on GINA's legislative history to argue otherwise is unpersuasive. According to Atlas, this human remains identification exception was created to address a concern raised by the Bureau of Alcohol, Tobacco, and Firearms ("ATF"). Congress apparently carved out the narrow exception for law enforcement agencies in response to ATF's concerns. But Atlas does not explain why such an exception would be necessary if, as Atlas would have it, the definition of "genetic information" already excludes the type of information in ATF's index—genetic information unrelated to one's propensity for disease. The Court therefore rejects Atlas's interpretation, which is inconsistent with the plain terms of the statute.

B. Evidence of Legislative Intent

Despite the plain, unambiguous language of GINA providing a broad definition of "genetic information," which covers the information Atlas requested in this case, Atlas urges the Court to adopt its narrow definition. It is true that "in rare and exceptional circumstances [a court] may decline to follow the plain meaning of a statute because overwhelming extrinsic evidence demonstrates a legislative intent contrary to the text's plain meaning." *Boca Ciega Hotel, Inc.*, 51 F.3d at 238. This is not such an exceptional case.

Atlas first relies on the Congressional Findings, included in GINA, to urge the Court to adopt its definition of "genetic information," but the Congressional Findings lend Atlas only limited support. The Congressional Findings do indeed express a concern that advances in genetic testing, which "can allow individuals to take steps to reduce the likelihood that they will contract a particular disorder," also "give rise to the potential misuse of genetic information to discriminate in health insurance and employment." 42 U.S.C. § 2000ff note.

And as Atlas highlights, the Findings include historical examples of discrimination on the basis of genetic testing that reveals the existence of or propensity for disease, such as state-sanctioned sterilization of individuals with genetic defects and state-sanctioned sickle cell anemia testing. *Id.* But Atlas ignores the Findings' more general pronouncement of GINA's purpose: to "establish[] a national and uniform basic standard" of unacceptable use of genetic information in health insurance and employment, in order "to fully protect the public from discrimination and allay their concerns about the potential for discrimination,

thereby allowing individuals to take advantage of genetic testing, technologies, research, and new therapies.” *Id.* It is not unreasonable for Congress to achieve this “national and uniform basic standard” of full protection by broadly prohibiting employers from requesting, requiring, or purchasing genetic information of their employees, except under limited circumstances.

On the contrary, GINA’s statutory regime, which errs on the side of prohibiting employer-mandated or requested genetic testing, seems fully consistent with these Congressional Findings.

Atlas next cherry-picks statements made during the legislative process to support its proposition that the term “genetic test” was meant to encompass a narrower set of tests which detect one’s propensity for disease. For example, Representative Louise Slaughter, sponsor of the original GINA bill in the House of Representatives identified examples of genetic tests including tests conducted on Hasidic Jewish children to determine if they had diseases, tests that could be “life-saving,” and tests that determine whether one has sickle cell anemia. 110 Cong. Rec. E120 (daily ed. Jan. 16, 2007) (remarks of Rep. Slaughter).

Atlas notes that these examples involve one’s propensity to develop disease. But Representative Slaughter did not indicate that these examples were exhaustive. In any case, one legislator’s list of examples—offered a year and half before the bill’s final passage, and before numerous debates and amendments to the statute—provides little insight into the overall congressional purpose of the Act.

Atlas then erroneously cites the view of a handful of legislators that the intent of GINA was to be limited to combating discrimination based on one’s propensity for disease. As Atlas points out, this group of eleven legislators “believe[d] that the basic intent of the authors [of the bill] [was] to regulate a predictive assessment concerning an individual’s propensity to get an inheritable genetic disease or disorder based on the occurrence of an inheritable genetic disease or disorder in the family member.” H.R.Rep. No. 110–28, pt. 3, at 70 (Mar. 29, 2007).

But the legislators recognized that, as written, GINA’s scope was much broader. They referenced the Director of the Human Genome Project Dr. Francis Collins’s testimony that “the GINA reference to detecting a genotype covered, among other things, ... forensic DNA identification tests, tissue typing for organ donation [,] and paternity tests,” all tests that do not indicate one’s propensity for disease. *Id.* at 71 (citing Collins’s testimony). This small group of legislators expressed concern about GINA’s “failure to limit [the] definition [of genetic information] to genetic markers for genetic disease.” *Id.* They therefore urged a narrowing of the scope of the statute. Despite these concerns, Congress stuck with the broad definition of “genetic tests” in the final version of the bill. Accordingly, the view of this small group of legislators appears to have been rejected.

The Congressional Findings and legislative history Atlas relies upon are not remotely sufficient to justify departing from the plain meaning of the statute's text. Accordingly, the Court applies the plain terms of the statute to find that, based on this record, Atlas violated GINA when it requested the results of the PowerPlex 21 test.

C. EEOC Regulation

3 As the Court concludes that the statute unambiguously covers the conduct at issue in this case, its analysis is complete. Nonetheless, because so few courts have had the occasion to address GINA, the Court briefly addresses Atlas's argument that an EEOC regulation, promulgated under GINA in accordance with 42 U.S.C. § 2000ff-10, weighs in favor its interpretation. Atlas argues, "Assuming, arguendo, that GINA's definition of 'genetic information' or 'genetic tests' is ambiguous, the Court should defer to the EEOC's interpretation of GINA as set forth in its regulations, which supports an order for summary judgment in Defendant's favor."

Although the EEOC's regulation define "genetic test" with exactly the same language as the statute, the regulation provide a list of examples, and Atlas attempts to capitalize on this list to support its argument. According to the regulation, "[g]enetic tests include, but are not limited to" the following:

- (i) A test to determine whether someone has the BRCA1 or BRCA2 variant evidencing a predisposition to breast cancer, a test to determine whether someone has a genetic variant associated with hereditary nonpolyposis colon cancer, and a test for a genetic variant for Huntington's Disease;
- (ii) Carrier screening for adults using genetic analysis to determine the risk of conditions such as cystic fibrosis, sickle cell anemia, spinal muscular atrophy, or fragile X syndrome in future offspring;
- (iii) Amniocentesis and other evaluations used to determine the presence of genetic abnormalities in a fetus during pregnancy;
- (iv) Newborn screening analysis that uses DNA, RNA, protein, or metabolite analysis to detect or indicate genotypes, mutations, or chromosomal changes, such as a test for PKU performed so that treatment can begin before a disease manifests;
- (v) Preimplantation genetic diagnosis performed on embryos created using invitro fertilization;
- (vi) Pharmacogenetic tests that detect genotypes, mutations, or chromosomal changes that indicate how an individual will react to a drug or a particular dosage of a drug;
- (vii) DNA testing to detect genetic markers that are associated with information about ancestry; and
- (viii) DNA testing that reveals family relationships, such as paternity.

Atlas correctly points out that tests like the PowerPlex 21 analysis are absent from the list of “genetic tests” identified by the EEOC. Thus, according to Atlas, the PowerPlex21 is not the type of test contemplated by the term “genetic test.”

The Court rejects Atlas’s argument for three reasons. First, as noted in the regulation, this list is not meant to be exhaustive. Thus, PowerPlex 21’s absence from the list is not, in itself, instructive. Second, two of the examples in the EEOC Regulation, “DNA testing to detect genetic markers that are associated with information about ancestry” and “DNA testing that reveals family relationships, such as paternity,” do not determine an individual’s propensity for disease. If the Court were to apply Atlas’s narrow definition of “genetic tests,” these two examples would go beyond the scope of the statute.

IV. CONCLUSION

For the reasons discussed above, the Court finds Atlas liable under 42 U.S.C. § 2000ff and GRANTS Plaintiffs Jack Lowe and Dennis Reynolds Partial Motion for Summary Judgment as to liability. The Court DENIES Defendant Atlas Logistics Group Retail Services (Atlanta), LLC Motion for Summary Judgment as to all claims.

IT IS SO ORDERED.

All Citations

Maxwell v. Verde Valley Ambulance Co. Inc., 2014 WL 4470512 (D. Az. 2014)

BRIDGET S. BADE, United States Magistrate Judge.

In this employment case, Plaintiff Matthew Maxwell (Plaintiff or Maxwell alleges that Defendant Verde Valley Ambulance Company (Defendant or VVAC discriminated against him based on disability, in also alleges that VVAC retaliated against him for engaging in protected activity. Finally, Plaintiff alleges that VVAC violated the Genetic Information Nondiscrimination Act of 2008 (GINA) by acquiring genetic information in an employment medical examination. (Id.)

Defendant VVAC has moved for summary judgment on Plaintiff’s ADA and Rehabilitation Act claims (Counts 1—6). (Doc. 40.) Defendant asserts that Plaintiff cannot establish a prima facie case under the ADA or the Rehabilitation Act because he is not disabled as defined in those Acts and, therefore, Defendant is entitled to judgment as a matter of law.

Defendant also asserts that even if Plaintiff established disability, his claims would nonetheless fail as a matter of law because his employment was not terminated because of any disability and, therefore, he cannot establish causation for his discrimination and retaliation claims. Defendant

also moves for summary judgment on Plaintiff's GINA claim (Count 7), arguing that it did not improperly acquire any genetic information. Finally, Defendant moves for summary judgment because it argues that there is no evidence to support an award of punitive damages. (Docs.37, 38.)

Plaintiff has also moved for summary judgment. He asserts that he is disabled as a matter of law under the ADA and Rehabilitation Act and, therefore, the Court should enter partial summary judgment in his favor on the issue of his disability under the statutes. (Doc. 37.) Plaintiff also moves for summary judgment on his GINA claim because he argues that VVAC acquired genetic information. For the reasons below, the Court denies Defendant's motion in part, and grants it in part, and denies Plaintiff's motion.

I. Factual Background

In 2000, several years before Plaintiff worked for VVAC, he was in a motorcycle accident and suffered injuries to several ligaments, tendons, nerves, and bones in his left leg (leg injury). Plaintiff currently takes over-the-counter medications (Motrin) on a regular basis and does a weekly home exercise program. Plaintiff asserts that he has drop foot, a limp, and regularly "trips over his toes." He also uses a knee brace whenever he "expects that there is above average danger that he could injure himself, step wrong, twist wrong, or do anything else that concerns him." Plaintiff complains of "pain, inflammation, crepitus, drop foot, lack of range of motion, [muscle atrophy], [numbness] in his lower extremity, phantom nerve pains, and [hammertoe]."

Plaintiff states that he can only participate in activities that require the use of his legs for a limited amount of time due to restricted blood flow, swelling, and pain. He also states that he is at risk of injuring himself if he does not pay attention to how he steps. (Id.)

In 2005, Plaintiff started working at VVAC as a reserve paramedic. He was later promoted to the position of captain paramedic (Captain). In January 2011, VVAC EMS Chief Kim Moore discovered that Plaintiff had used a VVAC computer assigned to the three captain paramedics (Captains' computer) to create a business plan for a medical marijuana business, Verde Valley Medicinal Supply (VVMS). On January 6, 2011, Moore met with Plaintiff and advised him that his activities violated VVAC's policies prohibiting personal use of company property. Moore directed Plaintiff to remove the VVMS documents from the VVAC computer. Moore prepared a memorandum confirming her meeting with Plaintiff.

On January 26, 2011, VVAC Board Chair, Allen Muma, sent Plaintiff a letter regarding his business activities. Muma advised Plaintiff that the VVAC Board of Directors was opposed to any VVAC employee being involved in a medical marijuana business. Muma stated that Plaintiff would be "terminated immediately" if VVAC obtained additional information that Plaintiff was still involved in a medical marijuana business.

In April 2011, Plaintiff failed to provide a required report for two months. Moore issued Plaintiff a letter of reprimand stating that he had failed to complete his responsibilities as a Captain and that she was reassigning the task of preparing the report for “pre-hospital” to another Captain. In May 2011, VVAC moved into a new building.

VVAC asserts that shortly after moving into the new building, Moore found computer files related to VVMS on the Captains’ computer and that these files were not the same files she found in January 2011. VVAC asserts that Moore decided to terminate Plaintiff’s employment upon that discovery. During that same time, Moore learned that Plaintiff had been telling co-workers that he was going to sue VVAC if he fell down the stairs due to an alleged disability. Moore discussed this issue with Plaintiff on May 16, 2011 and he advised her that he was disabled as a result of his leg injury and that he needed a first-floor bedroom.

Moore consulted with Muma about Plaintiff’s employment. Moore told Muma that Plaintiff claimed to have a disability. Muma advised Moore that they should send Plaintiff to a physician to determine if he was disabled before proceeding with termination proceedings. Muma stated that he concluded that Moore had already decided to terminate Plaintiff when she met with Muma in May 2011.

On May 30, 2011, after meeting with Muma, Moore sent Plaintiff to Scott D. Bingham, D.O., at Verde Valley Urgent Care to determine whether Plaintiff was qualified to engage in his work duties. Dr. Bingham noted that Plaintiff had good motor function in both legs, did not display any difficulty or a limp walking, and he had no difficulty stepping onto a stool with either leg. Dr. Bingham opined that Plaintiff could perform the functions of his job. On June 1, 2011, Dr. Bingham sent VVAC a letter reporting his May 30, 2011 examination. The letter stated that Plaintiff had been in an accident in 2000 but was currently in “good physical condition” and could “perform his current job with no limitations.”

After Moore received Dr. Bingham’s letter, she terminated Plaintiff on June 1, 2011. VVAC asserts that it terminated Plaintiff based on Moore’s discovery of VVMS documents on a VVAC computer in May 2011, Plaintiff’s past disciplinary issues, and dissension caused by Plaintiff’s threats to fall down the stairs and sue VVAC.

....

V. Plaintiff’s GINA Claim

A. Plaintiff’s Examination at Verde Valley Urgent Care

On May 30, 2011, Moore sent Plaintiff to Scott D. Bingham, D.O., at Verde Valley Urgent Care to determine whether Plaintiff was qualified to engage in his work duties. As part of that examination, Plaintiff completed a “Health and Occupational History and Physical Exam.” The form included a table labeled “family history,” that listed various diseases with a place for the

patient to indicate “yes” or “no” for each disease, and then a place to indicate the affected family member. On the line listing “cancer,” Plaintiff placed a check mark in the “yes” column and then wrote “grandpa.”

Dr. Bingham testified in his deposition that the “Health and Occupational History and Physical Exam” form, which included information about family history, “would never have been made available to employers” and instead would have stayed with his clinic. He further testified that the only information sent to an employer after a “fitness-to-work” exam would be a letter stating whether the employee could perform job duties. Moore states that after Plaintiff filed a charge of discrimination with the EEOC, she contacted Verde Valley Urgent Care and requested a copy of Dr. Bingham’s June 1, 2011 letter. In response, she received documentation that included Plaintiff’s family history, which she had not requested or expected, and which Verde Valley Urgent Care had never previously provided for any VVAC employees.

Plaintiff alleges that VVAC violated GINA by requiring him to disclose “genetic information” in his family medical history during his examination at Verde Valley Urgent Care. Plaintiff asserts that the required disclosure of such information was “part of Verde Valley Urgent Care’s practice at the time.”

In response, VVAC argues that it did not violate GINA because, without its knowledge or instruction, Dr. Bingham used a standard form to obtain Plaintiff’s family medical history and “inadvertently” provided that information to VVAC after Plaintiff’s termination. (Doc. 40 at 15.) It also argues that Dr. Bingham and Verde Valley Urgent Care were independent contractors and not employees of VVAC, and were not “employers” under GINA. (Doc. 49 at 14.) Both parties have moved for summary judgment on Plaintiff’s GINA claim (Count 7). (Docs. 37 at 16; Doc. 40 at 14)

B. Acquiring “Genetic Information” under GINA

Under GINA, it is unlawful for an employer to discriminate against an employee on the basis of genetic information, to use genetic information in making employment decisions, or to “request, require, or purchase” genetic information from an employee. 42 U.S.C. § 2000ff1 (a) and (b). VVAC asserts that there is no evidence that it discriminated against Plaintiff because of genetic information or that it used genetic information in making employment decisions. (Doc. 49 at 14.) Plaintiff does not allege that VVAC violated GINA in this manner.²⁰ (See Doc. 1.)

Instead, it appears that Plaintiff is alleging that VVAC violated GINA by requesting, requiring, or purchasing genetic information. See 42 U.S.C. § 2000ff–1(b) (“It shall be an unlawful employment practice for an employer to request, require, or purchase genetic information with respect to an employee or family member of the employee.”) The EEOC regulations interpreting GINA refer to requesting, requiring, or purchasing genetic information as “acquisition” of genetic information, which includes an employer “making requests for information about an

individual's current health status in a way that is likely to result in a covered entity obtaining genetic information." 29 C.F.R. § 1635.8(a).

The regulations also provide that "the general prohibition against requesting, requiring, or purchasing genetic information does not apply: ... [w]here a covered entity inadvertently requests or requires genetic information of the individual or family member of the individual." 29 C.F.R. § 1635.9(b)(1). However, the acquisition of genetic information "will not generally be considered inadvertent" unless the covered entity directed the health care provider not to provide genetic information. 29 C.F.R. § 1635.8(b)(1)(i)(A). The regulations further explain that the failure to provide this direction:

will not prevent [the covered entity] from establishing that a particular receipt of genetic information was inadvertent if its request for medical information was not 'likely to result in a covered entity obtaining genetic information' (for example, where an overly broad response is received in response to a tailored request for medical information.)
29 C.F.R. § 1635.8(b)(1)(i)(C).

In response to Plaintiff's motion for summary judgment, and in its motion for summary judgment, VVAC argues that its acquisition of any genetic information was "inadvertent" and, therefore, it has no liability under GINA. Although VVAC cites the regulations addressing inadvertent acquisition, it does not explain how these regulations apply to its acquisition of information from Verde Valley Urgent Care. Similarly, Plaintiff cites these regulations, but does not acknowledge that the regulations exclude the inadvertent acquisition of genetic information, and excuse the requirement for a covered entity to direct a health care provider not to provide genetic information if the covered entity's request for information was not likely to result in obtaining genetic information, such as when there was a narrowly tailored request for information.

Instead, Plaintiff argues that VVAC violated GINA by failing to direct Verde Valley Urgent Care "not to disclose any such genetic information" to VVAC. To support this claim, Plaintiff cites 29 C.F.R. § 1635.8(d), which provides that the "prohibition on acquisition of genetic information, including family medical history, applies to medical examinations related to employment." That section further provides that

[a] covered entity **must tell health care providers not to collect genetic information**, including family medical history, as part of a medical examination intended to determine the ability to perform a job, and **must take additional reasonable measures within its control if it learns that genetic information is being requested or required**. Such reasonable measures may depend on the facts and circumstances under which a request for genetic information was made, and may include no longer using the services of a health care professional who continues to request or require genetic information during medical examinations after being informed not to do so.

Id. (emphasis added by Court).

Although Plaintiff cites the applicable regulation, C.F.R. § 1635.8(d), he does not discuss the elements of a GINA claim based on a violation of that regulation, does not cite any authority, aside from the regulation, to support his claim that VVAC violated that regulation by failing to direct Verde Valley Urgent Care not to disclose Plaintiff's genetic information to it, and does not specifically explain the relief he seeks for the alleged violation of that regulation.

In sum, Plaintiff's summary judgment briefing does not include any substantive discussion supporting entitlement to summary judgment based on VVAC's alleged violation of 29 C.F.R. § 1356.8(d). See *Sanchez v. Miller*, 792 F.2d 694, 703 (7th Cir.1986) ("It is not the obligation of this court to research and construct the legal arguments open to parties, especially when they are represented by counsel."); *Marco Realini v. Contship Containerlines, Ltd.*, 143 F.Supp.2d 1337, 1343 (S.D.Fla.1999) (denying summary judgment when parties had failed to adequately brief the issues).

Accordingly, the Court denies Plaintiff's motion for summary judgment on his claim that VVAC violated GINA by failing to instruct "Bingham not to provide [Plaintiff's] genetic information," as required by C.F.R. § 1635.8(d). See *Healix Infusion Therapy, Inc. v. Helix Health LLC*, 737 F.Supp.2d 648, 658 (S.D.Tex.2010) (denying the plaintiff's motion for summary judgment for failure to include any substantive discussion or proof supporting entitlement to a permanent injunction or specific performance).

Similarly, the Court denies VVAC's motion for summary judgment because it has failed to show that it is entitled to judgment as a matter of law on this claim. See *Sanchez*, 792 F.2d at 703; *Marco Realini*, 143 F.Supp.2d at 1343. VVAC makes a conclusory argument that the requirements contained in C.F.R. § 1635.8(d) exceeded the EEOC's rule-making authority, but does not provide any analysis of relevant legal authority to support that assertion or to support its claim that it is entitled to summary judgment on that basis. (Doc. 49 at 15.)

C. GINA's Definition of "Genetic Information"

In their motions, the parties do not address whether the information that VVAC received from Verde Valley Urgent Care is "genetic information," as defined in GINA. The information at issue is Plaintiff's notation on his family medical history that a "grandpa" had "cancer." There is no other family medical information included in the "Health and Occupational History and Physical Exam" form that Plaintiff completed for the Verde Valley Urgent Care examination.

"Genetic information" is defined under GINA as information about (1) an individual's genetic tests; (2) the genetic tests of family members of an individual; or (3) the manifestation of a disease or disorder in family members of an individual. 42 U.S.C. § 2000ff(4). The regulations issued by the EEOC clarify that the phrase "manifestation of a disease or disorder in family

members” refers to an employee’s “family medical history,” interpreted in accordance with its normal understanding as used by medical providers. 29 C.F.R. § 1635.3(c)(iii).

GINA is intended to prohibit employers from making a “predictive assessment concerning an individual’s propensity to get an inheritable genetic disease or disorder based on the occurrence of an inheritable disease or disorder in [a] family member.” *Poore v. Peterbilt of Bristol, LLC*, 852 F.Supp.2d 727, 730 (W.D.Va.2012) (quoting H.R.Rep. No. 110–28, pt. 3, at 70 (2007), 2008 U.S.C.C.A.N. 112, 141).

Family medical history was included in the definition of “genetic information” because Congress understood that employers could potentially use family medical history as a “surrogate for genetic traits.” *Poore*, 852 F.Supp.2d at 730 (quoting H.R.Rep. No. 110–28, pt. 1, at 36 (2007), 2008 U.S.C.C.A.N. 66, 80). However, “the fact that an individual family member has been diagnosed with a disease or disorder is not considered ‘genetic information’ if ‘such information is taken into account only with respect to the individual in which such disease or disorder occurs and not as genetic information with respect to any other individual.’” *Poore*, 852 F.Supp.2d at 731 (quoting H.R.Rep. No. 110–28, pt. 2, at 27 (2007), 2008 U.S.C.C.A.N. 101, 105; Regulations Under the Genetic Information Nondiscrimination Act of 2008, 75 Fed.Reg. 68,917 (Nov. 9, 2010)).

Here, although the “Health and Occupational History and Physical Exam” form requested family medical history, there is nothing in the record that suggests that this information was “taken into account” with respect to Plaintiff. Plaintiff alleged disability based on an injury, not a “manifestation of a disease or disorder,” and Dr. Bingham’s contemporaneous notes state that Plaintiff’s family history is “unremarkable.”

Plaintiff does not argue that any information from his family medical history was considered or used in any manner as part of his examination or for any employment decision. Instead, he simply argues for strict liability any time an employer receives information about an employee’s family medical history. Because the parties have not addressed this issue, and because it appears from the record that there is a genuine issue of fact whether the information VVAC received from Verde Valley Urgent Care is “genetic information,” the Court denies both motions for summary judgment on Plaintiff’s GINA claims.

D. Definition of an Employer under GINA

Finally, Plaintiff alleges that VVAC was an employer under GINA and that it violated GINA by requiring Plaintiff to disclose family medical history pursuant to its “policy or practice regarding medical examinations” that required employees to disclose family history. (Doc. 1 at 10.) In its motion for summary judgment, VVAC asserts that it did not request Dr. Bingham to collect Plaintiff’s genetic information and that Verde Valley Urgent Care is an independent contractor and not an employer under GINA. (Doc. 40 at 14–15.) GINA defines an employer as a person

employing a sufficient number of employees, and “any agent of such a person.” 42 U.S.C. § 2000ff(2)(B)(i) (adopting the definition of employer in Title VII, 42 U.S.C. § 2000e(b)); 42 U.S.C. § 2000e(b)

In his reply in support of his motion for summary judgment, Plaintiff, for the first time, asserts that VVAC is liable for a GINA violation under an agency theory. Specifically, Plaintiff argues that Verde Valley Urgent Care was an agent of VVAC and, therefore, an employer under GINA. (Doc. 52 at 11.) In support of that argument, Plaintiff asserts that Verde Valley Urgent Care was VVAC’s agent because “Verde Valley Urgent Care performed fit-to-work physicals on [VVAC] employees—during which it requested family medical history—and then advised [VVAC] if employees could perform the essential functions of their job.”

Plaintiff, however, does not address the elements of his GINA claim, and does not cite any authority addressing the definition of “agent” as used in § 2000e(b), and incorporated in GINA. In short, Plaintiff’s summary judgment briefing fails to include any substantive discussion supporting entitlement to relief based on a GINA violation premised on its theory that Verde Valley Urgent Care was VVAC’s agent. As the moving party, Plaintiff “bears the initial responsibility of informing the district court of the basis for [his] motion, and identifying those portions of the [record, including pleadings, discovery materials and affidavits], which it believes demonstrate the absence of a genuine [dispute] of material fact.” *Celotex Corp.*, 477 U.S. at 323. Because Plaintiff has not met his initial burden, the Court denies Plaintiff’s motion for summary judgment on his claim that VVAC is liable for Verde Valley Urgent Care’s acquisition of Plaintiff’s genetic information because Verde Valley Urgent Care was its agent. See *Sanchez*, 792 F.2d at 703; *Marco Realini*, 143 F.Supp.2d at 1343.

The Court also denies VVAC’s motion for summary judgment on the GINA claim based on its assertion that a “private physician” is not an employer under GINA. (Doc. 40 at 15.) Although VVAC asserts that GINA does not apply because it did not request genetic information, and because Verde Valley Urgent Care or Dr. Bingham are not employers under GINA, it does not address GINA’s definition of an employer, which includes an employer’s agent, does not address the elements to establish a claim under GINA, or explain why it is entitled judgment as a matter of law on Plaintiff’s GINA claim. See *Sanchez*, 792 F.2d at 703; *Marco Realini*, 143 F.Supp.2d at 1343.

Accordingly, the Court denies both Plaintiff’s and Defendant’s motions for summary judgment on Plaintiff’s GINA claims.

VI. Punitive Damages

The complaint generally seeks “punitive damages,” without specifying on which counts of the complaint Plaintiff seeks such damages or citing any particular statute in support of that request. (Doc. 1 at 10.) Defendant requests summary judgment on Plaintiff’s claim for punitive damages.

(Doc. 40 at 16.) Defendant states that punitive damages are recoverable under the ADA, the Rehabilitation Act, and GINA, and that those damages are governed by 42 U.S.C. § 1981a(b). (Doc. 40 at 16.) The statute allows for punitive damages in cases in which the defendant has engaged in discriminatory acts “with malice or with reckless indifference” to the rights of the plaintiff. 42 U.S.C. § 1981a(b)(1). Defendant argues that Plaintiff has not presented any evidence of malice or reckless indifference. (Doc. 40 at 16 (citing *Kolstad v. Amer. Dental Ass’n.*, 527 U.S. 526, 119 S.Ct. 2118, 144 L.Ed.2d 494).)

In *Kolstad*, the Supreme Court explained that in § 1981a “Congress plainly sought to impose two standards of liability—one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for an award of punitive damages.” 527 U.S. at 534. Thus, for an award of punitive damages, an “employer must act with ‘malice or reckless indifference to the [plaintiff’s] federally protected rights.’” *Id.* at 535 (quoting 42 U.S.C. § 1981a(b)(1)) (alteration and emphasis in original).

The Court further explained that the terms “malice” and “reckless indifference” pertain to “the employer’s knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination.” *Id.* at 535. Therefore, under this standard, “an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages.” *Id.* at 536.

Plaintiff does not dispute that to support his claim for punitive damages he must establish that Defendant acted with “malice or reckless indifference” to his rights. Indeed, Plaintiff cites cases applying this standard from *Kolstad*. (*Id.*) Instead, Plaintiff argues that punitive damages are appropriate because Moore “had attended more training than any other employee at Verde Valley and that Moore had provided ADA training to other Verde Valley employees.” To support this assertion, Plaintiff cites Moore’s deposition testimony in which she states that she attended seminars at which the ADA was discussed, and that she provided some training to other VVAC employees by “talking with them” and directing them to resources on a website. (*Id.* at 21). She also testified that she learned “most of [her] stuff about the [ADA]” at an EMS management training course at which they discussed the ADA for “a half an hour to an hour.” (*Id.* at 16–17.) She also testified that she did not know of the ADAAA (*Id.* at 18) or the Rehabilitation Act.

Moore’s testimony that she had received some training on the ADA and that she provided some ADA training to other VVAC employees may show that she “knew of or [was] familiar with antidiscrimination laws,” *EEOC v. Autozone, Inc.*, 707 F.3d 824, 835 (7th Cir.2012), but it does not establish that when she terminated Plaintiff she acted “in the face of a perceived risk that [her] actions [would] violate federal law.” See *Koldstad*, 527 U.S. at 536. Plaintiff does not argue that any other evidence supports his claim for punitive damages.

This evidence is not sufficient to establish that Defendant acted with “malice” or “reckless indifference” to Plaintiff’s rights. If accepted, Plaintiff’s argument that knowledge of

antidiscrimination laws is sufficient to establish a claim for punitive damages “would reduce the incentive for employers to implement antidiscrimination programs [and would] likely exacerbate concerns among employers that § 1981a’s ‘malice’ and ‘reckless indifference’ standard penalizes those employers who educate themselves and their employees on [antidiscrimination law].” Kolstad, 527 U.S. at 544 (discussing an employer’s vicarious liability for punitive damages).

As the Court explained, “[d]issuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII. The statute’s ‘primary objective’ is ‘a prophylactic one,’ it aims, chiefly, ‘not to provide redress but to avoid harm.’” Id. at 545 (citations omitted.) Thus, authorizing punitive damages in this case based on Moore’s testimony that she had some training on antidiscrimination laws, and provided some training to other VVAC employees, would undermine the policies underlying § 1981a.

Therefore, the Court finds that punitive damages are not authorized under § 1981a(b)(1), and Defendant is entitled to judgment as a matter of law on Plaintiff’s demand for punitive damages.

Friedman v. Southern Cal. Permanente Medical Group
102 Cal.App.4th 39 (Cal. App. 2002)

I. INTRODUCTION

Jerold Daniel Friedman (plaintiff) appeals from a judgment entered after the general demurrers of Southern California Permanente Medical Group, Kaiser Foundation Hospitals, and Kaiser Foundation Health Plan, Inc. (defendants) were sustained without leave to amend. In the published portion of this opinion, we resolve the question of whether veganism is a “religious creed” within the meaning of the California Fair Employment and Housing Act (FEHA), Government Code section 12940. We conclude veganism is not a “religious creed” within the meaning of the FEHA. Accordingly, we affirm the judgment.

B. The Complaint’s Allegations of Religious Creed Discrimination

. . . . The trial court concluded veganism was not a religious creed within the meaning of the FEHA. In his original complaint, plaintiff alleged as follows. He is a strict vegan. Further, he alleged:

“As a strict Vegan, [plaintiff] fervently believes that all living beings must be valued equally and that it is immoral and unethical for humans to kill and exploit animals, even for food, clothing and the testing of product safety for humans, and that such use is a violation of natural law and the personal religious tenets on which [plaintiff] bases his

foundational creeds. He lives each aspect of his life in accordance with this system of spiritual beliefs. As a Vegan, and his beliefs [sic], [plaintiff] cannot eat meat, dairy, eggs, honey or any other food which contains ingredients derived from animals. Additionally, [plaintiff] cannot wear leather, silk or any other material which comes from animals, and cannot use any products such as household cleansers, soap or toothpaste which have been tested for human safety on animals or derive any of their ingredients from animals. This belief system[] guides the way that he lives his life. [Plaintiff's] beliefs are spiritual in nature and set a course for his entire way of life; he would disregard elementary self-interest in preference to transgressing these tenets. [Plaintiff] holds these beliefs with the strength of traditional religious views, and has lived in accordance with his beliefs for over nine (9) years. As an example of the religious conviction that [plaintiff] holds in his Vegan beliefs, [plaintiff] has even been arrested for civil disobedience actions at animal rights demonstrations. This Vegan belief system guides the way that [plaintiff] lives his life. These are sincere and meaningful beliefs which occupy a place in [plaintiff's] life parallel to that filled by God in traditionally religious individuals adhering to the Christian, Jewish or Muslim Faiths.”

Plaintiff was hired by a temporary agency to work for defendants as a computer contractor. He worked at a pharmaceutical warehouse owned by defendants. He had no contact with any of defendants' patients. Plaintiff alleged it was not anticipated that he ever would have contact with any of defendants' patients. Defendants offered plaintiff a permanent position with Kaiser. A written contract was prepared. Subsequently, however, plaintiff was advised “that to finish the process of becoming an employee he would need [a] mumps vaccine.” Plaintiff could not be vaccinated with the mumps vaccine because it is grown in chicken embryos. To be vaccinated, it was alleged, “would violate [plaintiff's] system of beliefs and would be considered immoral by [him].” When plaintiff refused to be vaccinated with the mumps vaccine, defendants withdrew the employment offer.

C. The FEHA and Differing Definitions of Religion

1. The FEHA

The elements of a religious creed discrimination claim are that: the plaintiff had a bona fide religious belief; the employer was aware of that belief; and the belief conflicted with an employment requirement.

With respect to the first element, possession of a bona fide religious belief, section 12940, subdivision (a) states in part: “It shall be an unlawful employment practice ... [¶] (a) For an employer, because of the ... religious creed ... of any person, to refuse to hire or employ the person ... or to bar or to discharge the person from employment ... or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.”

Further, section 12940, subdivision (1), states in part: “It shall be an unlawful employment practice ... [¶] ... [¶] (1) For an employer ... to refuse to hire or employ a person ... because of a conflict between the person’s religious belief or observance and any employment requirement, unless the employer ... demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance ..., but is unable to reasonably accommodate the religious belief or observance without undue hardship...”

Definition of the terms “religious belief or observance” and “religious creed” are provided in a statute and in a regulation. Section 12940, subdivision (1) defines religious belief as follows:

“Religious belief or observance, as used in [section 12940], includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance.”

Further description of the scope of the religious belief protection in the FEHA is found in section 12926, subdivision (o), which states: “As used in this part in connection with unlawful practices, unless a different meaning clearly appears from the context: [¶] ... [¶] (o) ‘Religious creed,’ ‘religion,’ ‘religious observance,’ ‘religious belief,’ and ‘creed’ include all aspects of religious belief, observance, and practice.”

The administrative agency charged with enforcing the FEHA, the Fair Employment and Housing Commission, has also enacted a regulation defining “religious creed.” California Code of Regulations, title 2, section 7293.1 (regulation 7293.1), defines “religious creed” as follows: **“‘Religious creed’ includes any traditionally recognized religion as well as beliefs, observations, or practices which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions.”**

Consistent with regulation 7293.1, plaintiff argues that his commitment to a vegan lifestyle occupies a place in his life parallel to that of traditionally recognized religions. Regulation 7293.1, by its express terms, reflects the notion that religious creed extends beyond traditionally recognized religions to encompass beliefs, observations, or practices occupying a parallel place of importance “to that of traditionally recognized religions” in an individual’s life. As will be discussed later, that concept of religion originates from two United States Supreme Court cases involving conscientious objection to military service— United States v. Seeger (1965) 380 U.S. 163, 164–188, 85 S.Ct. 850, 13 L.Ed.2d 733, and Welsh v. United States (1970) 398 U.S. 333, 335–344, 90 S.Ct. 1792, 26 L.Ed.2d 308.

2. California Decisional Authority

We have not found any Department of Fair Employment and Housing decision or any California judicial authority construing “religious creed” within the meaning of the FEHA or regulation 7293.1. But California courts have grappled with the question of what constitutes a religion in

other contexts. We discuss several of those decisions.

In *Smith v. Fair Employment & Housing Com.* (1996) 12 Cal.4th 1143, the California Supreme Court, in a plurality opinion authored by Associate Justice Kathryn Mickle Werdegar, observed that a religious belief is something other than “a philosophy or a way of life.” Justice Werdegar further noted, “[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.’

In a frequently cited opinion, *Fellowship of Humanity v. Co. Alameda* (1957), the Court of Appeal, in an opinion authored by then Presiding Justice Raymond Peters, discussed at length the meaning of “religious worship” in a property tax exemption case. Presiding Justice Peters observed:

“[T]here are forms of belief generally and commonly accepted as religions and whose adherents ... practice what is commonly accepted as religious worship, which do not include or require as essential the belief in a deity. Taoism, classic Buddhism, and Confucianism, are among these religions.”

Presiding Justice Peters found that dictionary definitions, decisional authority, and the views of scholars were not particularly helpful in resolving the issue before the court. Presiding Justice Peters then reasoned:

“[T]he only [proper] inquiry ... is the objective one of whether or not the belief occupies the same place in the lives of its holders that the orthodox beliefs occupy in the lives of believing majorities, and whether a given group that claims the exemption conducts itself the way groups conceded to be religious conduct themselves. The content of the belief, under such test, is not a matter of governmental concern. Under this test the belief or nonbelief in a Supreme Being is a false factor. The only way the state can determine the existence or nonexistence of ‘religious worship’ is to approach the problem objectively. It is not permitted to test validity of, or to compare beliefs. This simply means that ‘religion’ fills a void that exists in the lives of most men. Regardless of why a particular belief suffices, as long as it serves this purpose, it must be accorded the same status of an orthodox religious belief.”

Presiding Justice Peters concluded:

“[T]he proper interpretation of the terms ‘religion’ or ‘religious’ in tax exemption laws should not include any reference to whether the beliefs involved are theistic or nontheistic. Religion simply includes: (1) a belief, not necessarily referring to supernatural powers; (2) a cult, involving a gregarious association openly expressing the belief; (3) a system of moral practice directly resulting from an adherence to the belief; and (4) an organization within the cult designed to observe the tenets of

belief.”

In *Young Life Campaign v. Patino* (1981) 122 Cal.App.3d 559, 561, 176 Cal.Rptr. 23, the Court of Appeal for the Third Appellate District considered whether an organization was a “church” within the meaning of the Unemployment Insurance Code. The court adopted an approach used by the Internal Revenue Service to determine what is a “church,” which the Court of Appeal described as follows:

“Rather than defining ‘church,’ the IRS admits its inability to formulate a definition, and applies criteria derived from the forms and practices observed in recognized churches, without giving controlling weight to any. [Citation.]” (Id. at pp. 574–575, 176 Cal.Rptr. 23, fn. omitted.) The criteria for defining a church applied by the Internal Revenue Service were set forth in a footnote and included: “(1) a distinct legal existence, (2) a recognized creed and form of worship, (3) a definite and distinct ecclesiastical government, (4) a formal code of doctrine and discipline, (5) a distinct religious history, (6) a membership not associated with any other church or denomination, (7) a complete organization of ordained ministers ministering to their congregants, (8) ordained ministers selected after completing prescribed courses of study, (9) a literature of its own, (10) established places of worship, (11) regular congregations, (12) regular religious services, (13) Sunday schools for the religious instruction of the young, (14) schools for the preparation of its ministers.”

These California decisions point away from a strictly theistic definition of religion. A belief in a Supreme Being is not required. Among the factors to be considered are whether the belief system occupies in a person’s life a place parallel to that of God in recognized religions and whether it addresses ultimate concerns thereby filling a void in the individual’s life. Notably, in considering the concept of religion, California courts have consistently looked to federal authority. In accordance with that practice, we turn to federal decisions defining religion in varying constitutional, statutory, and regulatory contexts.

3. United States Supreme Court Cases

a. The original theistic view of religion and the development of a broader perspective

Historically, the United States Supreme Court at first adopted a theistic definition of religion. In the nineteenth century, for example, in *Davis v. Beason*, supra, 133 U.S. at page 342, 10 S.Ct. 299, the court stated: “The term ‘religion’ has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.” (See also *United States v. Macintosh* (1931) 283 U.S. 605, 633–634, 51 S.Ct. 570, 75 L.Ed. 1302 [dis. opn. of Hughes, C.J.], overruled, *Girouard v. United States* (1946) 328 U.S. 61, 69, 66 S.Ct. 826, 90 L.Ed. 1084.)

Later, however, the United States Supreme Court took a more expansive view of religion. In *Torcaso v. Watkins* (1961) 367 U.S. 488, 495, 81 S.Ct. 1680, 6 L.Ed.2d 982, for example, the court noted that neither a state nor the federal government can constitutionally “aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.” In a footnote the court observed, “Among religions in this country which do not teach what would generally be considered a belief in the existence of God are **Buddhism, Taoism, Ethical Culture, Secular Humanism and others.**” (Id. at p. 495, fn. 11, 81 S.Ct. 1680.) [Torcaso, an atheist, refused to take an oath to declare his belief in God as a condition for a state license as a notary.]

b. *United States v. Seeger*

In *Seeger*, the court concluded Congress intended that to qualify as a conscientious objector, a person needed only to “**have a conviction based upon religious training and belief....**” (*United States v. Seeger*, supra, 380 U.S. at p. 176, 85 S.Ct. 850.) The court construed that phrase as follows: “Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: **A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.**” The Supreme Court concluded, “This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets.”

In *Seeger*, the court held that a potential draftee who could not definitively declare that he believed in a Supreme Being, but who strongly concluded, with the strength of a more traditional religious conviction, that killing in war was wrong, immoral, and unethical, qualified as a conscientious objector. The court stated: “In summary, Seeger professed ‘religious belief’ and ‘religious faith.’ He did not disavow any belief ‘in a relation to a Supreme Being’; indeed he stated that ‘the cosmic order does, perhaps, suggest a creative intelligence.’ He decried the tremendous ‘spiritual’ price man must pay for his willingness to destroy human life. In light of his beliefs and the unquestioned sincerity with which he held them, we think the Board, had it applied the test we propose today, would have granted him the exemption. **We think it clear that the beliefs which prompted his objection occupy the same place in his life as the belief in a traditional deity hold in the lives of his friends, the Quakers.**”

c. *Welsh v. United States*

Section 6(j) of the Universal Military Training and Service Act was again discussed by the United States Supreme Court in 1970, in *Welsh v. United States*, supra, 398 U.S. at pages 338–344, 90 S.Ct. 1792. The *Welsh* court elaborated on *Seeger* as follows: “The [*Seeger*] Court’s

principal statement of its test for determining whether a conscientious objector's beliefs are religious within the meaning of [section] 6(j) was as follows: 'The test might be stated in these words: **A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.**' 380 U.S., at 176, 85 S.Ct. 850[].[¶]

Most of the great religions of today and of the past have embodied the idea of a Supreme Being or a Supreme Reality—a God—who communicates to man in some way a consciousness of what is right and should be done, of what is wrong and therefore should be shunned. If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by ... God' in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a 'religious' conscientious objector exemption under [section] 6(j) as is someone who derives his conscientious opposition to war from traditional religious convictions." (Welsh v. United States, supra, 398 U.S. at pp. 339–340, 90 S.Ct. 1792.)

In Welsh, the United States Supreme Court also discussed the federal statute's exclusion of persons with "essentially political, sociological, or philosophical views or a merely personal moral code" from conscientious objector status. (Welsh v. United States, supra, 398 U.S. at pp. 342–343, 90 S.Ct. 1792.) The court held:

"We certainly do not think that [section] 6(j)'s exclusion ... should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy. The two groups of registrants that obviously do fall within these exclusions from the exemption are those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency." (Ibid.) The court concluded that section 6(j) **"exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."**

The United States Supreme Court reversed the judgment convicting the defendant of refusing to submit to induction into the military. (Welsh v. United States, supra, 398 U.S. at p. 344, 90 S.Ct. 1792.) The defendant in Welsh, like the one in Seeger, could not definitively affirm or deny a belief in a Supreme Being. The defendant in Welsh, like the potential draftee in Seeger, preferred to leave that question open.

But, as the United States Supreme Court explained: "[B]oth Seeger and Welsh affirmed on [their] applications [for conscientious objector status] that they held deep conscientious

scruples against taking part in wars where people were killed. Both strongly believed that killing in war was wrong, unethical, and immoral, and their consciences forbade them to take part in such an evil practice. Their objection to participating in war in any form could not be said to come from a ‘still, small voice of conscience’; rather, for them that voice was so loud and insistent that both men preferred to go to jail rather than serve in the Armed Forces. There was never any question about the sincerity and depth of Seeger’s convictions as a conscientious objector, and the same is true of Welsh. In this regard the Court of Appeals noted, ‘[t]he government concedes that [Welsh’s] beliefs are held with the strength of more traditional religious convictions. [Citation.]’”

4. Federal Employment Discrimination Law

a. Statutory and regulatory authority

Title VII of the Civil Rights Act of 1964 (title VII) makes it unlawful for an employer to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s ... religion....” (42 U.S.C. § 2000e–2(a)(1)).

Title VII was amended in 1972 to include a definition of religion. (42 U.S.C. § 2000e(j); *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 73, 97 S.Ct. 2264, 53 L.Ed.2d 113.)

As amended, the pertinent part of title VII defines religion as follows: “The term ‘religion’ includes all aspects of religious observance and practice, as well as belief....” (42 U.S.C. § 2000e(j).) The United States Supreme Court has held, “**The intent and effect of this definition was to make it an unlawful employment practice under [Title VII] for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees.**” (*Trans World Airlines, Inc. v. Hardison*, supra, 432 U.S. at p. 74, 97 S.Ct. 2264; see *Balint v. Carson City* (9th Cir.1999) 180 F.3d 1047, 1052.)

Federal law governing “religious practices” discrimination in the employment context is drawn from the United States Supreme Court decisions in *Seeger* and *Welsh*. The applicable Equal Employment Opportunity Commission (EEOC) guideline states: “‘Religious’ nature of a practice or belief. [¶] In most cases whether or not a practice or belief is religious is not at issue.

However, in those cases in which the issue does exist, **the [Equal Employment Opportunity] Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.** This standard was developed in *United States v. Seeger*, [supra,] 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 ... and *Welsh v. United States*, [supra,] 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308.... The Commission has consistently applied this standard in its decisions. The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual

professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee....” (29 C.F.R. § 1605.1, fn. omitted.)

....

We conclude that the best way to assess whether an FEHA claimant’s “beliefs, observances, or practices” have “a place of importance parallel to that of traditionally recognized religions,” as required by regulation 7293.1, is to utilize the objective analysis enunciated by the Third, Ninth, Eighth, and Tenth Circuits in *Africa*, *Wiggins*, *Alvarado*, and *Meyers*.

Flexible application of the objective guidelines identified in those cases will enable courts and administrative agencies to make the sometimes subtle distinction between a religion and a secular belief system. As noted previously, the guidelines are: **“First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.”** (*Africa v. Com. of Pa.*, supra, 662 F.2d at p. 1032, fn. omitted.)

We consider plaintiff’s allegations in light of these three indicia. We do not question plaintiff’s allegation that his beliefs are sincerely held; it is presumed as a matter of law that they are. However, we disregard conclusory allegations, for example, that plaintiff’s beliefs “occupy a place in [his] life parallel to that filled by God in traditionally religious individuals adhering to the Christian, Jewish or Muslim Faiths.” (*Aubry v. Tri-City Hospital Dist.*, supra, 2 Cal.4th at pp. 966–967, 9 Cal.Rptr.2d 92, 831 P.2d 317; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125, 271 Cal.Rptr. 146, 793 P.2d 479.)

First, plaintiff believes “that all living beings must be valued equally and that it is immoral and unethical for humans to kill and exploit animals even for food, clothing and the testing of product safety for humans”; further, it is “a violation of natural law” to transgress this belief. There is no allegation or judicially noticeable evidence plaintiff’s belief system addresses fundamental or ultimate questions. There is no claim that veganism speaks to: the meaning of human existence; the purpose of life; theories of humankind’s nature or its place in the universe; matters of human life and death; or the exercise of faith.

There is no apparent spiritual or otherworldly component to plaintiff’s beliefs. Rather, plaintiff alleges a moral and ethical creed limited to the single subject of highly valuing animal life and ordering one’s life based on that perspective. While veganism compels plaintiff to live in accord with strict dictates of behavior, it reflects a moral and secular, rather than religious, philosophy. (*Africa v. Com. of Pa.*, supra, 662 F.2d at p. 1033; *Carpenter v. Wilkinson* (N.D.Ohio 1996) 946 F.Supp. 522, 526.)

Second, while plaintiff’s belief system governs his behavior in wide-ranging respects, including the food he eats, the clothes he wears, and the products he uses, it is not

sufficiently comprehensive in nature to fall within the provisions of regulation 7293.1.

Plaintiff does not assert that his belief system derives from a power or being or faith to which all else is subordinate or upon which all else depends. (United States v. Seeger, supra, 380 U.S. at p. 176, 85 S.Ct. 850; Africa v. Com. of Pa., supra, 662 F.2d at p. 1031.)

Third, though not determinative, no formal or external signs of a religion are present.

There are no: teachers or leaders; services or ceremonies; structure or organization; orders of worship or articles of faith; or holidays. (Alvarado v. City of San Jose, supra, 94 F.3d at p. 1230; Africa v. Com. of Pa., supra, 662 F.2d at pp. 1035–1036.)

Absent a broader, more comprehensive scope, extending to ultimate questions, it cannot be said that plaintiff's veganism falls within the scope of regulation 7293.1.

Rather, plaintiff's veganism is a personal philosophy, albeit shared by many others, and a way of life.

Therefore, plaintiff's veganism is not a religious creed within the meaning of the FEHA.

III. DISPOSITION

The judgment is affirmed. Defendants, Southern California Permanente Medical Group, Kaiser Foundation Hospitals, and Kaiser Foundation Health Plan, Inc., are to recover their costs on appeal from plaintiff, Jerold Daniel Friedman.

We concur: GRIGNON and ARMSTRONG, JJ.

Lewis v. United Parcel Service, Inc., 2005 WL 2596448 (N.D.Cal. 2005)

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANT

ALSUP, J.

INTRODUCTION

In this diversity-removal action, defendant United Parcel Service, Inc., moves for summary judgment on all plaintiff claims. The motion is Granted.

STATEMENT

Plaintiff Paul Lewis drove a UPS delivery truck. He went out on workers' compensation in September 2002. With the exception of two brief periods, he has remained on workers' compensation since. During his most recent stint of work, a labor manager, Mike Mullan, met

with Lewis and Eduardo Nuño, another manager. During the meeting, Mullan threatened to fire Lewis unless he trimmed his dreadlocks. The dreadlocks, tucked under a UPS cap, forced it to bulge out.

About the same time, various unnamed UPS managers told Lewis that he “wasn’t man enough to do the job.” Another employee told him that the job was “probably too much” for him. Nuño told Lewis that he “was not the right person for the job.” Mullan told Lewis that he was faking his injuries and did not want to work.

After the meeting, Lewis told UPS for the first time that he wore dreadlocks because of a religious belief. God instructed Lewis in a dream, Lewis now states, to grow dreadlocks so as to embody the values held by Jesus. The Book of Revelations, he states, described Jesus as wearing his hair like “wool.”

Lewis made known his religious viewpoint to UPS via a request for religious accommodation. This was submitted after the meeting in March 2004. About that time, however, Lewis left again on workers’ compensation. He remains on workers’ compensation. He has not been fired. He has not trimmed his dreadlocks. UPS states that if and when Lewis advises that he is ready and willing to return to work, UPS stands ready and willing to engage in an interactive process to try to reach a religious accommodation over his dreadlocks.

The foregoing is the view of the summary-judgment evidence most favorable to plaintiff. All claims are based on state law. Subject-matter jurisdiction is based on diversity-removal jurisdiction.

ANALYSIS

A. Adverse Employment Action.

Under California law, an adverse employment action may be an “ultimate employment action” such as termination or demotion. It may also be anything else that is “reasonably likely to adversely and materially affect an employee’s job performance or opportunity for advancement in his or her career.” On the other hand, “a mere offensive utterance or even a pattern of social slights” is not sufficiently adverse to satisfy this element. If the action does no more than “anger or upset an employee,” the claim must fail.

A mere threat of termination is not an adverse employment action. *Nunez v. City of L.A.*, 147 F.3d 867, 875 (9th Cir.1998). A threat combined with a systematic pattern of other negative treatment, however, may rise to the level of an adverse employment action. *Yanowitz*, 32 Cal.Rptr.3d at 459-60, 116 P.3d 1123.

The Ninth Circuit has found that a similarly “wide array of disadvantageous changes in the

workplace constitute adverse employment actions.” *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir.2000). It has found, for example, the following employment actions to be adverse:

- “[t]ransfers of job duties and undeserved performance ratings,” *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir.1987) (Title VII national-origin discrimination); see also *Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1286 (9th Cir.2001) (negative performance evaluations; FEHA and federal-law race, sex, national-origin and disability discrimination);
- dissemination of an unfavorable job reference, *Hashimoto v. Dalton*, 118 F.3d 671, 676 (9th Cir.1997) (Title VII race and gender discrimination);
- exclusion from meetings, seminars and positions that would have made the employee eligible for salary increases; denial of secretarial support; and a more burdensome work schedule, *Strothers v. S. Cal. Permanente Med. Group*, 79 F.3d 859, 869 (9th Cir.1996) (FEHA and federal-law race and gender discrimination); and
- elimination of a flexible start-time policy, a program to let employees meet with supervisors to discuss workplace issues, and institution of more burdensome workplace procedures, *Ray*, 217 F.3d at 1238-39 (Title VII gender discrimination).

The main adverse action was a threat to terminate Lewis if he did not conform to UPS’s “Personal Appearance Guidelines” (Lewis Dep. 18, Exh. 4). In addition, he was told that he “wasn’t man enough to do the job” by “various UPS persons, management personnel,” although Lewis did not attribute this comment to any specific person. Another UPS employee told Lewis the job was “probably too much” for him. Nuño told him that he “was not the right person for the job” (Lewis Dep. 129). Shortly before the termination threat, Mullan accused Lewis of faking his injuries (Lewis Decl. 3).FN1

In this case, a reasonable jury could find that Lewis suffered adverse employment action in the context of considering his claim of disability/medical-condition discrimination. There is evidence of more than “a mere offensive utterance or even a pattern of social slights,” due to the fact that Lewis was threatened with termination. See *Yanowitz*, 32 Cal.Rptr.3d at 454, 116 P.3d 1123. Stated in the alternative, there is evidence of more than a mere threat of termination. See *Nunez*, 147 F.3d at 875. This was not a mere reprimand for a dress code violation, unaccompanied by a threat of discharge. See *Flannery v. Trans World Airlines*, 160 F.3d 425, 427-28 (8th Cir.1998). The threat of termination and the insults Lewis suffered, when combined, are “reasonably likely to adversely and materially affect [his] job performance or opportunity for advancement in his or her career,” *Yanowitz*, 32 Cal.Rptr.3d at 454, 116 P.3d 1123.

In the instant case, a reasonable jury could find that the insults and derogatory comments related to Lewis’s physical capabilities, when combined with the threat to terminate him, constituted an adverse-employment-action element but for the issue next addressed.

B. Adverse Action Not By Reason of the Disability.

A plaintiff in a disability-discrimination claim must prove that the action was taken by reason of a disability or medical condition. Here this element cannot be satisfied. Significantly, the threat to fire concerned the dreadlocks, not any disability. When UPS threatened to fire Lewis, moreover, UPS did not yet know that Lewis wore dreadlocks for religious reasons. Therefore, the threat was innocent under the law. Since the threat would be a critical part of any “adverse employment action,” the claim fails.

A UPS poster describing the standards for male employee hair stated that it must appear “businesslike.” It did not address hair issues such as those of Lewis, whose long hair cause their caps to bulge. At some point, however, it is reasonable to assume that the mass of hair beneath such a hat would grow to such a size that most employers would consider it unprofessional in appearance. Not having any photographs of Lewis in his cap, this Court cannot determine whether Lewis’s locks reached that point. Vagueness of the policy alone, however, without something more, cannot sustain a claim that it was applied in a pretextual way to facilitate discrimination.

Overall, Lewis has not shown that there is a genuine issue of material fact that an UPS took any adverse employment action against him because of his disability or medical condition. Defendant UPS is therefore granted summary judgment on the claim for disability or medical-condition discrimination.

3. Third Claim: Religious Discrimination.

Under FEHA, it is unlawful for an employer “to bar or to discharge” a person from employment, or to discriminate against a person in the “terms, conditions, or privileges of employment” because of his or her religious creed. Cal. Gov’t Code § 12940(a). To establish religious-creed discrimination under FEHA, Lewis must show, among other things, that he had a bona fide religious belief and that the employer was aware of that belief. Of course, he must still show that some adverse job action was taken against him. Cal. Gov’t Code § 12940(a).

Lewis cites two Ninth Circuit decisions that state that a plaintiff makes out a prima facie case of Title VII religious discrimination whenever (1) he had a bona fide religious belief, the practice of which conflicted with an employment duty; (2) he informed his employer of the belief and conflict; and (3) the employer threatened him with or subjected him to discriminatory treatment, including discharge, because of his inability to fulfill the job requirements. *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir.1993) (emphasis added); *Lawson v. Wash. State Patrol*, 296 F.3d 799, 804 (9th Cir.2002). These statements were dicta. Nunez controls here.FN4

FN4. In *Heller*, the plaintiff was fired without any preceding threat, so threats had no bearing

on the court's holding. *Heller*, 8 F.3d at 1439. In *Lawson*, the Court held the plaintiff was not subject to any adverse action. The *Lawson* court also found that no threats were made against the plaintiff. *Lawson*, 296 F.3d at 805 & n. 6. In *Nunez*, the holding that the officer had suffered no adverse employment action was determinative of his First Amendment retaliation claim.

Lewis next invokes Section 12940(1), which bars employers from discriminating against a person because of a conflict between his or her religious belief and an employment requirement, unless it has explored ways of accommodating the religious practice and is unable to reasonably accommodate those beliefs.

This provision is distinct from Section 12940(a) because it makes unlawful adverse employment action taken not because of the employee's creed but rather because of a conflict between the creed and an employment requirement. Even if the employer takes an adverse action because of such a conflict, it can escape liability by showing that (1) it engaged in a good-faith attempt to reach an accommodation with the religious individual but (2) was unable to do so because the accommodation would cause undue hardship on the employer.

The analysis of whether there was an adverse employment action is identical under this provision as under 12940(a), and so is the conclusion. Again, *Nunez* controls. Lewis suffered no more than a single threat of termination because of the conflict between his dreadlocks and UPS's employee-hair policy. Furthermore, UPS did not know Lewis had a religious basis for his hair length at the time he made the reprimand threat. UPS therefore could not have made the threat due to any conflict between Lewis's religious practices and a UPS work requirement. No reasonable jury could find that Lewis has a valid religious-accommodation claim.

CONCLUSION

For the reasons stated above, defendant's motion for summary judgment is Granted with regard to all claims.

IT IS SO ORDERED.

**U.S. Equal Employment Opportunity Commission v. Consol Energy, Inc.,
__ F.3d __ (4th Cir. 2017) (2017 WL 2603976)**

Before NIEMEYER, TRAXLER, and HARRIS, Circuit Judges.

Opinion

Affirmed by published opinion. Judge Harris wrote the opinion, in which Judge Niemeyer and Judge Traxler joined.

PAMELA HARRIS, Circuit Judge:

For 37 years, Beverly R. Butcher, Jr. worked without incident as a coal miner at the Robinson Run Mine, owned by appellant Consol Energy, Inc. But when Consol implemented a biometric hand scanner to track its employees, Butcher, a devout evangelical Christian, informed his supervisors that his religious beliefs prevented him from using the system. And although Consol was providing an alternative to employees who could not use the hand scanner for non-religious reasons, it refused to accommodate Butcher's religious objection. Forced to choose between his religious commitments and his continued employment, Butcher retired under protest.

The United States Equal Employment Opportunity Commission (EEOC) sued on behalf of Butcher, alleging that Consol violated Title VII by constructively discharging Butcher instead of accommodating his religious beliefs. After trial, the jury returned a verdict in favor of the EEOC. Butcher was awarded compensatory damages and lost wages and benefits, but not punitive damages; the EEOC's evidence, the district court ruled, could not justify an award of punitive damages under the standard set out in Title VII. The district court subsequently denied Consol's post-verdict motions seeking judgment as a matter of law, a new trial, and amendment of the district court's findings regarding lost wages.

We agree with the district court that Consol is not entitled to judgment as a matter of law: The evidence presented at trial allowed the jury to conclude that Consol failed to make available to a sincere religious objector the same reasonable accommodation it offered other employees, in clear violation of Title VII. And we find no error in the host of evidentiary rulings challenged by Consol in its motion for a new trial, nor in the district court's determinations regarding lost wages and punitive damages. Accordingly, we affirm the district court judgment in all respects.

I.

A.

Butcher began work with Consol in April of 1975, and in September of 1977 started at Consol's Robinson Run Mine, in West Virginia. For almost 40 years, Butcher by all accounts was a satisfactory employee, with no record of poor performance or disciplinary problems. Butcher also is a life-long evangelical Christian. An ordained minister and associate pastor, he has served in a variety of capacities at his church: as a member of the board of trustees, as part of the church's worship team, as a youth worker, and as a participant in mission trips.

For 37 years, Butcher's employment with Consol posed no conflict with his religious conduct and beliefs. But in 2012, a change to the daily operations of the Robinson Run Mine put Butcher's religious beliefs at odds with his job. In the summer of 2012, Consol implemented a biometric hand-scanner system at the mine, in order to better monitor the attendance and work hours of its employees. The scanner system required each employee checking in or out of a shift to scan his or her right hand; the shape of the right hand was then linked to the worker's unique personnel number. As compared to the previous system, in which the shift foreman manually tracked the time worked by employees, the scanner was thought to allow for more accurate and efficient reporting.

For Butcher, however, participating in the hand-scanner system would have presented a threat to core religious commitments. Butcher, who testified that his religious beliefs are grounded in the "authenticity ... [and] authority of the scriptures," believes in an Antichrist that "stands for evil," and that the Antichrist's followers are condemned to everlasting punishment. Butcher's understanding of the biblical Book of Revelation is that the Mark of the Beast brands followers of the Antichrist, allowing the Antichrist to manipulate them. And use of Consol's hand-scanning system, Butcher feared, would result in being so "marked," for even without any physical or visible sign, his willingness to undergo the scan—whether with his right hand or his left—could lead to his identification with the Antichrist. That Butcher is sincere in these beliefs is not disputed.

Butcher brought his concerns to his union representative, who alerted Consol's human resources department. According to Butcher, he was then instructed by Consol to provide "a letter from my pastor explaining why I needed a religious accommodation." Butcher obtained a letter from his pastor vouching for Butcher's "deep dedication to the Lord Jesus Christ." He also prepared his own letter, citing verses from the Book of Revelation and explaining his view that the hand scanner would associate him with the Mark of the Beast, causing him through his will and actions to serve the Antichrist. Butcher ends the letter by stating:

As a Christian I believe it would not be in the best interest of a Christian believer to participate in the use of a hand scanner. Even though this hand scanner is not giving a number or mark, it is a device leading up to that time when it will come to fruition, and in good faith and a strong belief in my religion, I would not want to participate in this program.

In June of 2012, Butcher met with Mike Smith, the mine's superintendent, and Chris Fazio, a human resources supervisor, to discuss his situation. Butcher provided Smith and Fazio with the

letter from his pastor as well as his own letter, and explained that the hand-scanner system was not one that he “could or would want to participate in,” as a Christian.

According to Butcher, and consistent with the religious beliefs described above, the objection he described extended to the scanning of either hand, and was not limited to use of his right hand. Unaware of any other means of accommodating his religious concerns, Butcher offered to check in with his shift supervisor or to punch in on a time clock, as he had in the past while working at the mine.

In response, Fazio gave Butcher a letter written by the scanner’s manufacturer, offering assurances that the scanner cannot detect or place a mark—including the Mark of the Beast—on the body of a person. Offering its own interpretation of “[t]he Scriptures,” the letter explained that because the Mark of the Beast is associated only with the right hand or the forehead, use of the left hand in the scanner would be sufficient to obviate any religious concerns regarding the system. Fazio and Smith asked that Butcher review this information with his pastor, and, if he continued to object, provide a letter attesting to his church’s opposition to the scanner system.

At roughly the same time, and unbeknownst to Butcher, Consol was providing an accommodation to other employees that allowed them to bypass the new scanner system altogether. As of July 2012, Consol had determined that two employees with hand injuries, who could not be enrolled through a scan of either hand, instead could enter their personnel numbers on a keypad attached to the system. According to Consol’s own trial witness, this accommodation imposed no additional cost or burden on the company, and allowing Butcher to use the keypad procedure would have been similarly cost-free.

Nevertheless, Consol continued to resist making the same accommodation for Butcher, and instead decided that Butcher would be required to scan his left hand. The disparity in treatment was highlighted by a single email dated July 25, 2012, simultaneously authorizing the keypad accommodation for the two employees with physical injuries and denying that accommodation to Butcher: “[L]et’s make our religious objector use his left hand.”

Butcher was notified of Consol’s decision at a meeting with Smith and Fazio on August 6, 2012. At Butcher’s request, the meeting was deferred until August 10, 2012, so that Butcher could consider the option of using his left hand in the scanner. Butcher used that time, he testified, to go “back to the scriptures again” and to “pray[] very hard” about his dilemma. On August 10, Butcher told Smith and Fazio that “in good conscience [he] could not go along with this system of scanning [his] hand in and out.” Smith promptly handed Butcher a copy of Consol’s disciplinary procedures regarding the scanner, with the promise that it would be enforced against him if he refused to scan his left hand. According to the policy, an employee’s first and second

missed scans each would result in a written warning; the third would result in a suspension; and a fourth would result in suspension with intent to discharge. Butcher believed the message was clear: “If I didn’t go along with the hand scan system, their intent ... was to fire me.”

Butcher responded to this ultimatum by tendering his retirement. According to Butcher, he emphasized that he did not want to retire: “I didn’t have any hobbies, I wasn’t ready to retire.... I reiterated again, you know, that I really believed and tried to live by the scriptures and, well, almost practically just begged them to find a way to keep my job.” But when Consol remained unsympathetic, Butcher felt he had no choice but to retire under protest.

Shortly after retiring, Butcher learned from his union, the United Mine Workers of America (“UMWA”), about the keypad accommodation Consol had offered other employees. The union then filed a grievance on behalf of Butcher pursuant to its collective bargaining agreement with Consol, based on Consol’s failure to accommodate Butcher’s religious beliefs. The UMWA subsequently withdrew the grievance, however, when it determined that its agreement with Consol did not require religious accommodations.

In the meantime, Butcher, facing what he viewed as pressing financial need, sought new employment. In the summer and fall of 2012, he attended job fairs; looked for job postings; and applied for various jobs, including a position at the one coal mine he knew to have a vacancy. After several months of unsuccessful job-hunting, Butcher was hired by a temporary employment agency in October of 2012 to work as a carpenter helper. In September of 2013, Butcher accepted a better-paying construction position at another company, and he remained at that company for the duration of the trial.

B.

The EEOC brought an enforcement action against Consol on behalf of Butcher, alleging that Consol violated Title VII of the Civil Rights Act of 1964 by failing to accommodate Butcher’s religious beliefs and constructively discharging him. See 42 U.S.C. §§ 2000e to 2000e-6 (2012). It sought compensatory and punitive damages, back and front pay and lost benefits, and injunctive relief.

The case was tried before a jury in January of 2015. At the close of the EEOC’s evidence, the district court granted Consol’s Rule 50(a) motion for judgment as a matter of law on the issue of punitive damages. As the district court explained, punitive damages are available under Title VII only if a defendant employer has acted “with malice or with reckless indifference” to a plaintiff’s protected rights. 42 U.S.C. § 1981a(b)(1). Here, the district court concluded, the EEOC’s

evidence was insufficient to meet that standard; no reasonable jury could find “malice or reckless indifference to the rights of Mr. Butcher.”

The jury ultimately returned a verdict in favor of the EEOC, finding Consol liable for failing to accommodate Butcher’s religious beliefs. The jury made findings as to each of the three elements of a Title VII reasonable accommodation claim: that Butcher had sincere religious beliefs in conflict with Consol’s requirement that he use the hand scanner; that Butcher had informed Consol of this conflict; and that Consol constructively discharged Butcher for his refusal to comply with its directions.

The district court had instructed the jury on its authority to award compensatory damages in the event that it found a Title VII violation, distinguishing compensatory damages from lost wages and emphasizing that the jury “should not consider the issue of lost wages in [its] deliberations.” J.A. 1140. Nevertheless, in the blank on the jury form for compensatory damages, the jury wrote in “salary plus bonus & pension, court cost.” After conferring with the parties, the district court reinstructed the jury on compensatory damages and sent the jury back for further deliberations, clarifying that “[t]he fact that I am sending you back does not indicate my feelings as to the amount of damages or whether damages ... should be awarded.” Ten minutes later, the jury returned a second verdict, this time awarding \$150,000 in compensatory damages. In response to a poll requested by Consol, each member of the jury confirmed that no portion of the \$150,000 award consisted of lost wages.

After briefing by the parties, the court held an evidentiary hearing on equitable remedies, including front and back pay and lost benefits, and on the EEOC’s request for a permanent injunction against Consol, prohibiting further violations of Title VII’s reasonable accommodation provision. With respect to lost wages and benefits, the parties differed on two main issues: whether Butcher’s post-retirement job search satisfied his duty to mitigate his damages, and whether the pension benefits Butcher received after retiring should be offset from any award. The district court determined that Butcher properly mitigated his damages and that Butcher’s pension benefits were a “collateral source” that should not be deducted from a damages award. The court awarded Butcher \$436,860.74 in front and back pay and lost benefits, and issued a permanent injunction against Consol, requiring Consol to refrain from future violations of Title VII’s reasonable accommodation provision and to provide management training on religious accommodations.

After judgment was entered, Consol filed three post-verdict motions that are the subject of this appeal.

In a comprehensive and carefully reasoned opinion, the district court denied all three motions. Consol timely appealed, and the EEOC filed a timely cross-appeal of the district court's ruling on punitive damages.

II.

Title VII makes it an unlawful employment practice “to discharge any individual ... because of such individual's ... religion.” 42 U.S.C. § 2000e-2(a)(1). Under that provision, an employer must “make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship.” *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312 (4th Cir. 2008) (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977)); see also 42 U.S.C. § 2000e(j) (defining “religion” to include “all aspects of religious observance and practice, as well as belief,” unless employer can show that accommodation of employee's religion would impose an “undue hardship on the ... employer's business”).

To show a violation of this “reasonable accommodation” duty, as the district court explained, an employee must prove that: “(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; [and] (3) he or she was disciplined for failure to comply with the conflicting employment requirement.”

On appeal, as before the district court, Consol argues primarily that the evidence presented at trial was legally insufficient to support the jury's specific findings under the first and third of these elements: that there was a conflict between a bona fide religious belief held by Butcher and the requirement that Butcher use the hand scanner, and that Butcher was constructively discharged as a result. We agree with the district court that the evidence fully supports the jury's verdict on both these points, and therefore affirm the court's denial of Consol's motion for judgment as a matter of law.²

A.

The core of Consol's defense is that it did not fail to reasonably accommodate Butcher's religious beliefs because there was in fact no conflict between Butcher's beliefs and its requirement that Butcher use the hand scanner system. Highlighting the fact that Butcher testified—consistent with his letter to Consol,—that the system would not imprint a physical mark on his hand, Consol argues that the EEOC failed to establish that Butcher could not use the scanner system without compromising his beliefs regarding the Mark of the Beast.

The district court disagreed, and properly so. In both his letter to Consol and his trial testimony, Butcher carefully and clearly laid out his religious objection to use of the scanner system, notwithstanding the fact that it would produce no physical mark. As the district court explained, there was ample evidence from which a jury could conclude that Butcher sincerely believed “participation in this system”—with or without a tangible mark—“was a showing of allegiance to the Antichrist,” inconsistent with his deepest religious convictions. That is all that is required to establish the requisite conflict between Butcher’s religious beliefs and Consol’s insistence that he use its scanner system.

At bottom, Consol’s failure to recognize this conflict—in its dealings with Butcher as well as its litigation of this case—appears to reflect its conviction that Butcher’s religious beliefs, though sincere, are mistaken: that the Mark of the Beast is not, as Butcher believes, associated with mere participation in a scanner identification system, but instead manifests only as a physical mark, placed upon the right and not the left hand; and that as a result, allowing Butcher to scan his left hand through the system would be more than sufficient to obviate any potential conflict.

Thus, Consol relied in its discussions with Butcher and again in litigation on the letter from the manufacturer of the scanner system, which interpreted scripture to find that the Mark of the Beast is identified only with the right hand. It points to evidence that Butcher’s pastor does not share Butcher’s belief that there is a connection between the scanner and the Mark of the Beast. Indeed, Consol opened its oral argument before this court with quotations from scripture purporting to demonstrate that the Mark of the Beast can be imprinted only on the right hand.

But all of this, of course, is beside the point. It is not Consol’s place as an employer, nor ours as a court, to question the correctness or even the plausibility of Butcher’s religious understandings. See *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 887 (1990) (“Repeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim.”). Butcher’s religious beliefs are protected whether or not his pastor agrees with them, cf. *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 715–16, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981) (protection of religious beliefs not limited to beliefs shared by religious sect), and whether or not Butcher’s pastor—or Consol, or the manufacturer of Consol’s scanning system—thinks that Butcher, in seeking to protect his religious conscience, has drawn the line in the right place, see *id.* at 715, 101 S.Ct. 1425 (“[I]t is not for us to say that the line [the religious objector] drew was an unreasonable one.”). So long as there is sufficient evidence that Butcher’s beliefs are sincerely held—which the jury specifically found, and Consol does not dispute—and conflict with Consol’s employment requirement, that is the end of the matter.

Indeed, once we take out of this case any suggestion that Butcher may have misunderstood the Book of Revelation or the significance of the Mark of the Beast, there is very little left. This case does not present, for instance, the complicated questions that sometimes arise when an employer asserts as a defense to a religious accommodation claim that the requested accommodation would not be feasible, and would instead impose an “undue hardship” on its operations. See *Firestone Fibers*, 515 F.3d at 311–12; *Trans World Airlines*, 432 U.S. at 79–85, 97 S.Ct. 2264 (considering whether requested religious accommodation was feasible).

Quite the contrary: Consol expressly conceded that allowing Butcher to bypass the scan by entering his identification number into a keypad would impose no additional burdens or costs on the company. And Consol knew this, of course, because it had provided precisely that accommodation to two other employees who needed it for non-religious reasons—and then, in the very same email, refused to give equal regard to Butcher’s request for a religious accommodation. In light of all of this evidence, we have no reason to question the jury’s determination that Consol should be held liable for its response to a conflict between Butcher’s sincere religious beliefs and its scanner-system requirements.

B.

Consol also argues that the EEOC failed to establish the third element of a failure to accommodate claim: that Butcher suffered some adverse employment action as a result of his failure to comply with Consol’s employment requirements. According to Consol, Butcher was not disciplined or terminated but instead voluntarily retired, and the jury’s contrary finding of constructive discharge cannot be sustained on the evidence introduced at trial.

The district court rejected that claim. Under our precedent, it explained, an employee is constructively discharged—satisfying the third element of a failure to accommodate claim—when “an employer deliberately makes the working conditions of the employee intolerable.” (quoting *Whitten v. Fred’s, Inc.*, 601 F.3d 231, 248 (4th Cir. 2010)). As to the deliberateness prong, the district court found that evidence of Consol’s “complete failure to accommodate, in the face of repeated requests,” combined with evidence that Consol was aware of a costless accommodation but nevertheless refused to make it available to Butcher, was sufficient to support the jury’s verdict. And the district court dismissed Consol’s argument that Butcher’s working conditions could not have been “intolerable” as a matter of law because he had recourse to a grievance procedure under his union’s collective bargaining agreement, holding that there was sufficient evidence for the jury to find that Consol had left Butcher with no choice but to retire.

Before our court, Consol originally emphasized the “deliberateness” prong of this analysis, arguing that there is insufficient evidence to support a showing that Consol denied Butcher an accommodation in an effort to provoke his retirement.

But as a result of intervening Supreme Court case law, “deliberateness” is no longer a component of a constructive discharge claim. After the district court’s order—but before appellate briefing had concluded—the Supreme Court revisited the standard for constructive discharge in *Green v. Brennan*, — U.S. —, 136 S.Ct. 1769, 195 L.Ed.2d 44 (2016), and expressly rejected a “deliberateness” or intent requirement:

The whole point of allowing an employee to claim ‘constructive’ discharge is that in circumstances of discrimination so intolerable that a reasonable person would resign, we treat the employee’s resignation as though the employer actually fired him. We do not also require an employee to come forward with proof—proof that would often be difficult to allege plausibly—that not only was the discrimination so bad that he had to quit, but also that his quitting was his employer’s plan all along.

That leaves only the question of “intolerability,” or, more specifically, whether there is sufficient evidence that as a result of Consol’s discriminatory conduct, Butcher was subjected to circumstances “so intolerable that a reasonable person would resign.”

We agree with the district court that there exists substantial evidence that Butcher was put in an intolerable position when Consol refused to accommodate his religious objection, requiring him to use a scanner system that Butcher sincerely believed would render him a follower of the Antichrist, “tormented with fire and brimstone.”

This goes well beyond the kind of run-of-the-mill “dissatisfaction with work assignments, [] feeling of being unfairly criticized, or difficult or unpleasant working conditions” that we have viewed as falling short of objective intolerability. And like the district court, we do not think that the future prospect of a successful grievance under a collective bargaining agreement—even assuming, contrary to the union’s determination, that the collective bargaining agreement at issue here allowed for a grievance based on a right to religious accommodation—would do anything to alleviate the immediate intolerability of Butcher’s circumstances.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

All Citations

--- F.3d ----, 2017 WL 2603976

Contreras v. Crown Zellerbach Corp., 565 P.2d 1173 (1977)

Opinion

UTTER, Associate Justice.

David Contreras and his wife brought an action against Crown Zellerbach Corporation alleging five causes of action based upon allegedly abusive and improper conduct of Crown Zellerbach's employees and supervisory personnel. Crown Zellerbach moved to dismiss the first claim for relief, which is premised upon the tort of outrage, for failure to state a claim. The trial court granted this motion to dismiss and Contreras appeals. One remaining claim was dismissed by stipulation of the parties and claims for relief under the Washington civil rights act, RCW 49.60, the Civil Rights Act of 1866, 42 U.S.C. § 1981, and a claim for conspiracy under 42 U.S.C. § 1985, still remain.

We reverse the trial court and find the pleadings state a claim based upon the tort of outrage as defined in Restatement (Second) of Torts § 46(1).

Appellants' complaint alleges the following facts: David Contreras and his wife lived in Cathlamet (Washington) where Mr. Contreras was employed by respondent through the fall and winter of 1973. He was wrongfully terminated on January 24, 1974.

During the time of his employment he was subjected to continuous humiliation and embarrassment by reason of racial jokes, slurs and comments made in his presence by agents and employees of the defendant corporation on the job site and during working hours. Respondent's foreman and managing agents failed to control their employees and to accord appellant the right to work free of racial discrimination, slurs, comments and pressures.

Respondent's agents and employees, while acting within the scope of their employment, both while appellant was employed and after his discharge, made numerous statements accusing appellant wrongfully of stealing property owned by respondent.

The effect of these untrue statements was to prevent appellant from seeking and holding permanent employment in the Cathlamet area and to hold him and his wife up to public scorn and ridicule. Some of the statements made by respondent's agents and employees were made maliciously or with knowledge of their falsity or when they should have known the statements were false.

This conduct resulted in an inability of appellant to obtain employment which in turn made him unable to pay his bills and ruined an otherwise excellent credit rating. His failure to find full-time employment is a direct and proximate result of respondent's agents and employees' slander and racial actions.

Appellant's claim for relief is that respondent's conduct was intentional or reckless and so extreme in degree as to be beyond all reasonable bounds of decency. Such conduct in turn caused him severe emotional distress by reason of the acts of intimidation, demotions, humiliations and public exposure to scorn and ridicule when respondent's agents knew or should have known that appellant, by reason of his nationality and background as a Mexican-American, was particularly susceptible to emotional distress from defendant's conduct. He alleges respondent's conduct thereby amounts to the tort of outrage.

The trial court indicated it was dismissing the first cause of action based upon the tort of outrage inasmuch as the only authority for the tort of outrage in this state, *Grimsby v. Samson*, 85 Wash.2d 52, 530 P.2d 291 (1975), was limited to the facts of that case. In *Grimsby*, this court considered whether we would adopt subsection (2) of Restatement (Second) of Torts § 46. The facts there involved a claim by a husband for recovery of tort damages for distress he suffered when the hospital and doctors treating his wife allegedly breached the patient-physician relationship by abandoning her and failing to provide medical care causing suffering and resulting in her death before his eyes.

The facts of that case, by necessity, involved only a claim by a member of a third person's family, the husband, who was present at the time allegedly outrageous conduct was visited on his wife. We there adopted the tort of outrage for conduct against the wife which the husband had witnessed. We specifically held, among other limitations adopted, that "the plaintiff must be an immediate family member of the person who is the object of the defendant's actions, and he must be present at the time of such conduct (comment 1)." *Grimsby v. Samson*, supra at 60, 530 P.2d at page 295.

The trial court believed by our emphasis on the fact that the plaintiff must be an immediate family member of the person who is the object of the defendant's actions, that it was our intent to limit this tort to third-person situations only. While this interpretation is arguable, such was not our intent.

We went on to say in *Grimsby*, at page 60, 530 P.2d at page 296, that "we adopt the theory of Restatement (Second) of Torts, § 46(1), (2) and (2)(a) . . ."

There is no reason to limit recovery on the tort of outrage to members of the family of those directly injured while excluding recovery by the person primarily injured and we decline to do so. *W. Prosser, Insult and Outrage*, 44 Cal.L.Rev. 40 (1956). A vast majority of cases involving the tort of outrage have been actions brought by the recipient of the conduct. *Agis v. Howard Johnson Co., Mass.*, 355 N.E.2d 315 (1976); *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974); *Alcorn v. Anbro Engineering, Inc.*, 2 Cal.3d 493, 86 Cal.Rptr. 88, 468 P.2d 216 (1970); see *Annot.*, 64 A.L.R.2d 100 (1959).

Liability for outrage is of ancient lineage. The law in the classical age of the Roman Empire allowed recovery for outrage or insult as the delict [**wrongful act, tort**] of “iniuria.” It required an intent to insult and that anger be shown as soon as the facts were known. Intent to insult, however, could be presumed from the facts, which spoke for themselves. Defamation under Roman law was also a case of “iniuria,” where the basis of liability was not loss of reputation but outrage to feelings. Publication to a third party was thus arguably unnecessary. W. Buckland and A. McNair, *Roman Law and Common Law* 295-300 (1936).

Acceptance of the tort of outrage has undergone a remarkable evolutionary process in the United States in a relatively short time. Section 46 of the Restatement of Torts in its original form stated flatly there was no liability for the intentional infliction of emotional distress, or for bodily harm resulting from it, except in cases of assault and of the special liability of carriers covered in section 48.

This position was reversed in the 1948 supplement and the comments were completely rewritten. Restatement (Second) of Torts § 46 at 21 (Tent. Draft No. 1, 1957). The Restatement and courts supporting it have since drastically changed their position, from denial of liability for intentionally inflicting emotional distress to the allowance of liability against one who intentionally caused emotional distress without privilege to do so, and later to the present rule which requires that the conduct be extreme and outrageous before liability will attach. *Pakos v. Clark*, 253 Or. 113, 453 P.2d 682 (1969).

In *Browning v. Slenderella Systems*, 54 Wash.2d 440, 341 P.2d 859 (1959), we held recovery could be premised upon tort liability for emotional distress, unaccompanied by any physical injury where the victim was injured by racially discriminatory action. The court there recognized that the 1948 supplement to Restatement of Torts § 46 changed the language in the initial statement in Restatement, Torts (1934), § 46, to allow recovery from “(o)ne who, without a privilege to do so, intentionally causes severe emotional distress to another . . .” In its opinion this court quoted subsection (g) of the then section 46:

“(g) In short, the rule stated in this section imposes liability for intentionally causing severe emotional distress in those situations in which the actor’s conduct has gone beyond all reasonable bounds of decency. The prohibited conduct is conduct which in the eyes of decent men and women in a civilized community is considered outrageous and intolerable. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim ‘Outrageous!’”

Browning v. Slenderella Systems, supra at 447, 448, 341 P.2d at 864.

Thus, even before *Grimsby v. Samson*, supra, and in harmony with many other jurisdictions we recognized liability could be premised on outrageous conduct such as that alleged here.

Respondent argues that even if it is held the direct recipient of allegedly outrageous conduct may bring suit based upon the tort of outrage, the claim here stated is inadequate. There are limitations on the tort that we specifically noted in *Grimsby*. With these limitations in mind, the trial court first determines whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. Restatement (Second) of Torts § 46; *Alcorn v. Anbro Engineering, Inc.*, supra 2 Cal.3d at 498, 86 Cal.Rptr. 88, 468 P.2d 216; *Muhich v. Family Finance Corp.*, 72 Wis.2d 625, 241 N.W.2d 619 (1976).

When one in a position of authority, actual or apparent, over another has allegedly made racial slurs and jokes and comments, this abusive conduct gives added impetus to the claim of outrageous behavior. Restatement (Second) of Torts § 46 comment e. The relationship between the parties is a significant factor in determining whether liability should be imposed. *Alcorn v. Anbro Engineering, Inc.*, supra 2 Cal.3d at 498 n. 2, 86 Cal.Rptr. 88, 468 P.2d 216. See *Dawson v. Associates Financial Services Co. of Kansas, Inc.*, 215 Kan. 814, 529 P.2d 104 (1974); *Golden v. Dungan*, 20 Cal.App.3d 295, 97 Cal.Rptr. 577 (1971).

Appellant's factual recital that respondent's failure to control their employees and accord him a place to work free from racial discrimination, slurs, comments and pressures may add additional weight to his claim. Where a person is not free to leave but must remain in physical proximity to others who continually make racial slurs and comments, it is for the jury to determine both whether this is a factor in making the claim one of extreme outrage and the extent to which the employer was or should have been aware of these conditions, through its supervisory personnel or by other means.

As we as a nation of immigrants become more aware of the need for pride in our diverse backgrounds, racial epithets which were once part of common usage may not now be looked upon as "mere insulting language." Changing sensitivity in society alters the acceptability of former terms. It is noted in *Alcorn v. Anbro Engineering, Inc.*, supra at 498 n. 4, 86 Cal.Rptr. at 91, 468 P.2d at 219: "Although the slang epithet 'nigger' may once have been in common usage, along with such other racial characterizations as 'wop,' 'chink,' 'jap,' 'bohunk,' or 'shanty Irish,' the former expression has become particularly abusive and insulting in light of recent developments in the civil rights' movement as it pertains to the American Negro. Nor can we accept defendants' contention that plaintiff, as a truckdriver must have become accustomed to such abusive language. Plaintiff's own susceptibility to racial slurs and other discriminatory conduct is a question for the trier of fact, and cannot be determined on demurrer."

The same conclusion is compelled with regard to Mexican-Americans and the various slang epithets that may have once been in common usage regarding them. It is for the trier of fact to determine, taking into account changing social conditions and plaintiff's own susceptibility, whether the particular conduct was sufficient to constitute extreme outrage.

In determining whether to dismiss appellants' claim, this court must consider respondent's challenge within the framework of CR 12(b)(6). A motion to dismiss questions only the legal sufficiency of the allegations in a pleading. The court need not find that any support for the alleged facts exists or would be admissible in trial as would be its duty on a motion for summary judgment. The question under CR 12(b)(6) is basically a legal one, and the facts are considered only as a conceptual background for the legal determination. *Brown v. MacPherson's, Inc.*, 86 Wash.2d 293, 298, 545 P.2d 13 (1975). The only issue before the trial judge is whether it can be said there is no state of facts which plaintiff could have proven entitling him to relief under his claim. *Barnum v. State*, 72 Wash.2d 928, 435 P.2d 678 (1967); *Grimsby v. Samson*, supra 85 Wash.2d at 55, 530 P.2d 291.

Viewed in this light, appellant's claim that he was subjected to intentional or reckless conduct on the part of respondent which was beyond all reasonable bounds of decency and caused him severe emotional distress by reason of acts of intimidation, demotions, humiliation in public and exposure to scorn and ridicule, when respondent's agents knew or should have known that by reason of his Mexican nationality and background he was particularly susceptible to emotional distress as a result of respondent's conduct, is within the parameters of the tort of outrage as defined by our cases and the Restatement (Second) of Torts s 46(1).

The judgment of dismissal is reversed.

WRIGHT, C. J., and ROSELLINI, HAMILTON, HOROWITZ and DOLLIVER, JJ., concur.
STAFFORD, Associate Justice (concurring in the result only).

It must be stressed that the "facts" which set the stage for this opinion were derived from mere allegations in plaintiff's claim for relief. The sole issue is whether the allegations state a claim that will support the tort of outrage as defined in Restatement (Second) of Torts § 46(1) and *Grimsby v. Samson*, 85 Wash.2d 52, 530 P.2d 291 (1975).

In essence, the instant case observes that the allegations claim a series of intentional, reckless acts and circumstances which, if proved, could be deemed by a jury to be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Grimsby v. Samson*, supra at 59, 530 P.2d at 295. If a jury should so find and also determine that the conduct proximately caused "severe emotional distress to the plaintiff," the resulting damage would support recovery under the tort of outrage. *Grimsby v. Samson*, supra at 59, 530 P.2d at 295. Nevertheless, we should make it abundantly clear that we are not declaring, as a matter of fact or a matter of law, that the alleged acts and circumstances are to be equated with the tort of outrage. Whether the alleged acts and circumstances ultimately meet the tests of *Grimsby* and the Restatement is a jury question.

I take this cautionary approach because I fear the majority's discussion of the nation's growing

social sensitiveness to formerly acceptable language leads us too easily from an area of original social acceptance, and subsequent non-acceptance, to the area of legal liability. In fact, a cursory reading of the opinion and consideration of the cited law review article by W. Prosser, together with the proposition for which the treatise by W. Buckland and A. McNair is cited, could easily cause one to assume that the holding of this case either runs counter to, or at least greatly expands upon, the very carefully chosen words of Grimsby which were based upon the equally exacting terminology of Restatement (Second) of Torts § 46, particularly comment d.

The majority goes even further to say generally that “(w)hen one in a position of authority, actual or apparent, over another has allegedly made racial slurs and jokes and comments, this abusive position gives added impetus to the claim of outrageous behavior.” It cites Restatement (Second) of Torts s 46 comment e. Yet, even comment e closes with the admonition: “Even in such cases, however, the actor has not been held liable for mere insults, indignities, or annoyances that are not extreme or outrageous.” See also comments d and f which contain similar cautionary remarks.

Lest we leave the impression that every epithet, joke, comment, economic and racial slur, embarrassment or hurt feelings is ipso facto abusive within the terms of comments d, e and f or may support a claim for damages, we should recall specifically what was said in Grimsby. We expressed with care that “liability in the tort of outrage ‘does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.’

In this area plaintiffs must necessarily be hardened to a certain degree of rough language, unkindness and lack of consideration.” Grimsby v. Samson, supra at 59, 530 P.2d at 295. In the same paragraph we also stressed most carefully that “it is not enough that a ‘defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by ‘malice,’ ‘or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.’” Grimsby at page 59, 530 P.2d at page 295.

We cannot say, as a matter of fact or a matter of law, that the alleged conduct in this case is the equivalent of the tort of outrage. It is actionable only, if after considering all of the surrounding circumstances, a jury concludes that the conduct is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and should be regarded as atrocious and utterly intolerable in a civilized society. We hold only that the allegations, if proved, provide a jury question. Restatement (Second) of Torts s 46 comment h.
HICKS and BRACHTENBACH, JJ., concur.

**United States District Court,
D. Oregon.
Mamdouh EL-HAKEM, Plaintiff,**

v.
BJY INC., a foreign corporation, and Gregg Young, an individual, Defendants.
No. CV 01-663-BR.
March 19, 2003.

[Craig A. Crispin](#), [Patty T. Rissberger](#), Crispin & Associates, Portland, OR, for Plaintiff.
[Krishna Balasubramani](#), Sather Byerly & Holloway, LLP, Portland, James D. Pierce, Houston, TX, for Defendants.

OPINION AND ORDER

BROWN, District Judge

This matter comes before the Court on Defendant Gregg Young's Motion for Judgment as a Matter of Law and Alternatively a New Trial (#115) and Plaintiff Mamdouh El-Hakem's Motion for Judgment as a Matter of Law and to Amend Judgment or Alternatively for New Trial (#117).
[\[FN1\]](#)

[FN1](#). BJY, Inc., did not file any post-trial motions, but it joined Young in opposing Plaintiff's Motion, including that part in which Plaintiff seeks judgment as a matter of law against BJY. Also pending are Plaintiff's Motion for Attorney Fees and Costs (# 120, # 126) and BJY's Bill of Costs (# 116). The Court will take these Motions under advisement on this date and will resolve these matters consistent with this Opinion and Order.

For the reasons that follow, the Court **DENIES** Defendant Young's Motion. The Court also **GRANTS in part** that portion of Plaintiff's Motion in which Plaintiff seeks an amended judgment against Defendant BJY, Inc., for its vicarious liability under [Title VII](#) for the \$15,000 compensatory damages and \$15,000 punitive damages awarded to Plaintiff on his [§ 1981](#) claim against Young. The Court **DENIES** the remainder of Plaintiff's Motion.

BACKGROUND

Plaintiff, an Arab male of Egyptian origin, worked for BJY as a structural-plans examiner in Portland, Oregon, from approximately October 7, 1998, through April 7, 2000. Young is the Chief Executive Officer of BJY. During Plaintiff's employment, Young repeatedly addressed Plaintiff, over Plaintiff's objection, by the non-Arabic, "Western" name of "Manny." According to Plaintiff, Young's purpose for this practice was "to make it easier" for BJY's clients to interact with employees who did not have Western-sounding names. Although Young also selected Western names for other BJY employees throughout the country, only Plaintiff objected. Even after Plaintiff complained numerous times, Young persisted in using the name "Manny" to address Plaintiff in e-mails and in telephone conferences instead of using Plaintiff's given Arabic name, "Mamdouh."

Plaintiff worked under the supervision of a licensed structural-plans examiner. After the licensed examiner left the Portland office, however, Plaintiff, who was not licensed, was the only employee working there. Ultimately, BJY closed the Portland office in spring 2000. Before then, Plaintiff complained internally and to Oregon authorities that BJY was not compensating him properly under minimum- and overtime-wage laws. Plaintiff's employment ended shortly thereafter.

Plaintiff brought this action against both BJJ and Young individually for employment discrimination, wrongful termination, and unpaid wages pursuant to [42 U.S.C. § 1981](#); [Title VII](#) of the Civil Rights Act of 1964, [42 U.S.C. § 2000e](#); the Fair Labor Standards Act (FLSA), [29 U.S.C. § 201](#); and Oregon state law. The Pretrial Order included five claims for hostile work-environment discrimination based on race or religion; three claims for unlawful termination based on race, religion, or retaliation; and five claims for wage-law violations.

After a five-day trial, the jury answered specific interrogatories as to each Defendant. After the Court read the Verdicts to the parties, the Court asked whether the parties had any further inquiry for the jury before the Court received the Verdicts and discharged the jury. The parties did not have any further inquiries and did not object to the Court receiving the Verdicts. The jury found Young intentionally discriminated against Plaintiff by creating or maintaining a hostile work environment on the basis of Plaintiff's race in violation of [§ 1981](#). The jury awarded Plaintiff \$15,000 in compensatory damages and \$15,000 in punitive damages on this claim. In addition, the jury found BJJ failed to pay Plaintiff regular wages in violation of [Or.Rev.Stat. § 652.140](#), *et seq.*, in the amount of \$11,051.64 due and owing to Plaintiff at the time his employment ended.

In all other respects, the jury found in favor of Defendants. For example, the jury found BJJ did not discriminate against Plaintiff by creating a hostile work environment on the basis of Plaintiff's race or religion. In addition, although the jury concluded BJJ terminated Plaintiff's employment, the jury also found Plaintiff's race or religion was not a factor in that decision. Moreover, the jury found BJJ would have made the same decision even though the jury also found Plaintiff's complaint that BJJ owed him unpaid wages was a substantial motivating factor in terminating Plaintiff. Finally, the jury found Plaintiff was an exempt employee and, therefore, was not entitled to overtime wages.

Accordingly, the Court entered judgment against Young in the sum of \$15,000 compensatory damages and \$15,000 punitive damages. The Court also entered judgment against BJJ for unpaid regular wages of \$11,051.64 and penalties of \$6,691.20.

Young now moves for judgment in his favor as a matter of law. He asserts he cannot be held liable for race discrimination in violation of [§ 1981](#) because (1) his conduct was not "racially based," (2) there was no racially-hostile work environment, and (3) his conduct did not affect Plaintiff's right to make and to enforce his employment contract with BJJ. Young also contends the jury's separate Verdicts are inconsistent, and, therefore, he moves for a new trial.

Plaintiff also moves for judgment as a matter of law. As noted, Plaintiff prevailed on his [§ 1981](#) race discrimination hostile work-environment claim as to Young. Plaintiff asserts, however, he also is entitled to judgment against BJJ for the same amount of damages the jury awarded Plaintiff against Young on the [§ 1981](#) claim. Even if the jury correctly found BJJ was not directly liable to Plaintiff under [§ 1981](#), Plaintiff asserts BJJ is vicariously liable for these damages pursuant to Title VII.

In addition, Plaintiff seeks judgment as a matter of law on his claim for unpaid overtime and a new trial on the issue of the number of overtime hours he worked. Plaintiff maintains the evidence was insufficient to support either the professional or administrative exemption for payment of overtime wages found by the jury. Plaintiff also seeks judgment as a matter of law on his state law wage-retaliation claim because the "same decision" defense found by the jury does not apply to this claim. Finally, Plaintiff seeks judgment as a matter of law or, in the

alternative, a new trial on his retaliation claim under the FLSA against Young because the jury failed to resolve that claim due to “what appears to be a typographical error in the verdict form.”

STANDARDS

[T]he court may grant a new trial if a jury’s verdict contains irreconcilable inconsistencies: It is certainly true that ... [when] a jury answers special interrogatories and the answers cannot be reconciled, a new trial must be granted.

DISCUSSION

- I. Plaintiff is entitled to judgment against both Young and BJY on Plaintiff’s race-based hostile work-environment claim.**
 - A. Substantial evidence exists to support the jury’s Verdict against Young on Plaintiff’s [§ 1981](#) hostile work-environment claim.**

The Court submitted to the jury Plaintiff’s [§ 1981](#) race-discrimination claims against both BJY and Young. As noted, Plaintiff alleged both BJY and Young violated [§ 1981](#) by creating a racially-hostile work environment and/or by terminating Plaintiff’s employment because of his race. Although Plaintiff’s race-discrimination claims against Young arose only under [§ 1981](#), Plaintiff’s race-discrimination claims against BJY arose under both [§ 1981](#) and [Title VII](#) and involved identical factual issues. In addition, Plaintiff’s separate [Title VII](#) hostile work-environment and unlawful-termination claims for discrimination based on Plaintiff’s religion applied only to BJY. It was necessary, therefore, to make clear to the jury that (1) Plaintiff’s [Title VII](#) claims, including the discrimination claims based on religion, did not apply to Young and (2) the same factual issues necessary to resolve Plaintiff’s [§ 1981](#) claims against BJY also would resolve Plaintiff’s [Title VII](#) race-based claims against BJY. Accordingly, pursuant to [Rule 49\(a\)](#), the Court used two forms of verdict, one for each Defendant. The Court also directed the jury to answer specific questions tailored to Plaintiff’s multiple theories of discrimination.

The jury responded as follows to the Court’s interrogatories concerning Plaintiff’s claims of race-based hostile work environment and wrongful termination under [§ 1981](#) against Young:

- II. Part I. Hostile Work Environment Discrimination Claim**

1A. Has Plaintiff proved by a preponderance of the evidence that Defendant Young intentionally discriminated against Plaintiff by creating or maintaining a hostile work environment on the basis of Plaintiff’s race?

Yes X No
 ----- -----

If your answer is “No,” proceed to Part 2. If your answer is “Yes,” proceed to Question 1B.

1B. What are Plaintiff’s damages, if any, for intentional hostile work environment discrimination by Defendant Young?

For emotional distress: \$15,000
 For punitive damages: \$15,000

In Part II of Young's verdict form, the jury responded "No" to the question whether Plaintiff proved Young intentionally caused BJY to terminate Plaintiff's employment. Plaintiff, therefore, prevailed on his [§ 1981](#) race discrimination claim against Young only on the hostile work-environment theory.

Young now moves for judgment as a matter of law (and, alternatively, for a new trial) on Plaintiff's [§ 1981](#) claim based on a hostile work environment. Young asserts the evidence was insufficient to support any finding that (1) his conduct was racially based, (2) his conduct created a hostile work environment, or (3) his conduct affected Plaintiff's right to make and to enforce his employment contract with BJY. Young made these same arguments at trial.

Viewing the evidence in the light most favorable to Plaintiff, the Court remains convinced rational jurors could find Young's conduct was based on Plaintiff's status as an Arab. The Supreme Court has identified "targets of race discrimination for purposes of [Section 1981](#) include groups that today are considered merely different ethnic or national groups, such as Arabs, Jews, Germans and Italians." *Benigni v. City of Hemet*, 879 F.2d 473, 477-78 (9th Cir.1988), *reh'g denied*, 882 F.2d 356 (1989)(citing *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 609-12, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987)). See also *Pavon v. Swift Transp. Co., Inc.*, 192 F.3d 902, 908 (9th Cir.1999). When Young persistently addressed Plaintiff, over his objection, by a Western, non-Arabic name rather than Plaintiff's Arabic name in order "to make it easier" for customers of BJY to deal with Plaintiff, Young engaged in conduct that was racial in nature.

The Court also remains satisfied rational jurors could find Young's intentional conduct created a hostile work environment because his conduct was sufficiently pervasive to alter the conditions of Plaintiff's employment and to create a work environment racially hostile to a reasonable Arab. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). See also *Ray v. Henderson*, 217 F.3d 1234, 1245 (9th Cir.2000); *Ellison v. Brady*, 924 F.2d 872, 879-80 (9th Cir.1991). Young's argument that he never met Plaintiff in person is beside the point. Moreover, the evidence, viewed in the light most favorable to Plaintiff, does not support Young's contention that he only occasionally addressed Plaintiff as "Manny." In fact, the jury heard evidence that Young stubbornly continued to engage in this conduct over Plaintiff's repeated objections.

Young also contends he is entitled to judgment as a matter of law because he cannot be individually liable under [§ 1981](#) without privity of contract with Plaintiff. As the Third Circuit noted in its decision in *Al-Khazraji v. Saint Francis College*, however, an officer of a corporation who intentionally infringes on an individual's rights protected under [§ 1981](#) is personally liable: In particular, directors, officers, and employees of a corporation may become personally liable when they intentionally cause an infringement of rights protected by [Section 1981](#), regardless of whether the corporation may also be held liable. **If individuals are personally involved in the discrimination ... and if they intentionally caused the ... [infringement of] [Section 1981](#) rights, or if they authorized, directed, or participated in the alleged discriminatory conduct, they may be held liable.**

In summary, Young has not offered any persuasive arguments to set aside the jury's specific finding that he discriminated against Plaintiff based on Plaintiff's race in violation of [§ 1981](#). The Court, therefore, denies Young's Motion for Judgment as a Matter of Law.

B. The Court erred when it did not instruct the jury that BJY would be vicariously liable to Plaintiff if the jury found against Young on Plaintiff's [§ 1981](#) race discrimination claim.

Although the jury specifically found Young intentionally discriminated against Plaintiff by creating a racially-hostile work environment, the jury answered "No" when asked: "Has Plaintiff proved by a preponderance of the evidence that Defendant BJY, Inc., discriminated against Plaintiff by creating or maintaining a hostile work environment on the basis of Plaintiff's race or religion?"

Young moves alternatively for a new trial. Young asserts the jury's Verdict holding him liable for race-discrimination is inconsistent with the Verdict in which the jury found BJY did not discriminate against him on the basis of race. Young argues the solution to this inconsistency is to vacate the judgment against him.

Conversely, Plaintiff contends this same inconsistency warrants entry of judgment against BJY based on its vicarious liability pursuant to [Title VII](#) for the damages awarded Plaintiff on his [§ 1981](#) hostile work-environment claim against Young. Plaintiff emphasizes the only evidence at trial was that Young was acting within the course and scope of his employment with BJY. The Court agrees. Moreover, Plaintiff requested an instruction to that effect before the Court submitted the case to the jury, but the Court only instructed the jury generally concerning vicarious liability:

Under the law, a corporation is considered to be a person. It can act only through its employees, agents, directors, or officers. Therefore, a corporation is responsible for the acts of its employees, agents, directors, and officers performed within the scope of authority. Although the jury could have found BJY liable for Young's conduct pursuant to this instruction, the Court did not explicitly direct the jury that it must find against BJY if it found Young liable on either of Plaintiff's [§ 1981](#) claims.

The question is whether the jury's finding that Young discriminated against Plaintiff by creating a hostile work environment because of Plaintiff's race is inconsistent with the jury's answer in favor of BJY on Plaintiff's [§ 1981](#) hostile work-environment claim. That question turns on whether Plaintiff's [§ 1981](#) claim against Young was subject to the same elements and proof as Plaintiff's race-based [Title VII](#) and [§ 1981](#) hostile work-environment claims against BJY and whether, in any event, BJY is vicariously liable pursuant to [Title VII](#) for Young's conduct in violation of [§ 1981](#).

During trial and up to the time of instructing the jury, the Court and counsel explored at length whether Plaintiff's [§ 1981](#) claims against Young and BJY were subject to the same elements and proof as Plaintiff's race-based [Title VII](#) claims against BJY. To prevail on his [§ 1981](#) claims against Young, Plaintiff maintained he only needed to prove the same elements required for his

[Title VII](#) race-discrimination claims against BJY. Plaintiff relied on Footnote 3 in *Swinton v. Potomac Corp.* to support his contention that his [§ 1981](#) claims should be measured by the same standard as his [Title VII](#) race-discrimination claims:

FN3. Though *Ellerth* and *Faragher* involve [Title VII](#), their reasoning applies to cases involving [§ 1981](#) and RCW 49.60 et seq.

Because [Title VII](#) does not apply to individual defendants, however, Defendants argued at trial it would be error to use [Title VII](#) standards to instruct the jury on the elements of Plaintiff's [§ 1981](#) claims against Young. According to Defendants, Plaintiff had to prove a specific intent to discriminate on the basis of race in order to prevail on his [§ 1981](#) claims. Indeed, "[p]roof of intent to discriminate is necessary to establish a violation of [S]ection 1981." *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1313 (9th Cir.1992), cert. denied, 507 U.S. 1004, 113 S.Ct. 1644, 123 L.Ed.2d 266 (1993). In *Imagineering, Inc.*, the court cited the Supreme Court's decision in *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 390-91, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982), in which the Court explained the historical significance of and the legislative context in which [§ 1981](#) was enacted. The Court noted [§ 1981](#) prohibited only "purposeful discrimination."

The Court and the parties did not find any direct authority to support the principle that [Title VII](#) race-discrimination standards applicable in a [§ 1981](#) claim against an employer also control a companion [§ 1981](#) claim against an individual defendant. Moreover, neither the Court nor the parties identified any authority that explained whether "purposeful discrimination" under [§ 1981](#) required proof of specific intent to discriminate on the basis of race. Although the parties did not proffer any explicit instruction to address this particular issue, Defendants insisted on a specific-intent instruction. Plaintiff, in turn, maintained a standard [Title VII](#)-type instruction was sufficient for his [§ 1981](#) claims against Young. The Court, therefore, was left to reconcile whether there was any inconsistency between "purposeful discrimination" in a [§ 1981](#) race-discrimination claim against an individual defendant and an employer-defendant's "mere" intent to discriminate in violation of [Title VII](#).

To prevail on [Title VII](#) and [§ 1981](#) claims, it is well-settled that a plaintiff must show some form of intentional discrimination. See, e.g., *Robinson v. Adams*, 847 F.2d 1315, 1316 (9th Cir.1987), cert. denied, 490 U.S. 1105, 109 S.Ct. 3155, 104 L.Ed.2d 1018 (1989); *Craig v. Los Angeles County*, 626 F.2d 659, 668 (9th Cir.1980), cert. denied, 450 U.S. 919, 101 S.Ct. 1364, 67 L.Ed.2d 345 (1981). In addition, the courts seem to equate [Title VII](#) with [§ 1981](#) for purposes of analysis and instruction concerning a claim against an employer. In light of the legislative purpose underlying [§ 1981](#), the fact that [Title VII](#) does not apply to an individual defendant, the absence of precedential guidance from the appellate courts, and the risk of unnecessarily confusing the jury, this Court opted in favor of a specific-intent instruction only with respect to Plaintiff's [§ 1981](#) claims against Young and did not include a specific-intent instruction for Plaintiff's [§ 1981](#) claims against BJY. The Court, therefore, did not affirmatively require the jury to find against BJY based on vicarious liability if the jury found Plaintiff proved one or both of his [§ 1981](#) claims against Young. Accordingly, as to Plaintiff's [§ 1981](#) claim based on a hostile work environment, the Court instructed the jury that Plaintiff had to prove by a preponderance of the evidence all of the

following elements:

1. Plaintiff is a member of a racial minority. (As to this element, I instruct you that the Arab race is a racial minority.)
2. Defendants subjected Plaintiff to verbal or other conduct of a racial nature by addressing him, after his objection, by a non-Arab, Western name;
3. the conduct was unwelcome;
4. the conduct was sufficiently pervasive [\[FN2\]](#) to alter the conditions of Plaintiff's employment and create a racially hostile or abusive work environment;

[FN2.](#) Plaintiff conceded Young's conduct was not "severe," and the parties agreed the Court should instruct the jury only that the conduct must be "pervasive."

5. Plaintiff perceived the working environment to be abusive or hostile; and
6. a reasonable Arab man in Plaintiff's circumstances would consider the working environment to be abusive or hostile.

In addition, as to Defendant Gregg Young, Plaintiff must prove Defendant Young acted with a specific intent to discriminate against Plaintiff on the basis of Plaintiff's race. (Emphasis added.)

Plaintiff contends the proper response to this inconsistency is to enter judgment as a matter of law against BJY on the basis of vicarious liability for the hostile work-environment compensatory and punitive damages the jury awarded Plaintiff when the jury found against Young on Plaintiff's [§ 1981](#) hostile-work environment claim. The Court agrees.

In *Faragher v. City of Boca Raton*, the Supreme Court held "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." [524 U.S. 775, 777, 118 S.Ct. 2275, 141 L.Ed.2d 662 \(1998\)](#). Accord *Burlington Indus., Inc. v. Ellerth*, [524 U.S. 742, 765, 118 S.Ct. 2257, 141 L.Ed.2d 633 \(1998\)](#). In *Burrell v. Star Nursery, Inc.*, the Ninth Circuit explained the *Faragher* rule as follows: "[I]f the harassment is actionable and the harasser has supervisory authority over the victim, we presume that the employer is vicariously liable for the harassment." [170 F.3d 951, 956 \(9th Cir.1999\)](#). The presumption of vicarious liability may be overcome if the "alleged harassment has not culminated in a tangible employment action" and if the employer can prove both elements of the affirmative defense enunciated in *Faragher*. *Id.* "The *Faragher* affirmative defense requires proof of two elements by a preponderance of the evidence: (a) the employer exercised reasonable care to prevent and correct promptly any ... [discriminatory] behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." [E.E.O.C. v. Dinuba Med. Clinic, 222 F.3d 580, 587 \(9th Cir.2000\)](#) (internal quotations omitted).

In this case, BJY did not plead, prove, or seek any jury instruction to avoid vicarious liability pursuant to *Faragher*. In any event, the evidence indicates only one conclusion: Young, CEO of BJY, at all times acted in the course and scope of his employment. The presumption that BJY is vicariously liable under [Title VII](#) for Young's conduct in creating a racially-hostile work

environment, therefore, was not overcome. Accordingly, Plaintiff was entitled to have the Court explicitly instruct the jury that it must find BJY vicariously liable for any damages the jury awarded Plaintiff on his [§ 1981](#) claim against Young, but the Court declined to do so.

In this case, the Court finds the sole conclusion that can be drawn from the evidence and the jury's finding against Young requires entry of judgment as a matter of law against BJY based on its vicarious liability under [Title VII](#) for Young's conduct in creating a racially-hostile work environment.

Accordingly, the Court finds it erred when it did not instruct the jury that BJY would be vicariously liable to Plaintiff if the jury found against Young on Plaintiff's [§ 1981](#) race-discrimination claim. The Court, therefore, grants Plaintiff's Motion of Judgment as a Matter of Law and to Amend Judgment Against BJY, Inc., as to Plaintiff's race-based hostile work-environment claim against BJY and orders an amended judgment to enter against BJY for the same amount in compensatory and punitive damages the jury awarded to Plaintiff on his [§ 1981](#) hostile work-environment claim. The Court also denies Young's alternative Motion for New Trial.

CONCLUSION

For these reasons, the Court **DENIES** Defendant Gregg Young's Motion for Judgment as a Matter of Law and Alternatively a New Trial (# 115).

The Court also **GRANTS in part** that portion of Plaintiff Mamdouh El-Hakem's Motion for Judgment as a Matter of Law and to Amend Judgment or Alternatively for New Trial (# 117) in which Plaintiff seeks an amended judgment against Defendant BJY, Inc., for its vicarious liability pursuant to [Title VII](#) for the \$15,000 compensatory damages and \$15,000 punitive damages awarded to Plaintiff on his [§ 1981](#) claim against Defendant Young. Accordingly, the Court orders an amended judgment to enter against Defendant BJY, Inc., consistent with this Opinion and Order. The Court **DENIES** the remainder of Plaintiff's Motion.

IT IS SO ORDERED.

D.Or.,2003.

El-Hakem v. BJY Inc.

262 F.Supp.2d 1139

**Superior Court of Connecticut,
Judicial District of New London.
Scott STURMAN**

v.

**GROTON BOARD OF EDUCATION
2012 WL 6583026 (Superior Court of Connecticut)**

MARTIN, J.

FACTS

On December 21, 2011, the plaintiff, Scott Sturman, filed a five-count complaint against the defendant, the Groton Board of Education, alleging discrimination on the basis of sexual orientation, discrimination on the basis of sex, sexual harassment, retaliation and conversion. In counts two and five, which are at issue in the present motion, the plaintiff alleges the following facts. After exhausting his administrative remedies before the commission on human rights and opportunities, the plaintiff commenced the present litigation.

In August 2008, the plaintiff started working for the defendant at the Robert E. Fitch School as part of the “New Beginnings Alternative (NBA) program.” The plaintiff is a homosexual male. Throughout his time with the defendant, the plaintiff was subjected to numerous offensive remarks, comments and drawings by a fellow teacher, a school police officer and a supervisor.

The comments and drawings were made in front of other teachers, staff members and students. Such comments included the following: Paul Pattavina, NBA’s supervisor, telling Judith Viadella, NBA’s social worker, that the plaintiff was “too flaming” or “too flamboyant”; at a department meeting, Mat Orcutt, a fellow teacher, told the plaintiff: “You are so overdramatic, you are being a bitch just like a woman.”

Following the plaintiff’s December 2009 meeting with Pattavina and Viadella regarding the plaintiff not being a “team player,” Pattavina summarized the meeting by focusing on the plaintiff’s interpersonal performance and Pattavina stated: “Your apparent proneness towards using sarcasm and humor (that is often not understood by others) must change.”

Pattavina made repeated comments regarding how he and others cannot understand the plaintiff’s sense of humor, which “stems from their divergent social views and pervasive stereotypes on gender and sexuality.” On January 26, 2010, the plaintiff received a letter regarding the possibility that his contract would not be renewed for the following academic year, and on March 26, 2010, the plaintiff received a “letter of non-renewal” for the next academic year.

Based on the plaintiff’s failure to fit into traditionally accepted gender roles and standards of what is considered to be masculine behavior, the plaintiff was held to a higher standard than

similarly situated employees and the decision was made not to renew his contract. The plaintiff suffered various damages as a result of the defendant's conduct.

The plaintiff further alleges that he had possessions in his classroom at the time of his non-renewal. When the plaintiff inquired about the possessions, he was informed that the defendant had thrown them away. The defendant converted the plaintiff's possession to its own use and discarded them. The plaintiff suffered a loss equal to the value of the discarded possessions.

On May 15, 2012, the defendant filed a motion to strike counts two and five, accompanied by a memorandum of law in support. The defendant moved to strike count two on the ground that it fails to state a claim upon which relief can be granted because the plaintiff "has not set forth allegations that support a cause of action for discrimination on the basis of sex." . . .

DISCUSSION

With respect to count two, the defendant argues that the plaintiff's claim for discrimination based on sex should be stricken because the allegations in the complaint relate to the plaintiff's sexual orientation rather than gender stereotypes regarding the plaintiff's masculinity. The plaintiff counters that he has alleged sufficient facts to support his claim for discrimination on the basis of sex because he has alleged facts that support "a conclusion that his termination of employment was motivated by his failure to live up to gender-based stereotypes and norms of behavior." The plaintiff argues that his sexuality does not preclude him from bringing a claim for discrimination based on sex. In its reply, the defendant argues that a plaintiff may sustain claims for discrimination based on sexual orientation and discrimination based on sex under the Connecticut antidiscrimination statutes, but the plaintiff in the present case has not done so because the plaintiff's allegations specifically reference harassment based on his sexuality.

General Statutes § 46a-60(a)(1) provides in relevant part: "It shall be a discriminatory practice in violation of this section: For an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need ... to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's ... sex ..." "Connecticut antidiscrimination statutes should be interpreted in accordance with federal antidiscrimination laws." (Internal quotation marks omitted.) *Patino v. Birken Mfg. Co.*, 304 Conn. 679, 689, 41 A.3d 1013 (2012); see also *Brittell v. Department of Correction*, 247 Conn. 148, 164, 717 A.2d 1254 (1998) (legislative intent to make Connecticut statute prohibiting discrimination based on sex coextensive with federal statute).

"[I]n enacting Title VII [of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (Title VII)], Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S.Ct. 1775,

104 L.Ed.2d 268 (1989) ... As a result, [s]ex stereotyping [by an employer] based on a person's gender non-conforming behavior is impermissible discrimination ... That is, individual employees who face adverse employment actions as a result of their employer's animus toward their exhibition of behavior considered to be stereotypically inappropriate for their gender may have a claim under Title VII ... *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir.2005)."

"There is no basis in the statutory or case law to support the notion that an effeminate heterosexual man can bring a gender stereotyping claim while an effeminate homosexual man may not." *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 292 (3d Cir.2009). In *Prowel v. Wise Business Forms, Inc.*, supra, at 579 F.3d 286, the plaintiff, Brian Prowel, alleged that the defendant, Wise Business Forms, Inc. (Wise), harassed and retaliated against him because of his sex. *Id.* In support of his opposition to summary judgment, the plaintiff proffered the following evidence: the plaintiff "has a high voice and walks in an effeminate manner. In contrast with the typical male at Wise, Prowel testified that he: did not curse and was very well-groomed; filed his nails instead of ripping them off with a utility knife; crossed his legs and had a tendency to shake his foot 'the way a woman would sit.' Prowel also discussed things like art, music, interior design, and decor, and pushed the buttons on his encoder with 'pizzazz.' Prowel's effeminate traits did not go unnoticed by his co-workers, who commented: 'Did you see what Rosebud was wearing?'; 'Did you see Rosebud sitting there with his legs crossed, filing his nails?'; and 'Look at the way he walks.' Finally, a co-worker deposited a feathered, pink tiara at Prowel's work station." *Id.*, at 291–92. The United States Court of Appeals for the Third Circuit determined that the aforementioned facts "constitute sufficient evidence of gender stereotyping harassment—namely, Prowel was harassed because he did not conform to Wise's vision of how a man should look, speak, and act—rather than harassment based solely on his sexual orientation. *Id.*, at 292. In acknowledging that the record also contained evidence of harassment motivated by Prowel's sexual orientation, the court continued: "Thus, it is possible that the harassment Prowel alleges was because of his sexual orientation, not his effeminacy. Nevertheless, this does not vitiate the possibility that Prowel was also harassed for his failure to conform to gender stereotypes." *Id.*

In *Simonton v. Runyon*, 232 F.3d 33, 34 (2d Cir.2000), the complaint of the plaintiff, Dwayne Simonton, alleging he suffered harassment based on his sexual orientation was dismissed for failing to state a claim because Title VII does not prohibit discrimination based on sexual orientation. *Id.* On appeal, one of the arguments offered by Simonton was that the harassment based on sexual stereotypes is cognizable as discrimination based on sex; the United States Court of Appeals for the Second Circuit, however, found the argument not sufficiently pleaded. *Id.*, at 37.

The court noted that "[t]he [United States Supreme] Court in *Price Waterhouse* implied that a suit alleging harassment or disparate treatment based upon nonconformity with sexual stereotypes is cognizable under Title VII as discrimination because of sex. This theory would not bootstrap protection for sexual orientation into Title VII because not all homosexual males are stereotypically feminine, and not all heterosexual men are stereotypically masculine. But, under

this theory, relief would be available for discrimination based upon sexual stereotypes.” *Id.*, at 38. The court found that it did “not have sufficient allegations before [it] to decide Simonton’s claims based on stereotyping because [it] had no basis in the record to surmise that Simonton behaved in a stereotypically feminine manner and that the harassment he endured was, in fact, based on his non-conformity with gender norms instead of his sexual orientation.” *Id.* (noting also that the argument was not raised below, therefore, deferring merits of such stereotyping argument until properly raised).

In the present case, the plaintiff is arguing that he suffered harassment for his failure to conform to gender norms, and the plaintiff argues that such harassment occurred regardless of his sexual orientation. Reading the allegations of the complaint broadly and realistically, the allegations that the plaintiff was referred to as “too flamboyant,” or the comment directed at him: “You are so overdramatic, you are being a bitch just like a woman,” may be read as referring to the plaintiff’s failure to conform with stereotypically masculine characteristics. The plaintiff has alleged that Pattavina treated the plaintiff differently, held him to a higher standard than similarly situated employees and was motivated to make the non-renewal decision based on the plaintiff’s “failure to fit into traditionally accepted gender roles.” In support of this allegation, the plaintiff specifically alleges comments made by Pattavina such as the plaintiff was “too flaming” or “too flamboyant.” Accepting these allegations as admitted, the plaintiff has stated a legally sufficient claim for discrimination based on sex rather than simply re-alleging his claim for discrimination based on sexual orientation, which is alleged in count one.

Accordingly, the defendant’s motion to strike count two is denied.

Ramona HOLLOWAY, Appellant,
v.
ARTHUR ANDERSEN AND COMPANY, Appellee.
566 F.2d 659 (9TH Cir. 1977)

Before GOODWIN and ANDERSON, Circuit Judges, and NIELSEN,* District Judge.

Opinion

NIELSEN, District Judge:

Appellant, Ramona Holloway, a transsexual, claims that appellee, Arthur Andersen and Company, an accounting firm, discriminated against her in employment on account of her sex and has therefore violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. s 2000e et seq. Appellant appeals from the trial court’s judgment granting Andersen’s motion to dismiss for lack of subject matter jurisdiction. The district court determined that Title VII does not embrace transsexual discrimination. We AFFIRM.

I

Holloway was first employed by Arthur Andersen in 1969 and was then known as Robert Holloway. In 1970, appellant began to receive female hormone treatments. In February of 1974, appellant was promoted to the position of Head Multilith Operator. At this time, appellant informed Marion D. Passard, her supervisor, that appellant was undergoing treatment in

preparation for anatomical sex change surgery. In June of 1974, during annual review, an official of the company suggested that appellant would be happier at a new job where her transsexualism would be unknown. However, Holloway was still given a pay raise.

In November, 1974, at her request, Holloway's records were changed to reflect her present first name. Shortly thereafter, on November 18, 1974, Holloway was terminated.

After exhausting her administrative remedies, Holloway filed a complaint alleging that she was fired for her transsexualism, alleging jurisdiction under 28 U.S.C. s 1343(4) and 42 U.S.C. s 2000e-5(f). Defendant filed a motion to dismiss for lack of jurisdiction and for failure to state a claim. Holloway then filed a cross-motion for partial summary judgment on the issue of liability. On April 5, 1976, after a hearing on both motions, the district court issued a memorandum decision which held that transsexualism was not encompassed within the definition of "sex" as the term appears in 42 U.S.C. s 2000e-2(a)(1). Therefore, the court concluded that it lacked jurisdiction, so that judgment issued in defendant's favor. Holloway timely filed a motion to amend the judgment, which was denied.

II

It is clear from the record that the district court did not reach the merits of Holloway's case.² Therefore, the sole issue before us is whether an employee may be discharged, consistent with Title VII, for initiating the process of sex transformation.

1 42 U.S.C. s 2000e-2(a)(1) provides as follows:

- (a) It shall be an unlawful employment practice for an employer
- (1) . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or *662 privileges of employment, because of such individual's . . . sex"

Appellant contends that "sex" as used above is anonymous with "gender," and gender would encompass transsexuals. Appellee claims that the term sex should be given the traditional definition based on anatomical characteristics.

There is a dearth of legislative history on Section 2000e-2(a)(1), which was enacted as s 703(a)(1) of the Civil Rights Act of 1964, P.L. 88-352. The major concern of Congress at the time the Act was promulgated was race discrimination.⁵ Sex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate. *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975); *Developments in the Law Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv.L.Rev. 1109, 1167 (1971).

The 1972 Amendments to Title VII in the Equal Employment Opportunity Act of 1972 left the language of s 2000e-2(a)(1) unchanged, but the clear intent of the 1972 legislation was to remedy the economic deprivation of women as a class. 1972 U.S.Code Cong. & Admin.News, pp. 2137, 2140-2141. The cases interpreting Title VII sex discrimination provisions agree that they were intended to place women on an equal footing with men. See *Baker v. California Land Title Company*, 507 F.2d 895, 896 n.2 (9th Cir. 1974), cert. denied, 422 U.S. 1046, 95 S.Ct. 2664, 45 L.Ed.2d 699 (1975); *Rosenfeld v. Southern Pacific Company*, 444 F.2d 1219, 1225 (9th Cir.

1971).

Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of "sex" in mind. Later legislative activity makes this narrow definition even more evident. Several bills have been introduced to amend the Civil Rights Act to prohibit discrimination against "sexual preference." None have been enacted into law.⁶

Congress has not shown any intent other than to restrict the term "sex" to its traditional meaning. Therefore, this court will not expand Title VII's application in the absence of Congressional mandate. The manifest purpose of Title VII's prohibition against sex discrimination in employment is to ensure that men and women are treated equally, absent a bona fide relationship between the qualifications for the job and the person's sex.

III

The Fourteenth Amendment provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S.Const. amend. XIV, s 1. The Constitution contains no specific equal protection guarantee against the federal government; but the substance of such a guarantee has been implied in the Fifth Amendment Due Process Clause. *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

Appellant contends that had Congress chosen to expressly exclude transsexuals from the coverage of Title VII, there would be a violation of equal protection. Appellant further claims that a restrictive interpretation of the language of Title VII acts to exclude transsexuals as a class and "at the very least necessarily" raises equal protection problems. Therefore, argues appellant, because the narrow interpretation of the language of Title VII raises such equal protection issues, we must follow the "cardinal principle" of statutory construction as expressed by Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936). That principle is that one must construe statutes so that constitutional questions may be avoided if at all possible. Therefore, the proper construction of Title VII, according to appellant, is that transsexuals are protected, thus avoiding all possible equal protection problems.

Assuming briefly that appellant has properly raised an equal protection argument, we find no merit to it. Normally, any rational classification or discrimination is presumed valid. That is, a statute is constitutional if the classification or discrimination it contains has some rational relationship to a legitimate government interest, unless the statute is based upon an inherently suspect classification, in which case the statute requires close judicial scrutiny. *Graham v. Richardson*, 403 U.S. 365, 371-72, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971).

This court cannot conclude that transsexuals are a suspect class. Examining the traditional indicia of suspect classification, we find that transsexuals are not necessarily a "discrete and insular minority," *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); nor has it been established that transsexuality is an "immutable characteristic determined solely by the accident of birth" like race or national origin. *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770, 36 L.Ed.2d 583 (1973). Furthermore, the complexities involved merely in defining the term "transsexual"⁸ would prohibit a determination of suspect classification for transsexuals. Thus, the rational relationship test is the standard to apply. In applying this standard to this statute, it can be said without question that the prohibition *664 of

employment discrimination between males and females and on the basis of race, religion or national origin is rationally related to a legitimate governmental interest.

An equal protection argument is clearly not appropriate here, however. Pursuant to this court's construction, Title VII remedies are equally available to all individuals for employment discrimination based on race, religion, sex, or national origin. Indeed, consistent with the determination of this court, transsexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII. Holloway has not claimed to have treated discriminatorily because she is male or female, but rather because she is a transsexual who chose to change her sex. This type of claim is not actionable under Title VII and is certainly not in violation of the doctrines of Due Process and Equal Protection.

IV

A transsexual individual's decision to undergo sex change surgery does not bring that individual, nor transsexuals as a class, within the scope of Title VII. This court refuses to extend the coverage of Title VII to situations that Congress clearly did not contemplate. Therefore, the judgment of the district court dismissing Holloway's action for failure to state a claim is AFFIRMED.

GOODWIN, Circuit Judge, dissenting:

While I agree with the majority in the belief that Congress probably never contemplated that Title VII would apply to transsexuals, I dissent from the decision that the statute affords such plaintiffs no benefit. I would not limit the right to claim discrimination to those who were born into the victim class.

The only issue before us is whether a transsexual whose condition has not yet become stationary can state a claim under the statute if discharged because of her undertaking to change her sex. I read from the language of the statute itself that she can.

This is not a "sexual preference" case; this is a case of a person completing surgically that part of nature's handiwork which apparently was left incomplete somewhere along the line.

By its language, the statute proscribes discrimination among employees because of their sex. When a transsexual completes his or her transition from one sexual identity to another, that person will have a sexual classification. Assuming that this plaintiff has now undergone her planned surgery, she is, presumably, female, at least for most social purposes.

This plaintiff alleges that she was discharged from employment while she was in the process of assuming her new sexual identity. Had the employer waited and discharged the plaintiff as a postsurgical female because she had changed her sex, I suggest that the discharge would have to be classified as one based upon sex. I fail to see any valid Title VII purpose to be served by holding that a discharge while an employee is in surgery, or a few days before surgery, is not as much a discharge by reason of sex as a discharge a few days after surgery. The result is the same, whenever the employer sends the discharge notice. Plaintiff alleges that she was fired for being (or becoming) female under circumstances that allegedly disturbed her fellow workers and therefore motivated her employer to terminate her employment.

It seems to me irrelevant under Title VII whether the plaintiff was born female or was born

ambiguous and chose to become female. The relevant fact is that she was, on the day she was fired, a purported female. She says she was fired for having become female under controversial circumstances. The employer says these circumstances are disconcerting to other employees. That may or may not be true. Plaintiff says that how she became female is not her employer's business. That may or may not be true. Those are questions that ought to be answered in court, in a trial; they should not be precluded by summary judgment or Rule 12 dismissal.

If the plaintiff is, as the majority holds, claiming only that she was discharged for undertaking a course of medical treatment to achieve a future sex change and is not claiming that she was discharged for becoming a female, then she should be allowed to amend her pleading to conform to the evidence that ordinarily would be developed in pretrial discovery. Because I believe the plaintiff is entitled to win or lose on her statutory claim, I would not discuss the alleged constitutional claim.

I would vacate the dismissal and remand for further proceedings.

Parallel Citations

16 Fair Empl.Prac.Cas. (BNA) 689, 15 Empl. Prac. Dec. P 8059

2001 WL 1602800 (MCAD)

**Massachusetts Commission Against Discrimination
CHARLEGNE MILLETT, COMPLAINANT**

v.

**LUTCO, INC., RESPONDENT
98 BEM 3695**

October 10, 2001

ORDER OF THE FULL COMMISSION

This matter is before us following a referral from the Investigating Commissioner pursuant to 804 CMR 1.20(3)(b).

Complainant, a male-to-female transsexual, filed the instant complaint with the commission on December 2, 1998. The complainant contends that respondent discriminated against her because of her sex and sexual orientation. Specifically, complainant alleged that she was pretextually issued written warnings by her supervisor for insubordination and threatened with termination of employment after complaining about her supervisor's harassing behavior towards her.

The respondent filed a motion to dismiss, on January 22, 1999. This respondent argued that, as a matter of law, discrimination against a transsexual is not discrimination based upon sex and is not discrimination based upon sexual orientation, as those terms are used in Chapter 151B.

The Investigating Commissioner determined that this matter presents important questions of law and policy. She certified the questions below to us for resolution pursuant to our regulations. 804

CMR 1.20(3)(b). The legal questions presented may be answered without a full hearing on the facts and will have an impact on the pending investigative determination under 804 CMR 1.15. We take jurisdiction to answer the questions of law presented by the Investigating Commissioner and to generally provide guidance on specific issues of law and policy.

The questions presented are:

1. Is discrimination against an individual because he or she is a transsexual a violation of the prohibition against sexual orientation discrimination found at M.G.L. c. 151B?
2. Is discrimination against an individual because he or she is a transsexual a violation of the prohibition against sex discrimination found at M.G.L. c. 151B?

We will address each question in turn.

Sexual Orientation Discrimination

We first are called upon to consider whether discrimination against an individual because he or she is a transsexual is a violation of the prohibition against sexual orientation discrimination found at Chapter 151B of the Massachusetts General Laws. Chapter 151B §3(6) defines “sexual orientation” as follows:

The term “sexual orientation” shall mean having an orientation for or being identified as having an orientation for heterosexuality, bisexuality, or homosexuality.

This definition is unambiguous on its face: only heterosexuals, bisexuals and homosexuals are protected under the provisions of the statute.

Complainant in the instant matter is transsexual. “Transsexual” has been defined as “The desire to change one’s anatomic sexual characteristics to conform physically with one’s perception of self as a member of the opposite sex.” Stedman’s Medical Dictionary 1841 (26th d. 1995).

When interpreting a statute, it is our responsibility to construe it, to the best of our ability, as the legislature intended. Where the statute’s meaning is expressed in plain words, we cannot read more into them than is there. *Attorney General v. Hahnemann Hosp.*, 397 Mass. 820, 494 N.E.2d 1011 (1986) “Transsexuality” is not included within the statute’s definition of sexual orientation, nor is it tantamount to or synonymous with “heterosexuality,” “homosexuality,” or “bisexuality,” the terms actually used in the statute.”

We, therefore, conclude that “transsexuality” is not a “sexual orientation” as that term is defined by M.G.L. c. 151B §3(6).

Sex Discrimination

We are also called upon to consider whether discrimination against an individual because he or she is a transsexual violates the prohibition against sex discrimination found at M.G.L. c. 151B

Because M.G.L. c. 151B does not define “sex,” looking to the plain language of the statute is not helpful in our consideration. See *Dahill vs. City of Boston*, SJC-08324, (May, 2001), (the language of the Massachusetts statute is not dispositive...because the language of the statute does not end our inquiry...we turn to other sources to discern the Legislature’s intent). (emphasis added)

Case law provides some guidance. In the years since “sex” was added to Title VII protections in an attempt to defeat the legislation, See: C. & B. Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act*, 115-117 (1985), the legal understanding of sex discrimination has been in a state of continual evolution and expansion. Sex discrimination is a concept that is read broadly; in other words, illegal “sex discrimination” takes into account non-anatomical concepts, like gender.⁴ Examples of these concepts abound in the case law.

Massachusetts courts have held that pregnancy and childbirth are linked with “sex”, and therefore, an impermissible basis for discrimination. *Massachusetts Elec. Co. v. MCAD*, 375 Mass. 160, 167 (1978). See also *Carmichael v. Wynn & Wynn*, 17 M.D.L.R. 1641 (1995), affirmed *Wynn & Wynn v. Massachusetts Commission Against Discrimination*, 431 Mass. 655 (2000), *White v. Michaud Bus Lines, Inc.*, 19 MDLR 18, 20 (1997); *Lane v. Laminated Papers, Inc.*, 16 MDLR 1001, 1013 (1994)

The United States Supreme Court has held that where an employer holds female employees to standards of personal appearance not applied to men, the employer will be liable for sex discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (Holding that an accounting partner was discriminated against not because she was a woman, but because of the kind of woman she was, failing to exhibit stereotypical characteristics expected of women); See also *Mavro v. University Cinema Assoc., Inc.*, 73-Emp.-129 (1976), cited in *Macaulay v. Massachusetts Commission Against Discrimination*, 379 Mass. 279 (1979). The First Circuit Court of Appeals recently held that a man denied a loan application because he was dressed in female clothing may well be able to establish that the refusal was based upon sex:

It is reasonable to infer that [the teller] told [plaintiff] to go home and change because she thought that [plaintiff’s] attire did not accord with his male gender: In

Illegal sex discrimination includes an employer who acted against an employee because she had a mastectomy. *Brady v. Art-Cement Products Co., Inc.*, 11 M.D.L.R. 1053, 1061-5 (1989). In

Brady, the Commission based its analysis upon the societal distinction between male and female breasts, and the trauma of their removal, “in a society surrounded by images of Playboy bunnies.” Brady, at 1064. In addition, discrimination based on fertility, familial and marital status can be sex discrimination. In *United Automobile Workers v. Johnson Controls*, 499 U.S. 187 (1991), the Court held that an employer policy preventing fertile women from holding a class of jobs was direct evidence of sex discrimination. In *Phillips v. Martin Marietta*, 400 U.S. 542 (1971), an employer was required to show a bona fide occupational qualification in defense of its policy to not hire women with pre-school aged children. See also: *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1197-98 (7th Cir.), cert. denied., 404 U.S. 991 (1971); 29 C.F.R. § 1604.4 (marital status).

Penalizing those who do not fit stereotypical ideas of who they should be as women or men is illegal sex discrimination. *Doe & Doe v. City of Belleville, Ill.*, 119 F.3rd 563 (7th Cir., 1997), vacated and remanded in *City of Belleville, Ill., vs Doe and Doe* 118 S. Ct. 1183 (1998), (Holding that a man was subjected to illegal sexual harassment because “the way in which he projected the sexual aspect of his personality did not conform to his co-workers’ view of appropriate masculine behavior.”); *Albeita v. Transamerica Mailing*, 159 F.3rd 246, 1998 Fed. App. 0323P (6th Cir.) (Considering whether a comment about female employee’s weight reflected gender stereotyping.) But see *Macauley v. Massachusetts Commission Against Discrimination*, 379 Mass. 279 (1979) (Holding, without further explanation, that “sexual preference” was not sufficiently sex-linked, to warrant liability without legislative action.)

The issue for us, then, is whether transsexuality is sufficiently sex-linked to bring it within the ambit of the sex discrimination laws. We believe that it is.

We believe that discrimination against transsexuals is a form of sex discrimination within the conceptual framework of cases such as *Price-Waterhouse supra*, and its progeny; where an individual was subjected to workplace discrimination not because of the anatomical notion of “sex,” but because of a broader concept incorporating elements of “gender” and societal expectation. Hopkins was subjected to discrimination because she was “macho” and wore masculine suits. The complainant here contends that she was subjected to harassment because of the kind of man she was — one who wanted to be a woman.

Sex discrimination is a result of stereotypes of women and men, mandating conformity with society’s expectations of each sex; discrimination against transsexual people is, oftentimes, because the individual is well outside these expectations:

By definition, the transgendered person literally embodies a plethora of sexual stereotypes that are contrary to her birth sex. The sex of the transgendered person is only partially based upon her genitals; the rest is a sometimes strange mixture of complimentary and competing anatomical secondary physical characteristics, behaviors, life histories, psychological presumptions, and stereotypes. Nevertheless, the combination of these factors is what comprises the transgendered person’s “sex” — not always “either

/ or,” but often “both.”... The day when the sexes were rigidly defined by stereotypical behaviors and anatomies is gone.

Holt, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 Temp. L. Rev. 283, 290 (1997). In this way, discrimination against complainant on account of her transsexuality is completely about her current sex, in light of her former sex:

When a transgendered person suffers from an adverse employment decision, it is generally because the employer objects to the fact that she is “really” a man, or that she used to be a man. What the employer is objecting to is the fact that the employee no longer exhibits the stereotypical characteristics and behaviors of the sex the employer considers his or her employee to be. This reason flies in the face of the reality that the transgendered individual often exhibits many of the stereotypical traits of her new sex flawlessly. On its face, both this motivation and resulting action violates Title VII.

Holt, at 296.

Although we are not bound by federal interpretations of law, or interpretations of other state statutes, we note that most federal **FN5** and state **FN6** courts have held that discrimination against transsexuals is not considered discrimination based on sex.

FN5: The federal courts that have considered the issue have unanimously held that Title VII prohibitions do not apply to transsexuals. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir., 1977) (Holding that, in enacting Title VII, “...Congress had only the traditional notions of ‘sex’ in mind. Later legislative activity makes this narrow definition even more evident. Several bills have been introduced to amend the Civil Rights Act to prohibit discrimination because of ‘sexual preference.’ None have been enacted into law.”). Followed: *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir., 1984), cert. Denied, 471 U.S. 1017 (1985); *Somers v. Budget Marketing*, 667 F.2d 748 (8th Cir., 1982); *James v. Ranch Mart Hardware, Inc.*, 881 F.Supp. 478 (D.Kan. 1995). Even earlier cases refused to extend Title VII’s prohibitions, on similar grounds. See, e.g: *Powell v. Read’s Inc.*, 436 F.Supp. 369 (D.Md. 1977); *Voyles v. Ralph K. Davies Medical Center*, 403 F.Supp. 456 (N.D.Calif. 1975). For further exploration of the Title VII jurisprudence in this area, see *Reevaluating Holloway: Title VII, Equal Protection and the Evolution of a Transgender Jurisprudence*, 70 Temp L. Rev. 283 (1997).

FN6: The majority of states have determined that there is no protection afforded to transsexual individuals under sex discrimination laws. See: *Conway v. City of Hartford*, 1997 Conn. Super. LEXIS 282 (2/4/97) (Ct. Fair Employment Practice

Act). (Holding that “the weight of outside authority holding that Title VII and similar state statutes do not prohibit discrimination against transsexuals and the absence of any Connecticut legislative intent to cover discrimination against transsexuals.”); *Underwood v. Archer Management Services, Inc.*, 857 F.Supp. 96 (D.D.C. 1994) (DC Human Rights Act) (Holding that the Human Rights Commission regulations which defined “sex” as “the state of being male or female...” precluded a discrimination claim based on transsexuality.) *Dobre v. National RR Passenger Corp. (AMTRAK)*, 850 F.Supp. 284 (E.D. Pa. 1993) (Pa. Human Rights Act) (Holding that the term “sex” in state human rights act “was to be given its plain meaning.”).

However, the New York courts have failed to dismiss, on legal grounds, claims asserting that discrimination against transsexuals is a violation of sex discrimination laws. *Rentos v. OCE-Office Systems*, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. 1996); see also *Maffei v. Kolaeton Industry, Inc.*, 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995) (Holding that New York city ordinance prohibiting “gender” discrimination protects transsexuals).

In *Rentos*, the New York State Human Rights Law was interpreted (by the federal court) to cover transsexuals under the term “sex.” The court reasoned that although the state anti-discrimination statute is similar to the federal law (Title VII), New York courts are not bound to apply federal law in interpreting a state statute; and that discrimination based on a change of sexual status creates discrimination based on “sex.” In addition, the New Jersey Appellate Division recently held that transsexuals are protected from discrimination based on sex, under the states’ anti-discrimination laws. *Carla Enriquez v. West Jersey Health Systems et al* 2001 N.J. Super. LEXIS 283 (July 3, 2001). In *Enriquez*, the court eloquently noted (that);

It is incomprehensible to us that our Legislature would ban discrimination against heterosexual men and women; against homosexual men and women; against bisexual men and women; against men and women who are perceived, presumed or identified by others as not conforming to the stereotypical notions of how men and women behave, but would condone discrimination against men or women who seek to change their anatomical sex because they suffer from a gender identity disorder. We conclude that sex discrimination under the LAD includes gender discrimination so as to protect plaintiff from gender stereotyping and discrimination for transforming herself from a man to a woman.

While the current state of federal law is that discrimination based on change of sex is not the same thing as discrimination based on sex, the rationale of these cases is utterly unsatisfying to us. We would clearly not accept this proposition, raised as a defense in any other context. For example, if an individual who had changed religion, and as a result was subjected to disparate treatment filed a complaint with this commission, it would not be an appropriate defense to claim that the employee was subjected to the treatment because of the change in religion, as opposed to

the membership in the new religion. Yet, in the case of transsexuals, courts have adopted this very analysis.

We instead hold that “sex” discrimination, as prohibited by chapter 151B, includes a prohibition against discrimination against transsexual individuals. As the Supreme Judicial Court recently stated in *Dahill supra*;

“The public policies underlying M.G.L. c. 151B... are clear... to protect individuals from deprivations based on prejudice, stereotypes, or unfounded fear... (The) Legislature has directed that the provisions of G. L. c. 151B “shall be construed liberally” for the accomplishment of the remedial purposes of the statute. M.G. L. c. 151B, sect. 9.” (emphasis added).

This being the case, Respondent’s Motion to Dismiss the Sex discrimination charge is, hereby, DENIED.

17 F.Supp. 54, 61 Fair Empl.Prac.Cas. (BNA) 332, 61 Empl. Prac. Dec. P 42,343

United States District Court, N.D. Ohio, Western Division.

Noel C. CARR, Plaintiff,

v.

ARMSTRONG AIR CONDITIONING, INC., et al., Defendants.

Feb. 8, 1993.

John W. Potter, Senior District Judge.

Plaintiff was employed with Armstrong Air Conditioning for approximately twenty-nine years. On December 19, 1990, plaintiff executed a severance agreement in which he received various benefits in exchange for being terminated. Plaintiff now alleges he was wrongfully discharged based upon age discrimination. Defendants deny plaintiff’s allegations and filed a counterclaim based upon the severance agreement.

Plaintiff asserts that the counterclaim is based upon an invalid and unenforceable severance contract with defendant. According to plaintiff, the severance contract is in violation of the Age Discrimination in Employment Act (ADEA) and of the Older Workers Benefit Protection Act (OWBPA) in the following four ways: (1) it failed to specifically refer to rights or claims arising under the OWBPA; (2) plaintiff was never advised in writing to consult with an attorney prior to executing the agreement; (3) it failed to provide plaintiff with at least twenty-one days to consider it; and (4) it failed to allow seven days for revocation.

In order to ascertain whether plaintiff waived his ADEA claim, the court must determine whether any such waiver was “knowing and voluntary.” OWBPA became effective October 16, 1990 as an amendment to the ADEA. [Section 626\(f\), 29 U.S.C.](#), captioned “Waiver” states in pertinent part:

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and

voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum-

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

....

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in [the above subparagraphs] have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to (1) or (2).

The Court finds that plaintiff did not waive any rights he may have under ADEA since the severance agreement is in violation of OWBPA. In particular, this Court finds that as a matter of law the waiver was not “knowing and voluntary” as defined by the OWBPA for the following reasons: (1) the severance agreement fails to specifically refer to any rights or claims arising under the OWBPA in violation of [§ 626\(f\)\(1\)\(B\)](#); (2) plaintiff was never advised in writing to consult with an attorney prior to signing the agreement, although plaintiff admits to consulting with an attorney regarding the severance agreement, in violation of [§ 626\(f\)\(1\)\(E\)](#); (3) plaintiff was given only five days to consider the agreement instead of the required twenty-one days in violation of [§ 626\(f\)\(1\)\(F\)\(i\)](#); and (4) plaintiff was not given seven days to revoke the agreement in violation of [§ 626\(f\)\(1\)\(G\)](#).

Defendants next argue that if the waiver does not comply with OWBPA, Armstrong is still entitled to reimbursement of the consideration it paid for the waiver, under the tender-ratification theory. Defendants’ argument is based upon [Grillet v. Sears, Roebuck & Co., 927 F.2d 217 \(5th Cir.1991\)](#), and [O’Shea v. Commercial Credit Corp., 930 F.2d 358 \(4th Cir.1991\)](#). . . .

The Sixth Circuit has yet to rule on the issue of whether a tender requirement exists before one can proceed with a lawsuit under ADEA, i.e., whether the plaintiff has ratified the release by retaining the benefits received. The Fourth and Fifth Circuits have looked at the issue and have concluded that a tender

requirement does exist. See [Grillet, 927 F.2d 217](#); [O’Shea, 930 F.2d 358](#). However, in [Forbus v. Sears, Roebuck & Co., 958 F.2d 1036 \(11th Cir.1992\)](#), the Eleventh Circuit decided that a tender requirement does not exist. Using the rationale of Hogue by analogy, the Forbus court concluded, “ADEA plaintiffs are not required to tender the consideration received for releases as a condition prerequisite to challenging those releases in court, and that the [plaintiffs’] retention of their severance benefits during the pendency of this lawsuit does not constitute ratification of those releases.” Id. at 1041. See also, [Isaacs v. Caterpillar, Inc., 765 F.Supp. 1359 \(C.D.Ill.1991\)](#).

This Court finds that a tender requirement is not consistent with ADEA since it would deter meritorious challenges to releases in ADEA claims. Therefore, plaintiff is not required to tender benefits back to defendants before he can proceed with a lawsuit under ADEA, and his retention of severance benefits during the pendency of this suit does not constitute ratification of the release. Nevertheless, any benefits paid by defendants shall be set off from any damage award received by plaintiff. See [Hogue, 390 U.S. at 518, 88 S.Ct. at 1152](#); [Forbus, 958 F.2d at 1041](#); [Oberg v. Allied Van Lines, Inc., 1992 WL 211506, 1992 U.S.Dist. LEXIS 11208 \(N.D.Ill.1992\)](#).

The Court now turns its attention to defendants’ motion to dismiss plaintiff’s state law claims pursuant to [Fed.R.Civ.P. 12\(b\)\(6\)](#) or [56](#). Again, the Court will construe the motion to dismiss as one for summary judgment pursuant to [Rule 56](#) since defendants have attached an affidavit and other documents.

Defendants contend that plaintiff’s state law claims must be dismissed because he signed a valid waiver. A valid release is an absolute bar to a later action on any claim encompassed within the release, unless the release was obtained by fraud.^{FNI} [Haller v. Borrer Corp., 50 Ohio St.3d 10, 552 N.E.2d 207 \(1990\)](#). “In determining the validity of a waiver with regard to the state law claims the court applies the laws of the State of Ohio.” [Massi v. Blue Cross & Blue Shield Mut., 765 F.Supp. 904, 909 \(N.D. Ohio 1991\)](#).
^{FNI}. A release of liability based upon fraud is either void or voidable depending upon the nature of the fraud alleged. A release obtained by fraud in factum is void ab initio, while a release obtained by fraud in the inducement is merely voidable upon proof of fraud. [Haller v. Borrer Corp., 50 Ohio St.3d 10, 552 N.E.2d 207 \(1990\)](#).

Plaintiff now contends that he was induced to sign the severance agreement through fraud. In particular, plaintiff alleges that he signed the severance agreement under economic duress. The Supreme Court of Ohio has set forth a standard for determining economic duress:

A person who claims to have been a victim of economic duress must show that he or she was subjected to ‘... a wrongful or unlawful act or threat, ...’ and that it ‘... deprive[d] the victim of his unfettered will.’ Further, ‘... [m]erely taking advantage of another’s financial difficulty is not duress. Rather, the person alleging financial difficulty must allege that it was contributed to or caused by the one accused of coercion.’ The Restatement of Law 2d, Contracts ... also requires that the one who coerces the victim be the other party to the agreement: ‘If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.’ [Blodgett v. Blodgett, 49 Ohio St.3d 243, 246, 551 N.E.2d 1249 \(1990\)](#) (citations omitted).

According to plaintiff’s affidavit, plaintiff was unexpectedly informed that he was being terminated. Plaintiff was then shown a severance agreement and asked to sign it that day. Plaintiff also was informed that if he did not sign the agreement, he would be terminated with no severance pay. Plaintiff was in the

process of building a house and was therefore concerned about his economic future. Lastly, plaintiff alleges that he felt “disturbed, confused, devastated and dumbfounded,” due to the unexpected termination.

Whether particular facts are sufficient to constitute duress is a matter of law for the court to decide. However, the question of whether the facts alleged actually exist is a matter for the fact finder. [Massi, 765 F.Supp. at 910](#), citing [Anselmo v. Manufacturers Life Ins. Co., 771 F.2d 417, 419-20 \(8th Cir.1985\)](#). The plaintiff in the case sub judice has stated a viable claim of economic duress if the trier of fact believes the facts as alleged by plaintiff. Since there are genuine issues of material fact, summary judgment is inappropriate.

It should be noted that if the trier of fact finds that economic duress exists, plaintiff, under Ohio law, would have to first tender back to defendant the consideration given in order to maintain his state law actions. See [Haller, 50 Ohio St.3d at 15, 552 N.E.2d 207](#); [Harchick v. Baio, 62 Ohio App.3d 176, 574 N.E.2d 1160 \(1989\)](#). Plaintiff has neither done nor alleged to have done this. Consequently, plaintiff is faced with two alternatives: he may tender back to defendant the consideration given and file an amended complaint alleging the fact of such tender or he may dismiss his state law claims. THEREFORE, for the foregoing reasons, good cause appearing, it is ORDERED that plaintiff’s motion for summary judgment on the counterclaim be, and hereby is, GRANTED, and it is FURTHER ORDERED that defendants’ motion for summary judgment be, and hereby is, DENIED; and it is FURTHER ORDERED that plaintiff is granted thirty days to file an amended complaint.

Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County,
4 Cal.5th 903 (Cal S.Ct. 2018)

I. FACTS AND PROCEEDINGS BELOW

We summarize the facts as set forth in the prior Court of Appeal opinions in this matter, supplemented by additional facts set forth in the record.

Dynamex is a nationwide same-day courier and delivery service that operates a number of business centers in California. Dynamex offers on-demand, same-day pickup and delivery services to the public generally and also has a number of large business customers—including Office Depot and Home Depot—for whom it delivers purchased goods and picks up returns on a regular basis. Prior to 2004, Dynamex classified its California drivers as employees and compensated them pursuant to this state’s wage and hour laws. In 2004, Dynamex converted all of its drivers to independent contractors after management concluded that such a conversion would generate economic savings for the company. Under the current policy, all drivers are treated as independent contractors and are required to provide their own vehicles and pay for all of their transportation expenses, including fuel, tolls, vehicle maintenance, and vehicle liability insurance, as well as all taxes and workers' compensation insurance.

Dynamex obtains its own customers and sets the rates to be charged to those customers for its delivery services. It also negotiates the amount to be paid to drivers on an individual basis. For drivers who are assigned to a dedicated fleet or scheduled route by Dynamex, drivers are paid either a flat fee or an amount based on a percentage of the delivery fee Dynamex receives from the customer. For those who deliver on-demand, drivers are generally paid either a percentage of the delivery fee paid by the customer on a per delivery basis or a flat fee basis per item delivered.

Drivers are generally free to set their own schedule but must notify Dynamex of the days they intend to work for Dynamex. Drivers performing on-demand work are required to obtain and pay for a Nextel cellular telephone through which the drivers maintain contact with Dynamex. On-demand drivers are assigned deliveries by Dynamex dispatchers at Dynamex's sole discretion; drivers have no guarantee of the number or type of deliveries they will be offered. Although drivers are not required to make all of the deliveries they are assigned, they must promptly notify Dynamex if they intend to reject an offered delivery so that Dynamex can quickly contact another driver; drivers are liable for any loss Dynamex incurs if they fail to do so. Drivers make pickups and deliveries using their own vehicles, but are generally expected to wear Dynamex shirts and badges when making deliveries for Dynamex, and, pursuant to Dynamex's agreement with some customers, drivers are sometimes required to attach Dynamex and/or the customer's decals to their vehicles when making deliveries for the customer. Drivers purchase Dynamex shirts and other Dynamex items with their own funds.⁶

In the absence of any special arrangement between Dynamex and a customer, drivers are generally free to choose the sequence in which they will make deliveries and the routes they will take, but are required to complete all assigned deliveries on the day of assignment. If a customer requests, however, drivers must comply with a customer's requirements regarding delivery times and sequence of stops.

Drivers hired by Dynamex are permitted to hire other persons to make deliveries assigned by Dynamex. Further, when they are not making pickups or deliveries for Dynamex, drivers are permitted to make deliveries for another delivery company, including the driver's own personal delivery business. Drivers are prohibited, however, from diverting any delivery order received through or on behalf of Dynamex to a competitive delivery service.

Drivers are ordinarily hired for an indefinite period of time but Dynamex retains the authority to terminate its agreement with any driver without cause, on three days' notice. And, as noted, Dynamex reserves the right, throughout the contract period, to control the number and nature of deliveries that it offers to its on-demand drivers.

In January 2005, Charles Lee—the sole named plaintiff in the original complaint in the underlying action—entered into a written independent contractor agreement with Dynamex to provide delivery services for Dynamex. According to Dynamex, Lee performed on-demand

delivery services for Dynamex for a total of 15 days and never performed delivery service for any company other than Dynamex. On April 15, 2005, three months after leaving his work at Dynamex, Lee filed this lawsuit on his own behalf and on behalf of similarly situated Dynamex drivers.

In essence, the underlying action rests on the claim that, since December 2004, Dynamex drivers have performed essentially the same tasks in the same manner as when its drivers were classified as employees, but Dynamex has improperly failed to comply with the requirements imposed by the Labor Code and wage orders for employees with respect to such drivers. The complaint alleges five causes of action arising from Dynamex's alleged misclassification of employees as independent contractors: two counts of unfair and unlawful business practices in violation of Business and Professions Code section 17200, and three counts of Labor Code violations based on Dynamex's failure to pay overtime compensation, to properly provide itemized wage statements, and to compensate the drivers for business expenses.

The trial court's initial order denying class certification was reversed by the Court of Appeal based on the trial court's failure to compel Dynamex to provide contact information for potential putative class members that would enable plaintiffs to establish the necessary elements for class certification. (See *Lee v. Dynamex*, supra, 166 Cal.App.4th 1325, 1336-1338, 83 Cal.Rptr.3d 241.) After the trial court permitted plaintiffs to file a first amended complaint adding Pedro Chevez (a former Dynamex dedicated fleet driver) as a second named plaintiff and the parties stipulated to the filing of a second amended complaint (the current operative complaint), the parties agreed to send questionnaires to all putative class members seeking information that would be relevant to potential class membership.

Based on the responses on the questionnaires that were returned by current or former Dynamex drivers, plaintiffs moved for certification of a revised class of Dynamex drivers. As ultimately modified by the trial court, the proposed class includes those individuals (1) who were classified as independent contractors and performed pickup or delivery service for Dynamex between April 15, 2001 and the date of the certification order, (2) who used their personally owned or leased vehicles weighing less than 26,000 pounds, and (3) who had returned questionnaires which the court deemed timely and complete. The proposed class explicitly excluded, however, drivers for any pay period in which the driver had provided services to Dynamex either as an employee or subcontractor of another person or entity or through the driver's own employees or subcontractors (except for substitute drivers who provided services during vacation, illness, or other time off). Also excluded were drivers who provided services concurrently for Dynamex and for another delivery company that did not have a relationship with Dynamex or for the driver's own personal delivery customers. Thus, as narrowed by these exclusions, the class consisted only of individual Dynamex drivers who had returned complete and timely questionnaires and who personally performed delivery services for Dynamex but did not employ

other drivers or perform delivery services for another delivery company or for the driver's own delivery business. The trial court's certification order states that 278 drivers returned questionnaires and that from the questionnaire responses it appears that at least 184 drivers fall within the proposed class.

On May 11, 2011, the trial court, in a 26-page order, granted plaintiffs' motion for class certification. The validity of that order is at issue in the present proceeding.

After determining that the proposed class satisfied the prerequisites of ascertainability, numerosity, typicality, and adequacy of class representatives and counsel required for class certification, the trial court turned to the question of commonality—that is, whether common issues predominate over individual issues. Because of its significance to our subsequent legal analysis, we discuss this aspect of the trial court's certification order in some detail.

The trial court began its discussion of the commonality requirement by observing that “ ‘[]he ultimate question in every [purported class action] is whether, given an ascertainable class, the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.’ ” The court noted that in examining whether common issues of law or fact predominate, a court must consider the legal theory on which plaintiffs' claim is based and the relevant facts that bear on that legal theory. The court explained that in this case all of plaintiffs' causes of action rest on the contention that Dynamex misclassified the drivers as independent contractors when they should have been classified as employees. Thus, the facts that are relevant to that legal claim necessarily relate to the appropriate legal standard or test that is applicable in determining whether a worker should be considered an employee or an independent contractor.

The court then explained that the parties disagreed as to the proper legal standard that is applicable in determining whether a worker is an employee or an independent contractor for purposes of plaintiffs' claims. Plaintiffs relied on this court's then-recent decision in *Martinez*, supra, 49 Cal.4th 35, 109 Cal.Rptr.3d 514, 231 P.3d 259, maintaining that the standards or tests for employment set forth in *Martinez* are applicable in the present context, and that the standard for determining the employee or independent contractor question set forth in this court's decision in *Borello*, supra, 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399 is not the sole applicable standard. Dynamex, by contrast, took the position that the alternative definitions of “employ” and “employer” discussed in *Martinez* are applicable only in determining whether an entity that has a relationship with the primary employer of an admitted employee should be considered a joint employer of the employee, and not in deciding whether a worker is properly classified as an employee or an independent contractor. Dynamex asserted that even with respect to claims arising out of the obligations imposed by a wage order, the question of a worker's status as an employee or independent contractor must be decided solely by reference to the *Borello* standard.

In its certification order, the trial court agreed with plaintiffs' position, relying on the fact that the Martinez decision “did not indicate that its analysis was in any way limited to situations involving questions of joint employment.” The court found that the Martinez decision represents “a redefinition of the employment relationship under a claim of unpaid wages as follows: ‘To employ, then, under the IWC's [Industrial Welfare Commission's] definition, has three alternative definitions. It means (a) to exercise control over the wages, hours or working conditions, (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship.’ ” (Quoting Martinez, supra, 49 Cal.4th at p. 64, 109 Cal.Rptr.3d 514, 231 P.3d 259.) The trial court concluded that “[]hese definitions must be considered when analyzing whether the class members are employees or independent contractors” and thereafter proceeded to discuss separately each of the three definitions or standards set forth in Martinez in determining whether common issues predominate for purposes of class certification.

With regard to the “exercise control over wages, hours or working conditions” test, the trial court stated that “ ‘control over wages’ means that a person or entity has the power or authority to negotiate and set an employee's rate of pay” and that “[w]hether or not Dynamex had the authority to negotiate each driver's rate of pay can be answered by looking at its policies with regard to hiring drivers. ... [I]ndividual inquiry is not required to determine whether Dynamex exercises control over drivers' wages.”

With regard to the suffer or permit to work test, the trial court stated in full: “An employee is suffered or permitted to work if the work was performed with the knowledge of the employer. [Citation.] This includes work that was performed that the employer knew or should have known about. [Citation.] Again, this is a matter that can be addressed by looking at Defendant's policy for entering into agreement with drivers. Defendant is only liable to those drivers with whom it entered into an agreement (i.e., knew were providing delivery services to Dynamex customers). This can be determined through records, and does not require individual analysis.”

With regard to the common law employment relationship test referred to in Martinez, the trial court stated that this test refers to the multifactor standard set forth in Borello, supra, 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399. The trial court described the Borello test as involving the principal factor of “ ‘whether the person to whom services is rendered has the right to control the manner and means of accomplishing the result desired’ ” as well as the following nine additional factors: “(1) right to discharge at will, without cause; (2) whether the one performing the services is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether in the locality the work is usually done under the direction of the principal or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the services are to be performed; (7) method of payment, whether by the time or by the job; (8) whether or not the work is part of the regular

business of the principal; and (9) whether or not the parties believe they are creating the relationship of employer-employee.” As the trial court observed, Borello explained that “ ‘the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.’ ” (Borello, supra, 48 Cal.3d at p. 351, 256 Cal.Rptr. 543, 769 P.2d 399.)

The trial court then discussed the various Borello factors, beginning with whether the hiring business has the right to control work details. In analyzing this factor, the court stated: “A determination of control of the work details must look to ‘all meaningful aspects of the business relationship.’ [Citation.] For a delivery service, those aspects include obtaining customer/customer service, prices charged for delivery, routes, delivery schedules and billing. Plaintiffs contend that these factors are all controlled by Dynamex because it obtains the customers, maintains a centralized call system, maintains a package tracking system, sets the prices for its services and customers are billed by Dynamex. This is not necessarily borne out by the evidence. Defendants’ [supervising officer], Mr. Pople,⁷ testified that the drivers solicit new customers. [Citation.] There is also evidence that customer service is handled by some of the drivers, depending on the customer’s relationship to that driver. [Citation.] Finally, defendant does not necessarily control the drivers’ delivery schedules, as a number of drivers state that their only obligation is to complete the deliveries by the end of the business day. [Citation.] The degree to which Dynamex controls the details of the work varies according to different circumstances, including the particular driver or customer that is involved. Determining whether Dynamex controls the details of the business, therefore, does not appear susceptible to common proof.”

With regard to the right to discharge factor, the trial court stated: “[T]he right to discharge at will, without cause, is an important consideration. Defendant’s [supervising officer] testified that Dynamex maintains the right to discharge the drivers at will. [Citation.] This does not appear to vary from driver to driver. So it is a classwide factor, which is particularly relevant to demonstrating the existence of an employer-employee relationship.”

With regard to the “distinct occupation or business” factor, the trial court stated: “A distinct business relates to whether the drivers have the opportunity for profit and loss. [Citation.] Plaintiffs contend that the drivers have no opportunity for profit or loss because they are charged according to standardized rate tables. This may be a misrepresentation of defendants’ evidence. Defendant [supervising officer] testified that it tries to standardize the rates paid to on-demand drivers, however, drivers enter into different compensation arrangements. [Citations.] The opportunity for profit or loss depends on the nature of the agreement negotiated between Dynamex and the particular driver. Each arrangement would have to be reviewed to determine the extent of the driver’s opportunity for profit and loss.”

With regard to the “who supplies instrumentalities” factor, the court stated: “Defendant admitted that the drivers had to provide the instrumentalities of their work and that this was a classwide policy. This factor is subject to common inquiry.”

With regard to the duration of service factor, the court stated: “Defendants concede that the drivers are at-will. [This] [f]actor is also subject to common inquiry.”

With regard to the method of payment factor, the court stated: “Defendants identify different payment scenarios: (a) percentage of the fee Dynamex charges its customer for each delivery performed; (b) flat rate per day, regardless of the number of packages delivered; (c) set amount per package, regardless of the size or type of package; (d) flat fee to be available to provide delivery service regardless of whether the Driver's services are used; or (e) a combination of these payment types. [Citation.] These factors vary from driver to driver and raise individualized questions.”

Finally, with regard to the “parties' belief regarding the nature of relationship” factor, the court noted that “this factor is given less weight by courts” and stated “[a]ll the drivers signed agreements stating that they were independent contractors. The drivers' belief could reasonably be demonstrated through this classwide agreement.”

The court then summarized its conclusion with regard to the Borello standard: “Thus, most of the secondary factors are subject to common proof and do not require individualized inquiry of the class members. But the main factor in determining whether an employment agreement exists—control of the details—does require individualized inquiries due to the fact that there is no indication of a classwide policy that only defendants obtain new customers, only the defendants provide customer service and create the delivery schedules.”

With respect to the entire question of commonality, however, the trial court concluded: “Common questions predominate the inquiry into whether an employment relationship exists between Dynamex and the drivers. The first two alternative definitions of ‘employer’ can both be demonstrated through common proof, even if the common law test requires individualized inquiries.”

Having found that common issues predominate, the trial court went on to conclude that “[a] class action is a superior means of conducting this litigation.” The court stated in this regard: “Given that there is evidence from Plaintiffs that common questions predominate the inquiry into [the] employment relationship[,] managing this as a class action with respect to those claims will be feasible. There appears to be no litigation by individual class members, indicating that they have little interest in personally controlling their claims. Finally, consolidating all the claims before a single court would be desirable since it would allow for consistent rulings with respect to all the class members' claims.”

On the basis of its foregoing determinations, the trial court granted plaintiffs' motion for class certification.

In December 2012, Dynamex renewed its motion to decertify the class action that the trial court had certified in May 2011. Dynamex relied upon intervening Court of Appeal decisions assertedly demonstrating that the trial court had erred in relying upon the wage order's alternative definitions of employment, as set forth in *Martinez*. The trial court denied the renewed motion to decertify the class.

In June 2013, Dynamex filed a petition for writ of mandate in the Court of Appeal, challenging the trial court's denial of its motion to decertify the class. In response, plaintiffs, while disagreeing with Dynamex's claim that the trial court had erred, urged the Court of Appeal to issue an order to show cause and resolve the issues presented in the writ proceeding. The Court of Appeal issued an order to show cause in order to determine whether the trial court erred in certifying the underlying class action under the wage order definitions of “employ” and “employer” discussed in *Martinez*.

After briefing and argument, the Court of Appeal denied the petition in part and granted the petition in part. The appellate court concluded that the trial court properly relied on the alternative definitions of the employment relationship set forth in the wage order when assessing those claims in the complaint that fall within the scope of the applicable wage order, and it denied the writ petition with respect to those claims. With respect to those claims that fall outside the scope of the applicable wage order, however, the Court of Appeal concluded that the *Borello* standard applied in determining whether a worker is an employee or an independent contractor, and it granted the writ to permit the trial court to reevaluate its class certification order in light of this court's intervening decision in *Ayala*, *supra*, 59 Cal.4th 522, 173 Cal.Rptr.3d 332, 327 P.3d 165, which clarified the proper application of the *Borello* standard.

As already noted, Dynamex's petition for review challenged only the Court of Appeal's conclusion that the trial court properly determined that the wage order's definitions of “employ” and “employer” may be relied upon in determining whether a worker is an employee or an independent contractor for purposes of the obligations imposed by the wage order. We granted the petition for review to consider that question.

...

II. RELEVANT WAGE ORDER PROVISIONS

We begin with a brief review of the relevant provisions of the wage order that applies to the transportation industry. (See Cal. Code Regs., tit. 8, § 11090.)

In describing its scope, the transportation wage order initially provides in subdivision 1: “This order shall apply to all persons employed in the transportation industry, whether paid on a time,

piece rate, commission, or other basis,” except for persons employed in administrative, executive, or professional capacities, who are exempt from most of the wage order's provisions. (Cal. Code Regs., tit. 8, § 11090, subd. 1.)⁸

Subdivision 2 of the order, which sets forth the definitions of terms as used in the order, contains the following relevant definitions:

“(D) ‘Employ’ means to engage, suffer, or permit to work.

“(E) ‘Employee’ means any person employed by an employer.

“(F) ‘Employer’ means any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.” (Cal. Code Regs., tit. 8, § 11090, subd. 2(D)-(F).)⁹

Thereafter, the additional substantive provisions of the wage order that establish protections for workers or impose obligations on hiring entities relating to minimum wages, maximum hours, and specified basic working conditions (such as meal and rest breaks) are, by their terms, made applicable to “employees” or “employers.” (See, e.g., Cal. Code Regs., tit. 8, § 11090, subds. 3 [Hours and Days of Work], 4 [Minimum Wages], 7 [Records], 11 [Meal Periods], 12 [Rest Periods].)

Subdivision 2 of the wage order does not contain a definition of the term “independent contractor,” and the wage order contains no other provision that otherwise specifically addresses the potential distinction between workers who are employees covered by the terms of the wage order and workers who are independent contractors who are not entitled to the protections afforded by the wage order.

...

In 1989, in *Borello*, supra, 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399, this court addressed the employee or independent contractor question in an opinion that has come to be viewed as the seminal California decision on this subject. Because of the significance of this decision, we review the majority opinion in *Borello* at length.

...

the court in *Martinez* (2010) held that the IWC wage orders, by defining “employ” to mean “engage” to work (as well as to “suffer or permit” to work), incorporate the common law definition of employment as an alternative definition. The court explained in this regard: “The verbs ‘to suffer’ and ‘to permit,’ as we have seen, are terms of art in employment law. [Citation.] In contrast, the verb ‘to engage’ has no other apparent meaning in the present context than its plain, ordinary sense of ‘to employ,’ that is, to create a common law employment relationship. This conclusion makes sense because the IWC, even while extending its regulatory protection to

workers whose employment status the common law did not recognize, could not have intended to withhold protection from the regularly hired employees who undoubtedly comprise the vast majority of the state's workforce.” (Martinez, *supra*, 49 Cal.4th at p. 64, 109 Cal.Rptr.3d 514, 231 P.3d 259, fn. omitted.)

The Martinez court (2010) summarized its conclusion on this point as follows: “To employ, then, under the IWC's definition, has three alternative definitions. It means: (a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship.” (Martinez, *supra*, 49 Cal.4th at p. 64, 109 Cal.Rptr.3d 514, 231 P.3d 259.)

...

Four years after the decision in Martinez, *supra*, 49 Cal.4th 35, 109 Cal.Rptr.3d 514, 231 P.3d 259, we rendered the decision in Ayala (2014), *supra*, 59 Cal.4th 522, 173 Cal.Rptr.3d 332, 327 P.3d 165. In Ayala, a wage and hour action had been filed on behalf of newspaper carriers who had been hired by the Antelope Valley Press (Antelope Valley) to deliver its newspaper. The carriers alleged that Antelope Valley had misclassified them as independent contractors when they should have been treated as employees. The trial court in Ayala had denied the plaintiffs' motion to certify the action as a class action on the ground that under the Borello test—which, at the trial level, both parties agreed was the applicable standard—common issues did not predominate because application of the Borello standard “would require ‘heavily individualized inquiries’ into Antelope Valley's control over the carriers' work.” (59 Cal.4th at p. 529, 173 Cal.Rptr.3d 332, 327 P.3d 165.)

...

Dynamex argues that the suffer or permit to work standard cannot serve as the test for distinguishing employees from independent contractors because a literal application of that standard would characterize all individual workers who directly provide services to a business as employees. A business that hires any individual to provide services to it can always be said to knowingly “suffer or permit” such an individual to work for the business. A literal application of the suffer or permit to work standard, therefore, would bring within its reach even those individuals hired by a business—including unquestionably independent plumbers, electricians, architects, sole practitioner attorneys, and the like—who provide only occasional services unrelated to a company's primary line of business and who have traditionally been viewed as working in their own independent business. For this reason, Dynamex maintains that the Borello standard is the only approach that can provide a realistic and practical test for distinguishing employees from independent contractors.

It is true that, when applied literally and without consideration of its history and purposes in the context of California's wage orders, the suffer or permit to work language, standing alone, does

not distinguish between, on the one hand, those individual workers who are properly considered employees for purposes of the wage order and, on the other hand, the type of traditional independent contractors described above, like independent plumbers and electricians, who could not reasonably have been intended by the wage order to be treated as employees of the hiring business. As other jurisdictions have recognized, however, that the literal language of the suffer or permit to work standard does not itself resolve the question whether a worker is properly considered a covered employee rather than an excluded independent contractor does not mean that the suffer or permit to work standard has no substantial bearing on the determination whether an individual worker is properly considered an employee or independent contractor for purposes of a wage and hour statute or regulation. (See, e.g., *Rutherford Food Corp. v. McComb* (1947) 331 U.S. 722, 729, 67 S.Ct. 1473, 91 L.Ed. 1772 (*Rutherford Food*); *Scantland v. Jeffrey Knight, Inc.* (11th Cir. 2013) 721 F.3d 1308, 1311 (*Scantland*); *Brock v. Superior Care, Inc.* (2d Cir. 1988) 840 F.2d 1054, 1058-1059 (*Superior Care*); *Sec'y of Labor, U.S. Dept. of Labor v. Lauritzen* (7th Cir. 1987) 835 F.2d 1529, 1535-1539 (*Lauritzen*); see *id.* at pp. 1539-1545 (conc. opn. of Easterbrook, J.); *Silent Woman, Ltd. v. Donovan* (E.D.Wis. 1984) 585 F.Supp. 447, 450-452 (*Silent Woman, Ltd.*); *Jeffcoat v. State Dept. of Labor* (Alaska 1987) 732 P.2d 1073, 1075-1078; *Cejas Commercial Interiors, Inc. v. Torres-Lizama* (2013) 260 Or.App. 87, 316 P.3d 389, 397; *Commonwealth v. Stuber* (Pa. 2003) 822 A.2d 870, 873-875; *Anfinson v. FedEx Ground Package System* (2012) 174 Wash.2d 851, 281 P.3d 289, 297-299; see generally U.S. Dept. of Labor, Wage & Hour Div., Administrator's Interpretation letter No. 2015-1, *The Application of the Fair Labor Standard Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors* (July 15, 2015) available online at <http://www.blr.com/html_email/AI2015-1.pdf> [as of Apr. 30, 2018].)19

As we explain, for a variety of reasons we agree with these authorities that the suffer or permit to work standard is relevant and significant in assessing the scope of the category of workers that the wage order was intended to protect. The standard is useful in determining who should properly be treated as covered employees, rather than excluded independent contractors, for purposes of the obligations imposed by the wage order.

...

A multifactor standard—like the economic reality standard or the *Borello* standard—that calls for consideration of all potentially relevant factual distinctions in different employment arrangements on a case-by-case, totality-of-the-circumstances basis has its advantages. A number of state courts, administrative agencies and academic commentators have observed, however, that such a wide-ranging and flexible test for evaluating whether a worker should be considered an employee or an independent contractor has significant disadvantages, particularly when applied in the wage and hour context.

First, these jurisdictions and commentators have pointed out that a multifactor, “all the circumstances” standard makes it difficult for both hiring businesses and workers to determine in advance how a particular category of workers will be classified, frequently leaving the ultimate employee or independent contractor determination to a subsequent and often considerably delayed judicial decision. In practice, the lack of an easily and consistently applied standard often leaves both businesses and workers in the dark with respect to basic questions relating to wages and working conditions that arise regularly, on a day-to-day basis.

...

We briefly discuss each part of the ABC test and its relationship to the suffer or permit to work definition.

1. Part A: Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact?

789First, as our decision in *Martinez* makes clear (*Martinez*, supra, 49 Cal.4th at p. 58, 109 Cal.Rptr.3d 514, 231 P.3d 259), the suffer or permit to work definition was intended to be broader and more inclusive than the common law test, under which a worker's freedom from the control of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact, was the principal factor in establishing that a worker was an independent contractor rather than an employee. Accordingly, because a worker who is subject, either as a matter of contractual right or in actual practice, to the type and degree of control a business typically exercises over employees would be considered an employee under the common law test, such a worker would, a fortiori, also properly be treated as an employee for purposes of the suffer or permit to work standard. Further, as under *Borello*, supra, 48 Cal.3d at pages 353-354, 356-357, 256 Cal.Rptr. 543, 769 P.2d 399, depending on the nature of the work and overall arrangement between the parties, a business need not control the precise manner or details of the work in order to be found to have maintained the necessary control that an employer ordinarily possesses over its employees, but does not possess over a genuine independent contractor. The hiring entity must establish that the worker is free of such control to satisfy part A of the test.²⁷

2. Part B: Does the worker perform work that is outside the usual course of the hiring entity's business?

10Second, independent of the question of control, the child labor antecedents of the suffer or permit to work language demonstrate that one principal objective of the suffer or permit to work standard is to bring within the “employee” category all individuals who can reasonably be viewed as working “in the [hiring entity's] business” (see *Martinez*, supra, 49 Cal.4th at p. 69, 109 Cal.Rptr.3d 514, 231 P.3d 259, italics added), that is, all individuals who are reasonably viewed as providing services to the business in a role comparable to that of an employee, rather

than in a role comparable to that of a traditional independent contractor. (Accord *Rutherford Food*, supra, 331 U.S. at p. 729, 67 S.Ct. 1473 [under FLSA, label put on relationship by hiring business is not controlling and inquiry instead focuses on whether “the work done, in essence, follows the usual path of an employee”].) Workers whose roles are most clearly comparable to those of employees include individuals whose services are provided within the usual course of the business of the entity for which the work is performed and thus who would ordinarily be viewed by others as working in the hiring entity's business and not as working, instead, in the worker's own independent business.

11 Thus, on the one hand, when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee. (See, e.g., *Enforcing Fair Labor Standards*, supra, 46 UCLA L.Rev. at p. 1159.) On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company (cf., e.g., *Silent Woman, Ltd.*, supra, 585 F.Supp. at pp. 450-452; accord *Whitaker House Co-op*, supra, 366 U.S. 28, 81 S.Ct. 933), or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes (cf., e.g., *Dole v. Snell* (10th Cir. 1989) 875 F.2d 802, 811), the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees. In the latter settings, the workers' role within the hiring entity's usual business operations is more like that of an employee than that of an independent contractor.

Treating all workers whose services are provided within the usual course of the hiring entity's business as employees is important to ensure that those workers who need and want the fundamental protections afforded by the wage order do not lose those protections. If the wage order's obligations could be avoided for workers who provide services in a role comparable to employees but who are willing to forgo the wage order's protections, other workers who provide similar services and are intended to be protected under the suffer or permit to work standard would frequently find themselves displaced by those willing to decline such coverage. As the United States Supreme Court explained in a somewhat analogous context in *Alamo Foundation*, supra, 471 U.S. at page 302, 105 S.Ct. 1953, with respect to the federal wage and hour law: “[T]he purposes of the [FLSA] 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. [Citations.] Such exceptions to coverage would affect many more people than those workers

directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses.” (Ibid.)

12As the quoted passage from the Alamo Foundation case suggests, a focus on the nature of the workers' role within a hiring entity's usual business operation also aligns with the additional purpose of wage orders to protect companies that in good faith comply with a wage order's obligations against those competitors in the same industry or line of business that resort to cost saving worker classifications that fail to provide the required minimum protections to similarly situated workers. A wage order's industry-wide minimum requirements are intended to create a level playing field among competing businesses in the same industry in order to prevent the type of “race to the bottom” that occurs when businesses implement new structures or policies that result in substandard wages and unhealthy conditions for workers. (Accord *Gemsco, Inc. v. Walling* (1945) 324 U.S. 244, 252, 65 S.Ct. 605, 89 L.Ed. 921 [“[I]f the [proposed restrictions on homeworkers] cannot be made, the floor for the entire industry falls and the right of the homeworkers and the employers to be free from the prohibition destroys the right of the much larger number of factory workers to receive the minimum wage”]; see generally *Enforcing Fair Labor Standards*, supra, 46 UCLA L.Rev. at pp. 1178-1103.) Competing businesses that hire workers who perform the same or comparable duties within the entities' usual business operations should be treated similarly for purposes of the wage order.²⁸

Accordingly, a hiring entity must establish that the worker performs work that is outside the usual course of its business in order to satisfy part B of the ABC test.²⁹

3. Part C: Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity?

13Third, as the situations that gave rise to the suffer or permit to work language disclose, the suffer or permit to work standard, by expansively defining who is an employer, is intended to preclude a business from evading the prohibitions or responsibilities embodied in the relevant wage orders directly or indirectly—through indifference, negligence, intentional subterfuge, or misclassification. It is well established, under all of the varied standards that have been utilized for distinguishing employees and independent contractors, that a business cannot unilaterally determine a worker's status simply by assigning the worker the label “independent contractor” or by requiring the worker, as a condition of hiring, to enter into a contract that designates the worker an independent contractor. (See, e.g., *Borello*, supra, 48 Cal.3d at pp. 349, 358-359, 256 Cal.Rptr. 543, 769 P.2d 399; *Rutherford Food*, supra, 331 U.S. at p. 729, 67 S.Ct. 1473.) This restriction on a hiring business's unilateral authority has particular force and effect under the wage orders' broad suffer or permit to work standard.

As a matter of common usage, the term “independent contractor,” when applied to an individual worker, ordinarily has been understood to refer to an individual who independently has made the

decision to go into business for himself or herself. (See, e.g., *Borello*, supra, 48 Cal.3d at p. 354, 256 Cal.Rptr. 543, 769 P.2d 399 [describing independent contractor as a worker who “has independently chosen the burdens and benefits of self-employment”].) Such an individual generally takes the usual steps to establish and promote his or her independent business—for example, through incorporation, licensure, advertisements, routine offerings to provide the services of the independent business to the public or to a number of potential customers, and the like. When a worker has not independently decided to engage in an independently established business but instead is simply designated an independent contractor by the unilateral action of a hiring entity, there is a substantial risk that the hiring business is attempting to evade the demands of an applicable wage order through misclassification. A company that labels as independent contractors a class of workers who are not engaged in an independently established business in order to enable the company to obtain the economic advantages that flow from avoiding the financial obligations that a wage order imposes on employers unquestionably violates the fundamental purposes of the wage order. The fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself.

Accordingly, in order to satisfy part C of the ABC test, the hiring entity must prove that the worker is customarily engaged in an independently established trade, occupation, or business.³¹

...

B. Application of the Suffer or Permit to Work Standard in This Case

We now turn to application of the suffer or permit to work standard in this case. As *Dynamex* points out, the trial court, in applying the suffer or permit to work definition in its class certification order, appears to have adopted a literal interpretation of the suffer or permit to work language that, if applied generally, could potentially encompass the type of traditional independent contractor—like an independent plumber or electrician—who could not reasonably have been viewed as the hiring business's employee.³³ We agree with *Dynamex* that the trial court's view of the suffer or permit to work standard was too broad. For the reasons discussed below, however, we nonetheless conclude, for two independently sufficient reasons, that under a proper interpretation of the suffer or permit to work standard, the trial court's ultimate determination that there is a sufficient commonality of interest to support certification of the proposed class is correct and should be upheld.

¹⁸First, with respect to part B of the ABC test, it is quite clear that there is a sufficient commonality of interest with regard to the question whether the work provided by the delivery drivers within the certified class is outside the usual course of the hiring entity's business to permit plaintiffs' claim of misclassification to be resolved on a class basis. In the present case, *Dynamex's* entire business is that of a delivery service. Unlike other types of businesses in which

the delivery of a product may or may not be viewed as within the usual course of the hiring company's business,³⁴ here the hiring entity is a delivery company and the question whether the work performed by the delivery drivers within the certified class is outside the usual course of its business is clearly amenable to determination on a class basis. As a general matter, Dynamex obtains the customers for its deliveries, sets the rate that the customers will be charged, notifies the drivers where to pick up and deliver the packages, tracks the packages, and requires the drivers to utilize its tracking and recordkeeping system. As such, there is a sufficient commonality of interest regarding whether the work performed by the certified class of drivers who pick up and deliver packages and documents from and to Dynamex customers on an ongoing basis is outside the usual course of Dynamex's business to permit that question to be resolved on a class basis.

Because each part of the ABC test may be independently determinative of the employee or independent contractor question, our conclusion that there is a sufficient commonality of interest under part B of the ABC test is sufficient in itself to support the trial court's class certification order. (See *Brinker Restaurant Corp. v. Superior Court*, supra, 53 Cal.4th at p. 1032, 139 Cal.Rptr.3d 315, 273 P.3d 513 [class certification is not an abuse of discretion if certification is proper under any theory].) Nonetheless, for guidance we go on to discuss whether there is a sufficient commonality of interest under part C of the ABC test to support class treatment of the relevant question under that part of the ABC test as well.

¹⁹Second, with regard to part C of the ABC test, it is equally clear from the record that there is a sufficient commonality of interest as to whether the drivers in the certified class are customarily engaged in an independently established trade, occupation, or business to permit resolution of that issue on a class basis. As discussed above, prior to 2004 Dynamex classified the drivers who picked up and delivered the packages and documents from Dynamex customers as employees rather than independent contractors. In 2004, Dynamex adopted a new business structure under which it required all of its drivers to enter into a contractual agreement that specified the driver's status as an independent contractor. Here the class of drivers certified by the trial court is limited to drivers who, during the relevant time periods, performed delivery services only for Dynamex. The class excludes drivers who performed delivery services for another delivery service or for the driver's own personal customers; the class also excludes drivers who had employees of their own. With respect to the class of included drivers, there is no indication in the record that there is a lack of commonality of interest regarding the question whether these drivers are customarily engaged in an independently established trade, occupation, or business. For this class of drivers, the pertinent question under part C of the ABC test is amenable to resolution on a class basis.³⁵

For the foregoing reasons, we conclude that under a proper understanding of the suffer or permit to work standard there is, as a matter of law, a sufficient commonality of interest within the certified class to permit the question whether such drivers are employees or independent

contractors for purposes of the wage order to be litigated on a class basis. Accordingly, we conclude that with respect to the causes of action that are based on alleged violations of the obligations imposed by the wage order, the trial court did not abuse its discretion in certifying the class and in denying Dynamex's motion to decertify the class.

V. CONCLUSION

For the reasons discussed above, the judgment of the Court of Appeal is affirmed.

WE CONCUR:

**Estrada v. FedEx Ground Package System, Inc.
64 Cal.Rptr.3d 327 (Cal.App. 2007)**

**Briefs and Other Related Documents
Court of Appeal, Second District, Division 1, California.
Anthony ESTRADA et al., Plaintiffs and Appellants,**

v.

FEDEX GROUND PACKAGE SYSTEM, INC., Defendant and Appellant.

No. B189031.

Aug. 13, 2007.

Review Denied Nov. 28, 2007.

Background: Three drivers brought class action against package delivery company, contending that, for limited purpose of their entitlement to reimbursement for work-related expenses, they were employees, not independent contractors. The Superior Court of Los Angeles County, No. BC210130, Bruce E. Mitchell, Temporary Judge, entered orders dismissing some members from class. Drivers appealed, and the Court of Appeal, 125 Cal.App.4th 976, 23 Cal.Rptr.3d 261, dismissed appeal as premature. Other equitable orders were reversed on appeal, and in trifurcated trial on remand, the Superior Court, Los Angeles County, No. BC210130, Howard J. Schwab, Judge, and Bruce Mitchell, Temporary Judge, found drivers were employees, ordered company to reimburse some but not all of drivers expenses, granted most of equitable relief drivers sought, and ordered company to pay drivers' costs and attorney fees. Company appealed and drivers cross-appealed.

Holdings: The Court of Appeal, Vogel, J., held that:

- (1) drivers were employees rather than independent contractors;
- (2) drivers' claims were suitable for class action;
- (3) company did not comply with statutory obligation to reimburse its drivers;
- (4) representative driver was entitled to attorney fees under private attorney general doctrine;

- (5) attorney fees award of \$12.3 million was excessive;
- (6) expert analysis was not admissible to prove damages; and
- (7) company was required to reimburse drivers for their work accident insurance premiums.

VOGEL, J.

Three drivers brought this class action against FedEx Ground Package System, Inc., contending that, for the limited purpose of their entitlement to reimbursement for work-related expenses, they were employees, not independent contractors. They sought reimbursement and declaratory and injunctive relief, and obtained class certification for their reimbursement claim. In a trifurcated trial, the court found the drivers were employees within the meaning of Labor Code section 2802 (Phase I), ordered FedEx to reimburse some (about \$5 million, including prejudgment interest) but not all of their expenses (Phase II), granted most of the equitable relief sought by the drivers (Phase III), and ordered FedEx to pay the drivers' costs and attorneys' fees (about \$12.3 million). . . .

A. The Evidence At Trial

1. The Operating Agreement

Men and women who apply to FedEx for positions as drivers must complete applications, submit to background checks and strength tests, and satisfy appearance standards. The only required skill is driving and no commercial driving experience is needed. Upon acceptance, a driver must execute a nonnegotiable "Pick-up and Delivery Contractor Operating Agreement" that obligates him to "provide daily pick-up and delivery service, and to conduct his ... business so that it can be identified as being a part of the [FedEx] system." The Operating Agreement identifies the driver as an "independent contractor, and not as an employee ... for any purpose," sets forth the parties' "mutual business objectives," notes that "the manner and means of reaching [these objectives] are within the discretion of the [driver]," and states that "no officer or employee of [FedEx] shall have the authority to impose any term or condition [including hours of work or travel routes] contrary to this understanding."

Under the terms of the Operating Agreement, the driver must provide his own truck meeting FedEx's specifications, mark the truck with the FedEx logo, pay all costs of operating and maintaining the truck (including repairs, cleaning, fuel, tires, taxes, licenses and insurance), and use the truck exclusively in the service of FedEx (or mask the logo if the truck is used for any other purpose).

The driver must provide "fully competitive" service to a "primary service area" assigned by FedEx, and the Operating Agreement acknowledges the driver's "proprietary interest" in his primary service area's customer accounts-but gives FedEx the right to reconfigure primary service areas (and to reassign packages to another driver) if the volume of packages in the

driver's primary service area exceeds the amount the driver could reasonably be expected to handle on any given day. In the event of reconfiguration, the driver has a right "to receive payment" from FedEx or the benefited driver.

The Operating Agreement obligates the driver to try to "retain and increase" business within his primary service area, to "cooperate" with FedEx's employees, customers, and other drivers for the common goal of efficient pickup and delivery, to load, handle, and transport packages using methods designed to avoid theft, loss and damage, and to foster FedEx's "professional image" and "good reputation." The driver agrees to drive safely, to prepare driver logs, inspection reports, fuel receipts, and shipping documents, and (on a daily basis) to return these items and any collected charges and undeliverable packages to FedEx. He agrees to wear a FedEx-approved uniform and to maintain his appearance "consistent with reasonable standards of good order," his uniform "in good condition," and his truck in a "clean and presentable fashion."

For its part, FedEx reserves the right to have its management employees travel with the driver four times each year to verify that the driver is meeting FedEx's standards, and agrees to train or "familiarize [the driver] with [its] quality service procedures." FedEx pays or "settles" with a driver weekly based on a stated calculation, and offers the driver a "business support package" to help him obtain and maintain a truck, a scanner, clean uniforms, and other similar items, the cost of which is paid by the driver by deductions from his weekly "settlements." **FN3**

FN3. The scanner, which is leased from FedEx, is the device used by the driver to obtain signatures when packages are delivered. Every driver's truck has a computer, and the driver must insert the scanner into the computer after each delivery so that customers have immediate access to delivery information via the FedEx website.

The driver may elect the initial term of his Operating Agreement (from one to five years), with automatic yearly renewals unless, 30 days before expiration of the term, one party gives the other written notice of termination. The Operating Agreement may be terminated at any time by mutual consent, by FedEx for "intentional misconduct or reckless or willfully negligent operation" of equipment, by either party for breach of the Operating Agreement's obligations, by either party if FedEx stops doing business or reduces its operations at the driver's terminal, and by a driver on 30 days written notice.

The driver has the right to challenge his termination by an arbitration at which, if he prevails, he may be awarded reinstatement or damages or both. A driver in good standing has the right to assign his rights under the Operating Agreement to a replacement contractor acceptable to FedEx. The Operating Agreement recites that it and its attachments constitute the "entire agreement and understanding between the parties," and that it can be modified only by a writing signed by both parties.

Implementation of the Operating Agreement

Although FedEx claimed at trial that the Operating Agreement (and only the Operating

Agreement) determined the drivers' status as independent contractors, both sides presented anecdotal and other evidence through the testimony of numerous drivers, FedEx managers, and experts.

Notwithstanding the merger clause in the Operating Agreement, the drivers' relationship to FedEx is defined by a number of other sources, including the FedEx "Ground Manual" and "Operations Management Handbook," which set forth "policies and procedures" in great detail to ensure the uniform operation of FedEx terminals throughout California, as well as by recruiting materials, welcome packets, memoranda, training videos, bulletin board posters, round-table presentations, and similar means of communication.

A new driver leases a scanner and purchases or leases a truck (usually obtained from FedEx preferred vendors) that meets FedEx's size, model and condition specifications, paints the truck "FedEx White," and applies the FedEx logo to the truck. To pay for these items, drivers may obtain loans through FedEx's business support programs (with repayment through pay deductions). FedEx offers its drivers a deferred compensation or retirement plan (the record is ambiguous on this point) and other "employee benefits" (including direct deposit, a seniority-based "time-off program" for unpaid leave, and a scholarship program for the drivers' children). As is true of all FedEx employees, drivers are paid weekly at rates set by FedEx without negotiation (the drivers' rate is based on a daily rate, a piece rate for packages handled, and bonuses for length and quality of service).FN4 Customers are billed by FedEx, not the drivers.

FN4. Drivers are paid according to a complex formula that includes \$40/day for working in uniform and providing a van, \$5/day for participating in the flex program, a piece-rate component based on the number of stops made and packages handled, and a daily "temporary core zone density" payment, plus a quarterly performance bonus based on years of service and a monthly bonus based on both the individual driver's performance and the performance of his terminal.

Regional managers supervise terminal managers and have weekly discussions about goals and procedures. Terminal managers, in turn, supervise and train drivers. Drivers work full time and exclusively for FedEx, and must work every day FedEx provides service unless they have preapproved replacements.

FedEx sets the drivers' work hours (9.5 to 11 hours a day), and the average driver has worked for FedEx for eight years, with an annual income of \$35,000 to \$50,000 after expenses. The drivers and their trucks are subject to inspection every day (the trucks must be clean, the drivers in uniform and well groomed), and if either fails inspection, the driver may be barred from service.

Trucks must be parked in assigned spots and loaded by FedEx employees with the packages assigned to the driver by management (the drivers may not refuse an assignment).FN5 FedEx adjusts the number of assigned packages (thereby controlling the driver's hours and pay) by

“flexing” from an adjacent route to balance the workload between drivers and in furtherance of its goal-deliver “every package, every day.” Almost all drivers participate in the flex program. When necessary (as determined by FedEx), FedEx reconfigures primary service areas without payment by FedEx to the driver for lost customers.

FN5. Under federal law, the drivers’ trucks cannot be used for personal use during the hours they are used to deliver packages for FedEx. (See 49 C.F.R. § 376.12(c).) Because the drivers must park their trucks in assigned spaces at their terminals, and because the logos on most of the trucks are difficult if not impossible to conceal, FedEx’s assertion that the drivers may use their trucks for other purposes during off hours is more imagined than real. As a practical matter, most drivers rarely use their trucks for personal matters.

Drivers may not leave the terminal at the beginning of the work day until sorting is completed, and terminal managers may contact drivers during the day about additional assignments. Drivers may “sequence” the order of deliveries and pickups but must meet all pickup and delivery times or “windows” arranged by FedEx’s sales representatives and certain customers. These windows affect a driver’s ability to sequence his own route.

Drivers must comply with FedEx’s rules for obtaining signatures on scanners, releasing packages without signatures, special handling of overnight and C.O.D. packages, and tracing undelivered or improperly delivered packages. Drivers must place their scanners in their computers after each delivery (fn. 3, ante), and at the end of each day must return to their assigned terminal parking spaces, deliver all paperwork and cash from C.O.D. payments, download their scanners, and provide details about any unsuccessful deliveries.

When on any given day a driver makes no attempt to deliver a package, misses a pickup time or window, or is the subject of a complaint, the matter must be discussed with the terminal manager who, in addition, meets with each driver twice each year to communicate and document shortcomings. Several times each year, terminal managers evaluate each driver’s performance by means of a “customer service ride” and there are covert checks and security audits conducted in the field. Each driver receives an annual progress review. Terminal managers decide which “failures to service” or alleged breaches of the Operating Agreement to document, and they have discretion (subject to the regional managers’ and upper management’s approval) to recommend termination or nonrenewal.

In practice, therefore, the work performed by the drivers is wholly integrated into FedEx’s operation. The drivers look like FedEx employees, act like FedEx employees, are paid like FedEx employees, and receive many employee benefits.

B. The Phase I Statement of Decision

The trial court found, and set forth in its statement of decision, that the drivers were FedEx

employees, not independent contractors, and that they had not been indemnified for any of the expenses at issue. The court described the Operating Agreement as “a brilliantly drafted contract creating the constraints of an employment relationship with [the drivers] in the guise of an independent contractor model”-because FedEx “not only has the right to control, but has close to absolute actual control over [the drivers] based upon interpretation and obfuscation.” FN6

The court found that FedEx’s management witnesses “differed dramatically in their testimony as to the available remedies” for a driver challenging termination, with the head of contractor relations “admitting that he did not volunteer to [the drivers] any information about [their] rights to arbitrate or sue.” In the trial court’s view, FedEx’s conduct established that the drivers could be terminated “at will.”

FN6. The court found the drivers’ right to control their own routes and schedules was illusive because they were “constrained by customer pick up and delivery windows contracted by the [FedEx] sales force” and by FedEx’s paperwork requirements that required the drivers’ presence at the terminal.

The court found, in addition, that the drivers are “totally integrated into the [FedEx] operation,” that they perform work essential to FedEx’s core business, that they are required to work exclusively and full time for FedEx, that their customers are those assigned to them by FedEx, that no specialized skills are required, that they must wear uniforms and conform absolutely to FedEx’s standards and that, in the end, each driver has a “job” with “little or no entrepreneurial opportunities.” Although the drivers provide their own trucks and equipment, FedEx is involved in the purchasing process, providing funds and recommending vendors.

The essence of the trial court’s statement of decision is that if it looks like a duck, walks like a duck, swims like a duck, and quacks like a duck, it is a duck.

DISCUSSION

FedEx’s Appeal

I.

The trial court found that, for purposes of determining the drivers’ right to reimbursement for their expenses, the drivers are employees within the meaning of Labor Code section 2802.FN7 FedEx contends the trial court is wrong. We disagree.

FN7. Undesignated section references are to the Labor Code.

A.

Subdivision (a) of section 2802 provides that “[a]n employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties.”

Because the Labor Code does not expressly define “employee” for purposes of section 2802, the common law test of employment applies. (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1087, 32 Cal.Rptr.3d 483, 116 P.3d 1162.)

The essence of the test is the “control of details”— that is, whether the principal has the right to control the manner and means by which the worker accomplishes the work— but there are a number of additional factors in the modern equation, including (1) whether the worker is engaged in a distinct occupation or business, (2) whether, considering the kind of occupation and locality, the work is usually done under the principal’s direction or by a specialist without supervision, (3) the skill required, (4) whether the principal or worker supplies the instrumentalities, tools, and place of work, (5) the length of time for which the services are to be performed, (6) the method of payment, whether by time or by job, (7) whether the work is part of the principal’s regular business, and (8) whether the parties believe they are creating an employer-employee relationship.

FN8. *Air Couriers and JKH Enterprises* both involve package delivery drivers, albeit in different postures. In *Air Couriers*, a package delivery company sued the Employment Development Department for a refund of employment taxes, claiming its drivers were independent contractors; the trial court found the drivers were employees and the Third District affirmed. (*Air Couriers*, supra, 150 Cal.App.4th 923, 59 Cal.Rptr.3d 37.) In *JKH Enterprises*, the Department of Industrial Relations found in administrative proceedings that a courier service’s drivers were employees for whom workers’ compensation insurance had to be provided; the courier service challenged the order by a petition for a writ of mandate, claiming the drivers were independent contractors. The trial court found the drivers were employees and the Sixth District affirmed. (*JKH Enterprises, Inc. v. Department of Industrial Relations*, supra, 142 Cal.App.4th 1046, 48 Cal.Rptr.3d 563.)

The determination (employee or independent contractor) is one of fact and thus must be affirmed if supported by substantial evidence. (*Borello*, supra, 48 Cal.3d at p. 349, 256 Cal.Rptr. 543, 769 P.2d 399; *Air Couriers*, supra, 150 Cal.App.4th at p. 937, 59 Cal.Rptr.3d 37; *Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Bd.* (1991) 235 Cal.App.3d 1363, 1367, 1373, 1 Cal.Rptr.2d 64; *Toyota Motor Sales U.S.A., Inc. v. Superior Court*, supra, 220 Cal.App.3d at p. 877, 269 Cal.Rptr. 647.) Because the trial court expressly relied on *Borello*, and because FedEx does not dispute the applicability of the *Borello* test, there is no question of law with regard to this issue, only one of substantial evidence. (*Air Couriers*, supra, 150 Cal.App.4th at pp. 932-933, 937, 59 Cal.Rptr.3d 37.)

B.

FedEx contends the trial court misapplied the test (by an erroneous analysis of the “right to control” factor and otherwise) and made “insupportable inferences of fact” in determining that the drivers are employees. We disagree.

First, FedEx’s assumptions are wrong. Although it is true that the Operating Agreement says “the manner and means” to satisfy the objectives of the contract “are within the discretion of the [drivers],” and that FedEx does not have the “authority to impose any term or condition” to the contrary, the evidence shows unequivocally that FedEx’s conduct spoke louder than its words. As noted above, the parties’ label is not dispositive and will be ignored if their actual conduct establishes a different relationship.

The same is true with regard to FedEx’s claim that it cannot terminate the drivers at will. Although the Operating Agreement provides for termination with cause, it also provides for nonrenewal without any cause at all—and substantial evidence established that FedEx discharges drivers at will. (Id. at p. 875, 269 Cal.Rptr. 647.)

Second and most significantly, the trial court’s findings are supported by substantial evidence. FedEx’s control over every exquisite detail of the drivers’ performance, including the color of their socks and the style of their hair, supports the trial court’s conclusion that the drivers are employees, not independent contractors.^{FN9} The drivers must wear uniforms and use specific scanners and forms, all obtained from FedEx and marked with FedEx’s logo. The larger items—trucks and scanners—are obtained from FedEx approved providers, usually financed through FedEx, and repaid through deductions from the drivers’ weekly checks. Many standard employee benefits are provided, and the drivers work full time, with regular schedules and regular routes. The terminal managers are the drivers’ immediate supervisors and can unilaterally reconfigure the drivers’ routes without regard to the drivers’ resulting loss of income. The customers are FedEx’s customers, not the drivers’ customers. FedEx has discretion to reject a driver’s helper, temporary replacement, or proposed assignee.

^{FN9}. The drivers were told they could not wear white shoes or socks; the men were told they could not wear earrings or ponytails, and sometimes that they needed to shave or get a haircut. We summarily reject FedEx’s suggestion that constraints such as these are necessary to ensure the drivers’ compliance with government regulations. (See *Southwest Research Institute v. Unemployment Ins. Appeals Bd.* (2000) 81 Cal.App.4th 705, 709, 96 Cal.Rptr.2d 769.)

Drivers—who need no experience to get the job in the first place and whose only required skill is the ability to drive—must be at the terminal at regular times for sorting and packing as well as mandatory meetings, and they may not leave until the process is completed.^{FN10} The drivers are not engaged in a separate profession or business, and they are paid weekly, not by the job. They must work exclusively for FedEx. Although they have a nominal opportunity to profit, that opportunity may be lost at the discretion of the terminal managers by “flexing” and withheld

approvals, and for very slight violations of the rules. Most drivers have worked for FedEx for a long time (an average of eight years), and drivers employed by FedEx's competitors (UPS, DHL, and FedEx's sister corporation, FedEx Express) are classified as employees.

FN10. FedEx's reliance on *State Compensation Ins. Fund v. Brown* (1995) 32 Cal.App.4th 188, 38 Cal.Rptr.2d 98, is misplaced. Although that case observes that "truck driving-while perhaps not a skilled craft-requires abilities beyond those possessed by a general laborer" (*id.* at pp. 202-203, 38 Cal.Rptr.2d 98), the finding of independent contractor status in that case is based primarily on the facts that the truck drivers worked for more than one broker at a time and were compensated on a job-by-job basis, "with no obligation on the part of the [drivers] to accept any assignment and no retribution ... for refusing assignments." (*Id.* at p. 203, 38 Cal.Rptr.2d 98.)

Based on these facts, we reject FedEx's contention that this is a "true entrepreneurial opportunity depending on how well the [drivers] perform" and conclude that substantial evidence supports the trial court's finding that the drivers are employees, not independent contractors, for purposes of section 2802. (*Air Couriers*, *supra*, 150 Cal.App.4th at pp. 937-939, 59 Cal.Rptr.3d 37; *13 *JKH Enterprises, Inc. v. Department of Industrial Relations*, *supra*, 142 Cal.App.4th at pp. 1064-1065, 48 Cal.Rptr.3d 563; *Toyota Motor Sales U.S.A., Inc. v. Superior Court*, *supra*, 220 Cal.App.3d at pp. 876-878, 269 Cal.Rptr. 647.) FN11

FN11. The federal cases relied on by FedEx are factually inapposite. The truckers in *Berger Transfer v. Central States* (8th Cir.1996) 85 F.3d 1374 were paid by the trip, could refuse assignments, and did not have to wear uniforms or paint their trucks with any special marks. The drivers in *C.C. Eastern, Inc. v. N.L.R.B.* (D.C.Cir.1995) 60 F.3d 855 were paid by the job, did not have to wear uniforms, and could choose any kind of truck. The drivers in *Merchants Home Delivery Serv., Inc. v. N.L.R.B.* (9th Cir.1978) 580 F.2d 966 were paid by the job, chose their own work hours, could refuse assignments, could sometimes work for other businesses, and operated as partnerships or corporations, not individuals. The drivers in *North American Van Lines, Inc. v. N.L.R.B.* (D.C.Cir.1989) 869 F.2d 596 selected the frequency of their jobs, the type of loads, the routes taken, and they did not have to wear uniforms. The drivers in *United States v. Silk* (1947) 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757 hired their own helpers and hauled for more than one business. Meanwhile, the drivers in our case are not paid by the job but by a formula established by FedEx and must work only for FedEx, must wear uniforms, must conform their personal appearance to FedEx's rules and regulations, must work on the days required by FedEx, and must use FedEx's method of delivery.

....

FedEx contends that, assuming the drivers are employees, FedEx already indemnified them for the expenses due under section 2802. As did the trial court, we disagree.FN13

FN13. The trial court found that "[n]o evidence was presented to support [FedEx's] position [that

the drivers had already been indemnified for the expenses they sought under section 2802] and no language in the [Operating Agreement] would bolster that theory. Rather all witnesses testified that the [drivers] were responsible for their own expenses.”

Subdivision (a) of section 2802 obligates an employer to indemnify its employee “for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties.” According to FedEx, the Division of Labor Standards Enforcement requires reimbursement only for “any reasonable amount” (DLSE Interpretive Bulletin No. 84-7 (Jan. 8, 1985)), and the settlement formula in the Operating Agreement “effectively provided reasonable compensation” for the drivers’ business expenses. FedEx is wrong.

The Operating Agreement obligates the drivers to provide their own trucks, scanners, and clean uniforms, and to “bear all costs and expenses incidental to operation” of the trucks, including maintenance, cleaning, depreciation, fuel, oil, tires, repairs, taxes, licenses, tolls, and insurance. The drivers, the terminal managers, and FedEx’s upper management all testified that drivers are expected to bear their own costs. As for the “settlement,” the Operating Agreement provides that it is “for services provided,” not expenses incurred (for example, “contractor and van availability”). FedEx’s suggestion that the settlement formula is keyed to specific expenses and, as such, includes reimbursement for those expenses, is not supported by any evidence.FN14

FN14. We summarily reject FedEx’s claim of evidentiary error. It says it “sought to introduce evidence ... establishing that the settlement was designed overall to provide de facto compensation for all expenses incurred by contractors,” and it says it wanted to do this by “showing that the payments contractors made to their own hired drivers were far less than what contractors received through the settlement system for equivalent work.” FedEx’s record references do not support this point. Instead, the cited pages show that FedEx tried to ask witnesses about information in their tax returns, and that the trial court properly sustained objections to those questions based on the taxpayer privilege and because FedEx had other means to present the same information. (*Sav-On Drugs, Inc. v. Superior Court* (1975) 15 Cal.3d 1, 6, 123 Cal.Rptr. 283, 538 P.2d 739.) FedEx did not make any offer of proof remotely similar to the argument it offers on this appeal. (*People ex rel. Dept. of Transportation v. Superior Court* (2003) 105 Cal.App.4th 39, 46, 129 Cal.Rptr.2d 60.)

IV.

FedEx contends the attorneys’ fee award is “manifestly improper,” that it cannot be justified under Code of Civil Procedure section 1021.5, and that it must in any event be revisited in light of our reversal of the equitable orders in *Estrada II*.FN15 We reject FedEx’s substantive challenges but agree that the amount cannot stand.

Estrada’s motion asked for \$619,691 in costs and \$6,789,325 for his attorneys’ fees, a total of \$7,409,016-plus a 2.0 multiplier as compensation for delay and contingency, a total of

\$14,818,032.

The trial court reduced the fee by 18 percent (finding the amount “slightly bloated”) but otherwise granted the motion (including the 2.0 multiplier) and gave Estrada a total of \$12,373,875 for costs and fees, noting the risk inherent in a contingent fee, the “financial burden of private enforcement,” and the years of “long, hard-fought” and “labor intensive” litigation involving “enforcement of an important right” that conferred a “significant benefit on a large class.”

FedEx contends the award is erroneous because Estrada was motivated primarily by his own financial interests, that any benefit to a larger class was incidental, that no significant benefit was conferred on the public or a larger class, and that the trial court’s dual use of the same reasons to both calculate the fee and justify the multiplier created a windfall. We reject FedEx’s claim that fees were not recoverable in this case but agree that the amount must be reduced and that the same facts cannot be used to trigger the application of section 1021.5 and justify a multiplier.

. . . But Estrada did not get everything he sought. In *Estrada II*, we reversed all the equitable orders, finding that Estrada lacked standing to pursue his claims for prospective equitable relief (a) because his relationship with FedEx ended before this lawsuit was filed, and (b) because the class certification order was expressly limited to the reimbursement issue. (*Estrada II*, 2006 WL 3378246, *1.) The equitable orders were a significant part of the litigation and the resulting judgment.

In Phase III of these proceedings, Estrada sought declaratory relief and a permanent injunction on behalf of “all California single work area pick-up and delivery drivers who at any time since May 11, 1996 worked or currently work or in the future are employed to work under FedEx’s Operating Agreement.” The trial court rejected FedEx’s defenses, finding among other things that it was necessary to address the equitable claims in light of the “importance and recurring nature of the employment issues of the [drivers].” A permanent injunction issued, enjoining FedEx from (1) misclassifying drivers as independent contractors or participating in any agreement to misclassify them as independent contractors, and (2) violating or attempting to violate any provision of the California Labor Code, Industrial Welfare Commission Orders, or other state laws and regulations protecting the drivers as employees-both in the present and for as long as FedEx retained the employment model or substantially similar employment model used by FedEx at the time of trial. We reversed all of the equitable orders, finding that Estrada lacked standing to seek prospective declaratory or injunctive relief and that the trial court thus lacked jurisdiction to grant such relief.

When we reversed the equitable orders in *Estrada II*, we disposed of all of the benefits Estrada had obtained in the third phase of trial. Although we agree that Estrada is still the prevailing party, the factual predicate for the trial court’s award—that Estrada won on all points, including the far-reaching injunctions—is no longer valid. Estrada concedes as much, noting in his

respondent's brief that, under the short-lived injunctions, "the benefits of the instant litigation [would have been] enjoyed by thousands of people who are not members of the class, including future [drivers] and employees," and that the equitable orders were "[m]ore important" to the trial court than the damages award because "the injunctive and declaratory relief require[d] [FedEx] to treat all its current and future [drivers] as employees and thus provide[d] ongoing relief to a huge group of people."

The \$12,373,875 award is excessive and cannot stand.

C.

In recalculating an appropriate fee award on remand, the trial court must determine anew whether any multiplier is appropriate in this case. The fee award sans multiplier (\$5,567,246) exceeded the amount of the award to the entire class of plaintiffs (about \$3 million before interest was added, about \$5 million with prejudgment interest). By the time the trial court revisits this issue, the total monetary award to the plaintiffs will have increased for the reasons explained below with regard to the drivers' cross-appeal, and the attorneys will have spent more time on this case both on appeal and on the post-appeal trial court proceedings. While the amount of the fee is ultimately a decision within the trial court's discretion (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132, 104 Cal.Rptr.2d 377, 17 P.3d 735), the fee must above all else be reasonable and a multiplier, if used, must be based on facts other than those used to trigger the application of section 1021.5.

Lewis v. Epic Systems Corporation, 823 F.3d 1147 (7th Cir. 2016)

Opinion

Wood, Chief Judge.

Epic Systems, a health care software company, required certain groups of employees to agree to bring any wage-and-hour claims against the company only through individual arbitration. The agreement did not permit collective arbitration or collective action in any other forum. We conclude that this agreement violates the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151, et seq., and is also unenforceable under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1, et seq.

We therefore affirm the district court's denial of Epic's motion to compel arbitration.

I

On April 2, 2014, Epic Systems sent an email to some of its employees. The email contained an arbitration agreement mandating that wage-and-hour claims could be brought only through individual arbitration and that the employees waived "the right to participate in or receive money or any other relief from any class, collective, or representative proceeding." The agreement included a clause stating that if the "Waiver of Class and Collective Claims" was unenforceable, "any claim brought on a class, collective, or representative action basis must be filed in a court of

competent jurisdiction.” It also said that employees were “deemed to have accepted this Agreement” if they “continue [d] to work at Epic.”

Epic gave employees no option to decline if they wanted to keep their jobs. The email requested that recipients review the agreement and acknowledge their agreement by clicking two buttons. The following day, Jacob Lewis, then a “technical writer” at Epic, followed those instructions for registering his agreement.

Later, however, Lewis had a dispute with Epic, and he did not proceed under the arbitration clause. Instead, he sued Epic in federal court, contending that it had violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, et seq. and Wisconsin law by misclassifying him and his fellow technical writers and thereby unlawfully depriving them of overtime pay.

Epic moved to dismiss Lewis’s claim and compel individual arbitration. Lewis responded that the arbitration clause violated the NLRA because it interfered with employees’ right to engage in concerted activities for mutual aid and protection and was therefore unenforceable. The district court agreed and denied Epic’s motion. Epic appeals, arguing that the district court erred in declining to enforce the agreement under the FAA. We review de novo a district court’s decision to deny a motion to compel arbitration.

Section 7 of the NLRA provides that “[e]mployees 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.” 29 U.S.C. § 157. Section 8 enforces Section 7 unconditionally by deeming that it “shall be an unfair labor practice for an employer ... to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7].” Id. § 158(a)(1). The National Labor Relations Board is “empowered ... to prevent any person from engaging in any unfair labor practice ... affecting commerce.” Id. § 160(a).

Contracts “stipulat[ing] ... the renunciation by the employees of rights guaranteed by the [NLRA]” are unlawful and may be declared to be unenforceable by the Board. *Nat’l Licorice Co. v. NLRB*, 309 U.S. 350, 365, 60 S.Ct. 569, 84 L.Ed. 799 (1940) (“[I]t will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them, would violate the Board’s order or be inconsistent with any part of it[.]”); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337, 64 S.Ct. 576, 88 L.Ed. 762 (1944) (“Wherever private contracts conflict with [the Board’s] functions, they obviously must yield or the [NLRA] would be reduced to a futility.”).

In accordance with this longstanding doctrine, the Board has, “from its earliest days,” held that “employer-imposed, individual agreements that purport to restrict Section 7 rights” are unenforceable. *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 at *5 (2012) (collecting cases as early as 1939), enf’d in part and granted in part, *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir.

2013).

It has done so with “uniform judicial approval.” *Id.* (citing as examples *NLRB v. Vincennes Steel Corp.*, 117 F.2d 169, 172 (7th Cir. 1941), *NLRB v. Jahn & Ollier Engraving Co.*, 123 F.2d 589, 593 (7th Cir. 1941), and *NLRB v. Adel Clay Products Co.*, 134 F.2d 342 (8th Cir. 1943)). Section 7’s “other concerted activities” have long been held to include “resort to administrative and judicial forums.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566, 98 S.Ct. 2505, 57 L.Ed.2d 428 (1978) (collecting cases).

Similarly, both courts and the Board have held that filing a collective or class action suit constitutes “concerted activit[y]” under Section 7. See *Brady v. Nat’l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) (“[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is ‘concerted activity’ under § 7 of the National Labor Relations Act.”); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) (same); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (same); *Mohave Elec. Co-op., Inc. v. NLRB*, 206 F.3d 1183, 1189 (D.C. Cir. 2000) (single employee’s filing of a judicial petition constituted “concerted action” under NLRA where “supported by fellow employees”); *D.R. Horton*, 357 N.L.R.B. No. 184, at *2 n.4 (collecting cases).

This precedent is in line with the Supreme Court’s rule recognizing that even when an employee acts alone, she may “engage in concerted activities” where she “intends to induce group activity” or “acts as a representative of at least one other employee.” *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 831, 104 S.Ct. 1505, 79 L.Ed.2d 839 (1984).

Section 7’s text, history, and purpose support this rule. In evaluating statutory language, a court asks first “whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.” *Exelon Generation Co., LLC v. Local 15, Int’l Bhd. of Elec. Workers, AFL-CIO*, 676 F.3d 566, 570 (7th Cir. 2012). In doing so, it “giv[es] the words used their ordinary meaning.” *Lawson v. FMR LLC*, — U.S. —, 134 S.Ct. 1158, 1165, 188 L.Ed.2d 158 (2014) (internal citation omitted). “Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.” *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980).

The NLRA does not define “concerted activities.” The ordinary meaning of the word “concerted” is: “jointly arranged, planned, or carried out; coordinated.” *Concerted*, NEW OXFORD AMERICAN DICTIONARY 359 (3d ed. 2010). Activities are “thing[s] that a person or group does or has done” or “actions taken by a group in order to achieve their aims.” *Id.* at 16. Collective or class legal proceedings fit well within the ordinary understanding of “concerted activities.”

The NLRA’s history and purpose confirm that the phrase “concerted activities” in Section 7

should be read broadly to include resort to representative, joint, collective, or class legal remedies. (There is no hint that it is limited to actions taken by a formally recognized union.) Congress recognized that, before the NLRA, “a single employee was helpless in dealing with an employer,” and “that union was essential to give laborers opportunity to deal on an equality with their employer.” *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33, 57 S.Ct. 615, 81 L.Ed. 893 (1937).

In enacting the NLRA, Congress’s purpose was to “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.” *City Disposal Systems*, 465 U.S. at 835, 104 S.Ct. 1505. Congress gave “no indication that [it] 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.” *Id.*

Collective, representative, and class legal remedies allow employees to band together and thereby equalize bargaining power. See *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 809, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) (noting that the class action procedure allows plaintiffs who would otherwise “have no realistic day in court” to enforce their rights); *Harry Kalven, Jr. & Maurice Rosenfield, The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941) (noting that class suits allow those “individually in a poor position to seek legal redress” to do so, and that “an effective and inclusive group remedy” is necessary to ensure proper enforcement of rights).

Given Section 7’s intentionally broad sweep, there is no reason to think that Congress meant to exclude collective remedies from its compass.

....

The Board’s interpretation is, at a minimum, a sensible way to understand the statutory language, and thus we must follow it.

....

The question thus becomes whether Epic’s arbitration provision impinges on “Section 7 rights.”

The answer is yes.

In relevant part, the contract states “that covered claims will be arbitrated only on an individual basis,” and that employees “waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding.” It stipulates that “[n]o party may bring a claim on behalf of other individuals, and any arbitrator hearing [a] claim may not: (i) combine more than one individual’s claim or claims into a single case; (ii) participate in or facilitate notification of others of potential claims; or (iii) arbitrate any form of a class, collective or representative proceeding.” It notes that “covered claims” include any “claimed violation of

wage-and-hour practices or procedures under local, state, or federal statutory or common law.”

It thus combines two distinct rules: first, any wage-and-hour dispute must be submitted to arbitration rather than pursued in court; and second, no matter where the claim is brought, the plaintiff may not take advantage of any collective procedures available in the tribunal.

Insofar as the second aspect of its provision is concerned, Epic’s clause runs straight into the teeth of Section 7. The provision prohibits any collective, representative, or class legal proceeding. Section 7 provides that “[e]mployees shall have the right to ... engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157.

A collective, representative, or class legal proceeding is just such a “concerted activit[y].” See *Eastex*, 437 U.S. at 566, 98 S.Ct. 2505; *Brady*, 644 F.3d at 673; *D.R. Horton*, 357 N.L.R.B. No. 184, at *2–3.

Under Section 8, any employer action that “interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in [Section 7]” constitutes an “unfair labor practice.” 29 U.S.C. § 158(a)(1). Contracts that stipulate away employees’ Section 7 rights or otherwise require actions unlawful under the NLRA are unenforceable. See *Nat’l Licorice Co.*, 309 U.S. at 361, 60 S.Ct. 569; *D.R. Horton*, 357 N.L.R.B. No. 184, at *5.

We conclude that, insofar as it prohibits collective action, Epic’s arbitration provision violates Sections 7 and 8 of the NLRA.

III

That would be all that needs to be said, were it not for the Federal Arbitration Act. Epic argues that the FAA overrides the labor law doctrines we have been discussing and entitles it to enforce its arbitration clause in full. Looking at the arbitration agreement, it is not clear to us that the FAA has anything to do with this case. The contract imposes two rules: (1) no collective action, and (2) proceed in arbitration. But it does not stop there. It also states that if the collective-action waiver is unenforceable, then any collective claim must proceed in court, not arbitration. Since we have concluded in Part II of this opinion that the collective-action waiver is incompatible with the NLRA, we could probably stop here: the contract itself demands that Lewis’s claim be brought in a court. Epic, however, contends that we should ignore the contract’s saving clause because the FAA trumps the NLRA. In essence, Epic says that even if the NLRA killed off the collective-action waiver, the FAA resuscitates it, and along with it, the rest of the arbitration apparatus. We reject this reading of the two laws.

n relevant part, the FAA provides that any written contract “evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or

transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

Enacted in “response to judicial hostility to arbitration,” *CompuCredit Corp. v. Greenwood*, — U.S. —, 132 S.Ct. 665, 668, 181 L.Ed.2d 586 (2012), its purpose was “to make arbitration agreements as enforceable as other contracts, but not more so.” *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n. 12, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967).

Federal statutory claims are just as arbitrable as anything else, “unless the FAA’s mandate has been ‘overridden by a contrary congressional command.’” *CompuCredit*, 132 S.Ct. at 669 (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987)).

The FAA’s “saving clause permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses,’ ... but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011).

Epic argues that the NLRA contains no “contrary congressional command” against arbitration, and that the FAA therefore trumps the NLRA.

But this argument puts the cart before the horse. Before we rush to decide whether one statute eclipses another, we must stop to see if the two statutes conflict at all. See *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995). In order for there to be a conflict between the NLRA as we have interpreted it and the FAA, the FAA would have to mandate the enforcement of Epic’s arbitration clause. As we now explain, it does not.

Epic must overcome a heavy presumption to show that the FAA clashes with the NLRA. “[W]hen two statutes are capable of co-existence ... it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” *Vimar Seguros*, 515 U.S. at 533, 115 S.Ct. 2322 (applying canon to find FAA compatible with other statute)

Epic has not carried that burden, because there is no conflict between the NLRA and the FAA, let alone an irreconcilable one. As a general matter, there is “no doubt that illegal promises will not be enforced in cases controlled by the federal law.” *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77, 102 S.Ct. 851, 70 L.Ed.2d 833 (1982).

The FAA incorporates that principle through its saving clause: it confirms that agreements to arbitrate “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

Illegality is one of those grounds. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) (noting that illegality is a ground preventing enforcement under § 2). The NLRA prohibits the enforcement of contract provisions like Epic’s, which strip away employees’ rights to engage in “concerted activities.” Because the provision at issue is unlawful under Section 7 of the NLRA, it is illegal, and meets the criteria of the FAA’s saving clause for nonenforcement. Here, the NLRA and FAA work hand in glove.

B

In *D.R. Horton, Inc. v. NLRB*, the Fifth Circuit came to the opposite conclusion.† 737 F.3d at 357. Drawing from dicta that first appeared in *Concepcion*, 563 U.S. at 348, 131 S.Ct. 1740, and was then repeated in *American Express Co. v. Italian Colors Restaurant*, — U.S. —, 133 S.Ct. 2304, 2310, 186 L.Ed.2d 417 (2013), the Fifth Circuit reasoned that because class arbitration sacrifices arbitration’s “principal advantage” of informality, “makes the process slower, more costly, and more likely to generate procedural morass than final judgment,” “greatly increases risks to defendants,” and “is poorly suited to the higher stakes of class litigation,” the “effect of requiring class arbitration procedures is to disfavor arbitration.” *D.R. Horton*, 737 F.3d at 359 (quoting *Concepcion*, 563 U.S. at 348–52, 131 S.Ct. 1740); see also *Italian Colors*, 133 S.Ct. at 2312.

The Fifth Circuit suggested that because the FAA “embod[ies] a national policy favoring arbitration and a liberal federal policy favoring arbitration agreements,” *Concepcion*, 563 U.S. at 346, 131 S.Ct. 1740 (internal quotation marks and citations omitted), any law that even incidentally burdens arbitration—here, Section 7 of the NLRA—necessarily conflicts with the FAA. See *D.R. Horton*, 737 F.3d at 360 (“Requiring a class mechanism is an actual impediment to arbitration and violates the FAA. The saving clause is not a basis for invalidating the waiver of class procedures in the arbitration agreement.”).

There are several problems with this logic. First, it makes no effort to harmonize the FAA and NLRA. When addressing the interactions of federal statutes, courts are not supposed to go out looking for trouble: they may not “pick and choose among congressional enactments.” *Morton*, 417 U.S. at 551, 94 S.Ct. 2474.

Rather, they must employ a strong presumption that the statutes may both be given effect. See *id.* The savings clause of the FAA ensures that, at least on these facts, there is no irreconcilable conflict between the NLRA and the FAA.

Indeed, finding the NLRA in conflict with the FAA would be ironic considering that the NLRA is in fact pro-arbitration: it expressly allows unions and employers to arbitrate disputes between each other, see 29 U.S.C. § 171(b), and to negotiate collective bargaining agreements that require employees to arbitrate individual employment disputes. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257–58, 129 S.Ct. 1456, 173 L.Ed.2d 398 (2009); *City Disposal Systems*, 465 U.S. at

836–37, 104 S.Ct. 1505.

The NLRA does not disfavor arbitration; in fact, it is entirely possible that the NLRA would not bar Epic’s provision if it were included in a collective bargaining agreement. See *City Disposal Systems*, 465 U.S. at 837, 104 S.Ct. 1505. (“[I]f an employer does not wish to tolerate certain methods by which employees invoke their collectively bargained rights, [it] is free to negotiate a provision in [its] collective-bargaining agreement that limits the availability of such methods.”). If Epic’s provision had permitted collective arbitration, it would not have run afoul of Section 7 either. But it did not, and so it ran up against the substantive right to act collectively that the NLRA gives to employees.

Neither *Concepcion* nor *Italian Colors* goes so far as to say that anything that conceivably makes arbitration less attractive automatically conflicts with the FAA, nor does either case hold that an arbitration clause automatically precludes collective action even if it is silent on that point.

In *Concepcion*, the Supreme Court found incompatible with the FAA a state law that declared arbitration clauses to be unconscionable for low-value consumer claims. See *Concepcion*, 563 U.S. at 340, 131 S.Ct. 1740. The law was directed toward arbitration, and it was hostile to the process. Here, we have nothing of the sort. Instead, we are reconciling two federal statutes, which must be treated on equal footing. The protection for collective action found in the NLRA, moreover, extends far beyond collective litigation or arbitration; it is a general principle that affects countless aspects of the employer/employee relationship.

The FAA does not “pursue its purposes at all costs”—that is why it contains a saving clause. *Id.*

If these statutes are to be harmonized—and according to all the traditional rules of statutory construction, they must be—it is through the FAA’s saving clause, which provides for the very situation at hand. Because the NLRA renders Epic’s arbitration provision illegal, the FAA does not mandate its enforcement.

We add that even if the dicta from *Concepcion* and *Italian Colors* lent itself to the Fifth Circuit’s interpretation, it would not apply here: Sections 7 and 8 do not mandate class arbitration. Indeed, they say nothing about class arbitration, or even arbitration generally. Instead, they broadly restrain employers from interfering with employees’ engaging in concerted activities. See 29 U.S.C. §§ 157, 158. Sections 7 and 8 stay Epic’s hand. (This is why, in addition to its being waived, Epic’s argument that Lewis relinquished his Section 7 rights fails.)

Epic acted unlawfully in attempting to contract with Lewis to waive his Section 7 rights, regardless of whether Lewis agreed to that contract. The very formation of the contract was illegal. See *Italian Colors*, 133 S.Ct. at 2312 (Thomas, J., concurring) (noting, in adopting the narrowest characterization of the FAA’s saving clause of any Justice, that defenses to contract formation block an order compelling arbitration under FAA).

Epic warns us against creating a circuit split, noting that at least two circuits agree with the Fifth. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013) (rejecting argument that there is inherent conflict between NLRA/Norris LaGuardia Act and FAA); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n. 8 (2d Cir. 2013) (rejecting NLRA-based argument without analysis); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n. 3 (9th Cir. 2013) (noting “[w]ithout deciding the issue” that a number of courts have “determined that they should not defer to the NLRB’s decision in *D.R. Horton*”). Of these courts, however, none has engaged substantively with the relevant arguments.

Because it precludes employees from seeking any class, collective, or representative remedies to wage-and-hour disputes, Epic’s arbitration provision violates Sections 7 and 8 of the NLRA. Nothing in the FAA saves the ban on collective action. The judgment of the district court is therefore **AFFIRMED**.

All Citations

Monroe v. FTS USA, __ F.3d __ (6th Cir. 2017)

STRANCH, J., delivered the opinion of the court in which BOGGS, J., joined. SUTTON, J. (pp. 1024–32), delivered a separate opinion concurring in part and dissenting in part.

OPINION

STRANCH, Circuit Judge.

Edward Monroe, Fabian Moore, and Timothy Williams brought this Fair Labor Standards Act (FLSA) claim, on behalf of themselves and others similarly situated, against their employers, FTS USA, LLC and its parent company, UniTek USA, LLC. FTS is a cable-television business for which the plaintiffs work or worked as cable technicians. The district court certified the case as an FLSA collective action, allowing 293 other technicians (collectively, the FTS Technicians) to opt in. FTS Technicians allege that FTS implemented a company-wide time-shaving policy that required its employees to systematically underreport their overtime hours. A jury returned verdicts in favor of the class, which the district court upheld before calculating and awarding damages.

We **AFFIRM** the district court’s certification of the case as a collective action and its finding that sufficient evidence supports the jury’s verdicts. We **REVERSE** the district court’s calculation of damages and **REMAND** the case for recalculation of

damages consistent with this opinion.

I. BACKGROUND

FTS contracts with various cable companies, such as Comcast and Time Warner, to provide cable installation and support, primarily in Tennessee, Alabama, Mississippi, Florida, and Arkansas. To offer these services, FTS employs technicians at local field offices, called “profit centers.” FTS’s company hierarchy includes a company CEO and president, regional directors, project managers at each profit center, and a group of supervisors. FTS Technicians report to the supervisors and project managers. FTS’s parent company, UniTek, is in the business of wireless, telecommunication, cable, and satellite services, and provides human resources and payroll functions to FTS.

All FTS Technicians share substantially similar job duties and are subject to the same compensation plan and company-wide timekeeping system. FTS Technicians report to a profit center at the beginning of each workday, where FTS provides job assignments to individual technicians and specifies two-hour blocks in which to complete certain jobs. Regardless of location, “the great majority of techs do the same thing day in and day out which is install cable.” Time is recorded by hand, and FTS project managers transmit technicians’ weekly timesheets to UniTek’s director of payroll. FTS Technicians are paid pursuant to a piece-rate compensation plan, meaning each assigned job is worth a set amount of pay, regardless of the amount of time it takes to complete the job. The record shows that FTS Technicians are paid by applying a .5 multiplier to their regular rate for overtime hours.

FTS Technicians presented evidence that FTS implemented a company-wide time-shaving policy that required technicians to systematically underreport their overtime hours. Managers told or encouraged technicians to underreport time or even falsified timesheets themselves. To underreport overtime hours in compliance with FTS policy, technicians either began working before their recorded start times, recorded lunch breaks they did not take, or continued working after their recorded end time.

FTS Technicians also presented documentary evidence and testimony from technicians, managers, and an executive showing that FTS’s time-shaving policy originated with FTS’s corporate office. Technicians testified that the time-shaving

policy was company-wide, applying generally to all technicians, though not in an identical manner. At meetings, managers instructed groups of technicians to underreport their hours, and managers testified that corporate ordered them to do so. One former manager, Anthony Loudon, offered testimony regarding high-level executive meetings. Loudon identified overtime and fuel costs as the two leading items that an FTS executive felt it “should be able to manage and cut in order to make a bigger profit.” Loudon also stated that FTS executives circulated and reviewed technicians’ timesheets, “go[ing] into detail on which technician had overtime, and, you know, go[ing] over why this guy had too much overtime and why he didn’t have overtime.” Technicians testified that they often complained about being obligated to underreport, and FTS’s human resources director testified that she received such complaints. No evidence was presented that managers or technicians were disciplined for underreporting time.

....

The collective action proceeded to trial on a representative basis. FTS Technicians identified by name 38 potential witnesses and called 24 witnesses, 17 of whom were class-member technicians. FTS and UniTek identified all 50 representative technicians as potential witnesses, but called only four witnesses—all FTS executives and no technicians.

The district court explained the representative nature of the collective action to the jury, both before the opening argument and during its instructions, noting that FTS Technicians seek “to recover overtime wages that they claim [FTS and UniTek] owe them and the other cable technicians who have joined the case.” The jury instructions specified that the named plaintiffs brought their claim on behalf of and collectively with “approximately three hundred plaintiffs who have worked in more than a dozen different FTS field offices across the country.” The court also set out how the case would be resolved, instructing that FLSA procedure “allows a small number of representative employees to file a lawsuit on behalf of themselves and others in the collective group”; that the technicians who “testified during this trial testified as representatives of the other plaintiffs who did not testify”; and that “[n]ot all affected employees need testify to prove their claims” because “non-testifying plaintiffs who performed substantially similar job duties are deemed to have shown the same thing.”

The district court then charged the jury to determine whether all FTS Technicians “have proven their claims” by considering whether “the evidence presented by the representative plaintiffs who testified establishes that they worked unpaid overtime hours and are therefore entitled to overtime compensation.” If the jury answers in the affirmative, the court explained, “then those plaintiffs that you did not hear from are also deemed by inference to be entitled to overtime compensation.” The jury returned verdicts of liability in favor of the class, finding that FTS Technicians worked in excess of 40 hours weekly without being paid overtime compensation and that FTS and UniTek knew or should have known and willfully violated the law. The jury determined the average number of unrecorded hours worked per week by each testifying technician—all of whom were representative and were called on behalf of themselves and all similarly situated employees, as authorized by 29 U.S.C. § 216(b) and instructed by the district court. As indicated to the parties and the jury, the court used the jury’s factual findings to calculate damages for all testifying and nontestifying technicians in the opt-in collective action. The trial court ruled that the formula for calculating uncompensated overtime should use a 1.5 multiplier, apparently based on the assumption that FTS and UniTek normally used that multiplier.

[The court eventually awarded a damages of \$3.8 million.]

II. ANALYSIS

FTS and UniTek challenge the certification of the case as a collective action pursuant to 29 U.S.C. § 216(b), the sufficiency of the evidence as presented at trial, the jury instruction on commuting time, and the district court’s calculation of damages. After a review of the legal framework for collective actions in our circuit, we turn to each of these arguments.

A. Legal Framework

Under the FLSA, an employer generally must compensate an employee “at a rate not less than one and one-half times the regular rate at which he is employed” for work exceeding forty hours per week. 29 U.S.C. § 207(a)(1). Labor Department regulations clarify, however, that in a piece-rate system only “additional half-time pay” is required for overtime hours. 29 C.F.R. § 778.111(a).

Congress passed the FLSA with broad remedial intent” to address “unfair method[s] of competition in commerce” that cause “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.” The provisions of the statute are “remedial and humanitarian in purpose,” and “must not be interpreted or applied in a narrow, grudging manner.” *Herman v. Fabri-Centers of Am., Inc.*, 308 F.3d 580, 585 (6th Cir.2002).

To effectuate Congress’s remedial purpose, the FLSA authorizes collective actions “by any one or more employees for and on behalf of himself or themselves and other employees similarly situated.” 29 U.S.C. § 216(b). To participate in FLSA collective actions, “all plaintiffs must signal in writing their affirmative consent to participate in the action.” *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546 (6th Cir.2006). Only “similarly situated” persons may opt in to such actions.

[The employer appealed to the U.S. Supreme Court, which ruled that the appellate court erred when it overruled the district court’s award of damages.]

On certiorari, the Supreme Court held that we had imposed an improper standard of proof that “has the practical effect of impairing many of the benefits” of the FLSA. It reminded us of the correct liability and damages standard, with a cautionary note: an employee bringing such a suit has the “burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great public policy which it embodies ... militate against making that burden an impossible hurdle for the employee.” *Id.* at 686–87, 66 S.Ct. 1187. We have since acknowledged that instruction. See *Moran v. Al Basit LLC*, 788 F.3d 201, 205 (6th Cir.2015).

The Supreme Court also explained how an employee can satisfy his burden to prove both uncompensated work and its amount: “where the employer’s records are inaccurate or inadequate and the employee cannot offer convincing substitutes ... an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.” *Mt. Clemens*, 328 U.S. at 687, 66 S.Ct. 1187.

The employee's burden of proof on damages can be relaxed, the Supreme Court explained, because employees rarely keep work records, which is the employer's duty under the Act. *Id.*; see *O'Brien*, 575 F.3d at 602; see also 29 U.S.C. § 211(c); 29 C.F.R. § 516.2(a)(7). Once the employees satisfy their relaxed burden for establishing the extent of uncompensated work, "[t]he burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Mt. Clemens*, 328 U.S. at 687–88, 66 S.Ct. 1187.

....

The first factor, the factual and employment settings of the individual FTS Technicians, considers, "to the extent they are relevant to the case, the plaintiffs' job duties, geographic locations, employer supervision, and compensation." *Id.* at 19–155. On FTS Technicians' duties and locations, the record reveals that all FTS Technicians work in the same position, have the same job description, and perform the same job duties: regardless of location, "the great majority of techs do the same thing day in and day out which is install cable." FTS Technicians also are subject to the same timekeeping system (recording of time by hand) and compensation plan (piece rate).

Key here, the record contains ample evidence of a company-wide policy of requiring technicians to underreport hours that originated with FTS executives. Managers told technicians that they received instructions to shave time from corporate, that underreporting is "company policy," and that they were "chewed out by corporate" for allowing too much time to be reported. Managers testified that FTS executives directed them to order technicians to underreport time. FTS executives reinforced their policy during meetings with managers and technicians at individual profit centers. FTS Technicians testified that they complained of being required to underreport, often in front of or to corporate representatives, who did nothing.

Evidence of market pressures suggests that FTS executives had a motive to institute a company-wide time-shaving policy. According to one manager's testimony, "[e]very profit center has ... a budget," and to meet that budget "you couldn't put all of your overtime." Both managers and technicians were under the impression that FTS's profitability depended on underreporting.

The underreporting policy applied to FTS Technicians regardless of profit center or supervisor, as technicians employed at multiple profit centers and under multiple managers reported consistent time-shaving practices across the centers and managers. Namely, FTS executives told managers that technicians' time before and after work or during lunch should be underreported.

One manager told his technicians that “an hour lunch break will be deducted whether [they] take it or not,” while technicians who reported full hours were told to “change that” and that “[t]his is not how we do it over here, ... you are just supposed to record your 40 hours a week, take out for your lunch, sign it and turn it in.” If technicians failed to comply with the policy, managers would directly alter time sheets submitted by employees—one manager changed a seven to an eight and another used whiteout to change times. Regarding reporting lunch hours not taken, one manager said “that’s the way it’s got to be, you put it on there or I’ll put it on there.” Even technicians who never received direct orders from managers to underreport time knew that FTS required underreporting in order to continue receiving work assignments and to avoid reprimand or termination.

FTS Technicians identified the methods—the same methods found in O’Brien—by which FTS and UniTek enforced their time—shaving policy: (1) “requiring plaintiffs to work ‘off the clock’ “ before or after scheduled hours or during lunch breaks and (2) “alter[ing] the times that had previously been entered.” O’Brien, 575 F.3d at 572–73. As in O’Brien, such plaintiffs will be similarly situated where their claims are “unified by common theories of defendants’ statutory violations, even if the proofs of these theories are inevitably individualized and distinct.” *Id.* at 585.

We now turn to the second factor—the different defenses to which the plaintiffs may be subject on an individual basis. FTS and UniTek argue that they must be allowed to raise separate defenses by examining each individual plaintiff on the number of unrecorded hours they worked, but that they were denied that right by the allowance of representative testimony and an estimated-average approach. Several circuits, including our own, hold that individualized defenses alone do not warrant decertification where sufficient common issues or job traits otherwise permit collective litigation. O’Brien, 575 F.3d at 584–85 (holding that employees are similarly situated if they have “claims ... unified by common theories of defendants’ statutory violations, even if the proofs of these theories are inevitably

individualized and distinct”); Morgan, 551 F.3d at 1263; see Thiessen, 267 F.3d at 1104–08.

As noted above, the record includes FTS Technicians’ credible testimonial and documentary evidence that they performed work for which they were improperly compensated. In the absence of accurate employer records, both Supreme Court and Sixth Circuit precedent dictate that the burden then shifts to the employer to “negative the reasonableness of the inference to be drawn from the employee’s evidence” and, if it fails to do so, the resulting damages award need not be perfectly exact or precise. Mt. Clemens, 328 U.S. at 687–88, 66 S.Ct. 1187 (“The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of [the FLSA].”); see Herman, 183 F.3d at 473.

Under this framework, and with the use of representative testimony and an estimated-average approach, defenses successfully asserted against representative testifying technicians were properly distributed across the claims of nontestifying technicians.

For example, FTS and UniTek argue that testifying technicians did not work all of the overtime they claimed and underreported some of their overtime for reasons other than a company-wide policy requiring it. FTS and UniTek had every opportunity to submit witnesses and evidence supporting this claim. The jury’s partial acceptance of these defenses, as evidenced by its finding that testifying technicians worked fewer hours than they claimed, resulted in a lower average for nontestifying technicians. Thus, FTS Technicians’ representative evidence allowed appropriate consideration of the individual defenses raised here. The district court, moreover, offered to convene a second jury and submit the issue of damages to it, but FTS and UniTek declined.

The third factor, the degree of fairness and the procedural impact of certifying the case, also supports certification. This case satisfies the policy behind FLSA collective actions and Congress’s remedial intent by consolidating many small, related claims of employees for which proceeding individually would be too costly to be practical. Because all FTS Technicians allege a common, FLSA-violating policy, “[t]he judicial system benefits by efficient resolution in one proceeding of

common issues of law and fact.” In view of the entire record, neither this factor nor the other two suggest that the district court abused its discretion in finding FTS Technicians similarly situated and maintaining certification.

To conclude our similarly situated analysis, certification here is supported by our standard. The factual and employment settings of individual FTS Technicians and the degree of fairness and the procedural impact of certifying the case favor upholding certification. FTS and UniTek’s alleged individual defenses do not require decertification because they can be, and were, adequately presented in a collective forum.

....

Our sister circuits overwhelmingly recognize the propriety of using representative testimony to establish a pattern of violations that include similarly situated employees who did not testify. See, e.g., *Garcia v. Tyson Foods, Inc.*, 770 F.3d 1300, 1307 (10th Cir.2014) (quoting the Ninth Circuit’s *Henry v. Lehman Commercial Paper, Inc.*, 471 F.3d 977, 992 (9th Cir.2006), for the proposition that “[t]he class action mechanism would be impotent” without representative proof and the ability to draw class-wide conclusions based on it); *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 67 (2d Cir.1997) (“[I]t is well-established that the Secretary may present the testimony of a representative sample of employees as part of his proof of the prima facie case under the FLSA.”); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir.1994) (“Courts commonly allow representative employees to prove violations with respect to all employees.”); *Brock v. Tony & Susan Alamo Found.*, 842 F.2d 1018, 1019–20 (8th Cir.1988) (“[T]o compensate only those associates who chose or where chosen to testify is inadequate in light of the finding that other employees were improperly compensated.”); *Ho Fat Seto*, 850 F.2d at 589 (holding that, based on representative testimony, “[t]he twenty-three non-testifying employees established a prima facie case that they had worked unreported hours”); *Donovan v. Bel–Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir.1985) (holding that requirement that testimony establishing a pattern or practice must refer to all nontestifying employees “would thwart the purposes of the sort of representational testimony clearly contemplated by *Mt. Clemens* “); *Donovan v. Burger King Corp.*, 672 F.2d 221, 224–25 (1st Cir.1982) (limiting testimony to six plaintiffs from six restaurant locations owned by defendant “in light of the basic similarities between the individual restaurants”); *Gen. Motors Acceptance Corp.*, 482 F.2d at 829 (holding that, based on testimony from sixteen representative employees and a report on six

employees that found “employees in this type of job consistently failed to report all the overtime hours worked,” “the trial court might well have concluded that plaintiff had established a prima facie case that all thirty-seven employees had worked unreported hours”). In the face of these consistent precedents, many with fact patterns similar to this case, FTS and UniTek point to no case categorically disapproving of representative testimony to prove employer liability to those in the collective action who do not testify.

FTS and UniTek next assert that, even if representative testimony is allowed generally, testifying technicians here were not representative of nontestifying technicians. The record suggests otherwise, as we explained above when determining that FTS Technicians were similarly situated. We found that testifying technicians were geographically spread among various FTS profit centers and were subject to the same job duties, timekeeping system, and compensation plan as nontestifying technicians.

2. Damages

FTS and UniTek object to the use of an estimated-average approach to calculate damages for nontestifying technicians. They argue that an estimated-average approach does not allow a “just and reasonable inference”—the Mt. Clemens standard—on the number of hours worked by nontestifying technicians because it results in an inaccurate calculation, giving some FTS Technicians more than they are owed and some less.

Mt. Clemens acknowledges the use of “an estimated average of overtime worked” to calculate damages for nontestifying employees. 328 U.S. at 686, 66 S.Ct. 1187. There, eight employees brought suit on behalf of approximately 300 others. A special master concluded that productive work did not regularly commence until the established starting time. *Id.* at 684, 66 S.Ct. 1187. Declining to adopt the special master’s recommendation, the district court found that the employees were ready for work 5 to 7 minutes before starting time and presumed that they started immediately. *Id.* at 685, 66 S.Ct. 1187.

To calculate damages, the district court fashioned a formula to derive an estimated average of overtime worked by all employees, testifying and nontestifying. *Id.* On direct appeal to the Sixth Circuit, we deemed the estimated average insufficient. *Id.*

at 686, 66 S.Ct. 1187. Though the Supreme Court ultimately agreed with the special master, it reversed our disapproval of the estimated average, explaining that we had “imposed upon the employees an improper standard of proof, a standard that has the practical effect of impairing many of the benefits of the Fair Labor Standards Act.” Id. at 686, 689, 66 S.Ct. 1187.

Disapproving of an estimated-average approach simply due to lack of complete accuracy would ignore the central tenant of Mt. Clemens—an inaccuracy in damages should not bar recovery for violations of the FLSA or penalize employees for an employer’s failure to keep adequate records.

...

Viewing the evidence in the light most favorable to FTS Technicians, we cannot conclude that reasonable minds would come to but one conclusion in favor of FTS and UniTek. Accordingly, the average number of unpaid hours worked by testifying and nontestifying technicians, based on the jury’s findings and the estimated-average approach, resulted from a just and reasonable inference supported by sufficient evidence.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court’s certification of this case as a collective action, allowance of representative testimony at trial, and use of an estimated-average approach....

823 F.3d 1147, 206 L.R.R.M. (BNA) 3293, 26 Wage & Hour Cas.2d (BNA) 795

Garcia v. American United Life Ins. Co.

422 Fed.Appx. 306 (5th Cir. 2011)

Appeal from the United States District Court for the Eastern District of Texas (5:07–CV–63).

Before JOLLY, GARZA, and STEWART, Circuit Judges.

PER CURIAM:

In January 2006, Salvador DeReza Garcia (Salvador) died in a car accident. At the time of his death, Salvador was covered under a group life and accidental death insurance policy (hereinafter policy) issued by American United Life Insurance Company (AUL) and subject to the Employee

Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001–46. Salvador’s wife, Araceli Medina Garcia (Araceli), submitted a claim under this policy following his death. AUL denied Araceli’s claim because Salvador was living illegally in the United States and made material misrepresentations regarding his identity during the application process. Subsequently, Araceli filed suit, and the district court found in AUL’s favor. We AFFIRM.

I. BACKGROUND

Tatum Excavating, Inc. and Tatum Excavating, Inc. Employee Benefit Plan (collectively, Tatum) signed a contract for a group policy for several of its employees with AUL. The policy offered life insurance coverage in the amount of \$20,000 and accidental death and dismemberment coverage in the amount of \$20,000 per eligible employee. A few months after Tatum entered into this agreement, Salvador signed a group enrollment form to apply for the policy (hereinafter the enrollment form). The enrollment form reflected Salvador’s alleged date of birth as August 19, 1966 and purported Social Security Number (SSN) as XXX–XX–XXXX, but did not designate a beneficiary. Later, Salvador completed a beneficiary designation form, naming Araceli as sole beneficiary.

On January 25, 2006, Salvador died in a traffic accident. Subsequently, Tatum sent AUL a proof of death form, notifying AUL of Salvador’s death, Araceli’s Mexican identification card, and Salvador’s death certificate, identifying his date of birth as August 19, 1966, place of birth as Mexico City, Mexico, and SSN as XXX–XX–XXXX. In order to verify eligibility, AUL requested additional documentation because, based on Salvador’s place of birth, there was no indication from the documents that Tatum sent that Salvador was a United States citizen. Tatum then sent AUL another copy of Araceli’s alien registration card and a copy of Salvador’s I–9 form,^{FN1} which reflected a SSN for Salvador of XXX–XX–XXXX and Alien Resident Card number of 048–931–385 with an expiration date of May 26, 2009.

FN1. An I–9 form is a document that indicates that an individual is an alien authorized to work in the United States. See *Velasquez–Tabir v. I.N.S.*, 127 F.3d 456, 457 (5th Cir.1997).

On that same day, AUL initiated an eligibility investigation, seeking verification of Salvador’s alien status and the SSN. The results of the eligibility investigation indicated that the SSN (reflected on the enrollment form, I–9, death certificate, and proof of death form) did not belong to Salvador.

AUL sent Araceli a letter rescinding Salvador’s policy and denying Araceli’s claim. Araceli appealed AUL’s decision, but did not submit additional records in support of her claim. AUL then re-opened its eligibility investigation. The reinvestigation confirmed the prior results.

Specifically, the investigation report stated that the Social Security Administration (SSA) records reflected that the SSN that Salvador provided on the enrollment form belonged to a woman who died in 1966 and that the SSA was not able to find any SSN matching Salvador's name. The report further stated that the Department of Homeland Security (DHS) had no information in their system that matched the information provided for Salvador.

After AUL confirmed these findings, it sent Araceli another letter explaining the reasons for AUL's denial and rescission of coverage, and providing additional information supporting its decision. Shortly thereafter, Araceli filed suit under 29 U.S.C. § 1132(a).

AUL and Araceli filed cross motions for summary judgment. Accepting the report and recommendation of the magistrate judge, the district court found in AUL's favor. Araceli appealed.

II. DISCUSSION

....

1. Whether the district court applied the correct standard of review.

If a plan gives the administrator discretion to make claim determinations, the court must apply an abuse of discretion standard in reviewing the administrator's decision. *Atteberry v. Memorial-Hermann Healthcare Sys.*, 405 F.3d 344, 347 (5th Cir.2005). The policy in this case demonstrates that AUL possessed the power to determine eligibility benefits for applicants, as well as any benefits owed to beneficiaries. Specifically, the policy states: "ENTIRE CONTRACT: This policy, the enrollment forms of the individuals, the application of the Group Policyholder and any amendments made from time to time constitute the entire contract." Salvador's beneficiary designation form, an amendment to the policy designating Araceli as Salvador's beneficiary, states that "[t]he undersigned understands and agrees ... benefits under any policy will be paid only if AUL decides in its discretion the applicant is entitled to them." Taken together these documents indicate that the policy gives AUL discretion to make claim determinations. Araceli's arguments to the contrary are unavailing.

Specifically, Araceli notes that the policy states the following regarding amendments:

AMENDMENT and CHANGES: This policy may be amended by mutual agreement between the Group Policyholder and AUL but without prejudice to any valid claim incurred prior to the effective date of the amendment. No change in this policy is valid until approved by the Chief Executive Officer, President or Secretary of AUL. No agent has the authority to change this policy or waive any of its provisions.

The policy also notes:

GROUP POLICYHOLDER means the sole proprietorship, partnership, corporation, firm, school, school district, or other instrumentality of a state or political subdivision thereof that employs Persons and that is covered under this policy as shown on the Title Page. Any references to Group Policyholder used in this policy shall include Insured Units.

Pursuant to these provisions, Araceli argues, all policy amendments require the mutual agreement of AUL's Chief Executive Officer, President or Secretary and a representative from Tatum. She claims that the beneficiary designation form is not an amendment because it does not meet these requirements. Araceli's argument lacks merit.

To begin, her argument impermissibly ignores the text of the policy, as discussed above and, moreover, ignores the text of the beneficiary designation form. See *Sharpless*, 364 F.3d at 641 ("Federal common law governs rights and obligations stemming from ERISA-regulated plans, including the interpretation of [a policy.] When construing ERISA plan provisions, courts are to give the language of an insurance contract its ordinary and generally accepted meaning if such a meaning exists.").

The beneficiary designation form clearly provides: "It is understood and agreed upon receipt of this beneficiary designation by AUL at its principal office, such beneficiary designation will become effective." In other words, the beneficiary designation form explains how it becomes an amendment for purposes of the policy. Moreover, Araceli's argument, taken to its logical conclusion, would lead to the unduly burdensome and nonsensical requirement that every time an insured changes her named beneficiary this change must not only be approved by a representative from Tatum, but also AUL's Chief Executive Officer, President or Secretary.

Thus, we conclude that the beneficiary designation form is an amendment to the policy and gives AUL discretion to make claim determinations. Therefore, the district court correctly applied the abuse of discretion standard of review. *Atteberry*, 405 F.3d at 347.

2. Abuse of Discretion Standard of Review

To determine whether a plan administrator has abused its discretion, we apply a two-step analysis. *Crowell v. Shell Oil Co.*, 541 F.3d 295, 312 (5th Cir.2008). The first step is to determine whether the administrator's decision was "legally correct." *Id.* (citing *Pickrom v. Belger Cartage Serv., Inc.*, 57 F.3d 468, 471 (5th Cir.1995)). To address the question of whether the administrator's interpretation of the policy was legally correct, we consider three factors: 1) whether the administrator gave the policy a uniform construction; 2) whether the administrator's interpretation is consistent with a fair reading of the policy; and 3) whether different interpretations of the policy will result in unanticipated costs. *Id.* (citation omitted).

If the determination was legally correct, our inquiry ends because a legally correct decision precludes any abuse of discretion.

Conversely, if the administrator's interpretation was not legally correct, we review the decision for an abuse of discretion. *Id.* Because we determine that the administrator's interpretation of the plan was legally correct, we do not explore whether the determination was an abuse of discretion.

We now turn to the merits of the case and analyze whether AUL abused its discretion when it rescinded the policy and denied Araceli's claim.

C.

As previously noted, to determine whether an administrator's interpretation of the policy was legally correct, we consider three factors: 1) whether the administrator gave the policy a uniform construction; 2) whether the administrator's interpretation is consistent with a fair reading of the policy; and 3) whether different interpretations of the policy will result in unanticipated costs.

Araceli does not argue that AUL did not give a uniform construction to the policy, nor is there evidence in the record to support this conclusion. Specifically, Araceli does not point to any similarly situated individuals whose claims were treated differently from her own. *Stone*, 570 F.3d at 259.

To the contrary, as the district court noted, the record indicates that, since 2001, AUL has examined the citizenship status of its insureds and has denied benefits, on multiple occasions, based entirely or in part on AUL's determination that the insured was not legally living or working in the United States. Furthermore, Araceli does not argue that different interpretations of the policy will result in unanticipated costs, and there is no evidence in the record to support this conclusion. Therefore, we base our decision on whether AUL's interpretation is consistent with a fair and reasonable reading of the policy. *James v. La. Laborers Health and Welfare Fund*, 29 F.3d 1029, 1033 (5th Cir.1994); see also *Stone*, 570 F.3d at 258 ("The most important factor in this three-part analysis is whether the administrator's interpretation was consistent with a fair reading of the plan.").

An administrator's decision is "fair and reasonable," if the decision is supported by substantial evidence. *Pylant v. Hartford Life & Accident Ins. Co.*, 497 F.3d 536, 540 (5th Cir.2007) (citation omitted). Substantial evidence is evidence that a reasonable mind might accept as sufficient to support the conclusion. *Wade v. Hewlett-Packard Dev. Co.*, 493 F.3d 533, 541 (5th Cir.2007). We conclude that the administrator's decision was legally correct because a reasonable and fair reading of the policy indicates that Salvador made a material misrepresentation warranting rescission and denial of Araceli's claim.

As “a general rule ... intentional misrepresentation, by the applicant for an insurance policy, of a material fact, if relied on by the insurer, is ground for rescission of the policy by giving notice that the policy is cancelled.” *Apperson v. U.S. Fid. & Guar. Co.*, 318 F.2d 438, 441 (5th Cir.1963) (citing cases from various circuits, including the Fifth Circuit, and states holding that an intentional misrepresentation cancels an insurance policy); see also *Sharpless*, 364 F.3d at 641 (explaining that, under federal common law, if an insurer wants to rescind a policy, claiming that the insured made a fraudulent misstatement, the insurer must prove that the alleged misstatement was material).

It remains undisputed that Salvador provided a false SSN, and Araceli does not argue that Salvador has a valid SSN or that he was legally entitled to be present and work in the United States. Araceli’s primary argument is that Salvador’s providing a false SSN on his application was not a material misrepresentation that could justify AUL’s decision to rescind Salvador’s coverage and deny Araceli’s claim. We disagree.

An insured’s misrepresentation is “material” if the facts that were misrepresented or omitted would have affected the insurance company’s decision to issue the policy. See *Sharpless*, 364 F.3d at 641–42; see also *Wiley v. State Farm Fire and Cas. Co.*, 585 F.3d 206, 210 (5th Cir.2009) (“[A] fact is ‘material’ only if its resolution would affect the outcome of the action.”). For example, in *Sharpless*, the insured claimed on her policy application that “she had never had any known indication of a mental or emotional disorder, had never sought treatment for alcohol use, and had never used barbiturates.” *Id.* at 641. However, it later came to light that she had attempted suicide, had taken barbiturates, and suffered from depression and alcoholism. *Id.* These statements, we determined, were “material” misstatements because the insurer’s policy guidelines called “for policy administrators to take into account all relevant information about drug and alcohol use and mental impairments.” *Id.* As such, the insurance company would not have issued the policy, if the company knew the relevant information. *Id.* at 641–42.

Salvador’s misrepresentations were clearly material and of the type that would have prevented AUL from issuing the policy. A SSN is an integral part of the process by which a party’s identity can be verified. See generally *Sherman v. U.S. Dept. of the Army*, 244 F.3d 357, 364–66 (5th Cir.2001) (discussing the significant privacy interest an individual has in her SSN because it could be used to uncover her financial information, as well as other identity-related information). Because Salvador provided a false SSN and inhibited AUL’s ability to verify his identity, he not only placed AUL at risk of severe penalties, but also inhibited AUL’s ability to assess the underwriting risk involved in issuing him the policy.

To begin, the Department of the Treasury’s Office of Foreign Assets Control (OFAC) maintains the Specially Designated Nationals List (hereinafter the List), which includes the names of individuals designated, for example, as terrorists, drug dealers, and money launderers. Insurance companies are prohibited from engaging in transactions that in any way involve individuals on the List. See, e.g., 31 C.F.R. § 595.204 (2011) (“Except as otherwise authorized, no U.S. person may deal in property or interests in property of a specially designated terrorist, including the

making or receiving of any contribution of funds, goods, or services to or for the benefit of a specially designated terrorist.”). Punishment for violations of this law can be substantial. Notably, criminal penalties can reach up to \$1,000,000 and 20 years of imprisonment for “[a] person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission” of certain violations. See 50 U.S.C. § 1705(c); see also 31 C.F.R. § 595.701(a) (2011) (citing § 1705).

As AUL explained in its denial letter to Araceli, “[t]he misrepresentation respecting [Salvador’s identity] and his ability to work and reside in the U.S. would not permit AUL’s compliance with” federal regulations, regarding the List. Thus, Salvador’s misrepresentation made AUL vulnerable to substantial civil and criminal penalties, such as those enumerated in § 1705. We conclude that AUL would not have issued the policy if the company knew that Salvador provided a false SSN, preventing AUL from verifying whether Salvador was on the List.

Additionally, without accurate information about a proposed insured’s identity, an insurance company cannot properly assess the business risk involved in issuing a policy. As AUL noted in its correspondence with Araceli, insurance companies rely on an individual’s identity, including their SSN, to obtain information used to assess the applicant’s potential health risks, the financial and moral fitness of an applicant, and the likelihood that the insured would file a false claim. By relying on the false SSN that Salvador provided, AUL could not properly assess this information to accurately determine whether it would take on the business risk of insuring Salvador. Thus, we further conclude that AUL would not have issued the policy if the company knew that Salvador did not provide a valid SSN and that the company could not accurately verify his identity to assess the possible financial risks posed by insuring him.

Araceli would have this court overlook the fact that Salvador submitted a false SSN and exposed AUL to substantial liability, ostensibly to become employed by Tatum, so that Araceli may benefit from a policy for which Salvador would not otherwise have been eligible. We decline to do so and conclude that AUL was legally correct in determining that Salvador made a “material” misrepresentation that allowed AUL to rescind Salvador’s policy and deny Araceli’s claim for benefits.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court’s judgment.

**RHODIA CORP. and UNITED STEEL WORKERS, LOCAL 2011
MARCH 22, 2012**

In the matter of:	}	
	}	
Rhodia Corp.	}	
	}	Grievant: Adrian Lacy
&	}	
	}	
United Steel Workers, Local 2011	}	

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ISSUE

Just Cause Discharge

DATES

GRIEVANCE: May 13, 2011; ARBITRATION HEARING: January 10, 2012;
ARBITRATION AWARD: March 22, 2012

Arbitrator

Michael H. LeRoy

I. ISSUE

Was the Grievant, Adrian Lacy, discharged for just cause and if not, what is the remedy?

II. FACTS

A. Background

The Company produces chemical surfactants that are used in soaps and other cleaning products. It operates seven days a week and maintains a 24 hour schedule. At the University Park location,

there are approximately 140 employees. Sixty-eight (68) workers are in the bargaining unit as production employees, seven (7) are maintenance mechanics, and another seven individuals (7) work in the warehouse. The Union was certified as the bargaining representative in an election conducted by the NLRB on July 29, 2010. The Collective Bargaining Agreement (CBA) is the first labor contract at this facility.

There are two different types of work schedules for bargaining unit employees. Production workers are scheduled on 12 hour shifts. For one week, the schedule is: Monday, 12 hours; Tuesday, 12 hours; Wednesday, off; Thursday, off; Friday, 12 hours, Saturday, 12 hours, Sunday, 12 hours. For the second week, the schedule alternates work days and days-off with the first week. Thus, it is: Monday, off; Tuesday, off; Wednesday, 12 hours; Thursday, 12 hours; Friday, off; Saturday, off; and Sunday, off.

Maintenance employees have a different schedule. They work five consecutive shifts, each lasting for 8 hours. This is followed by two consecutive days off.

Also by way of background, the Company administers a no-fault attendance policy. Essentially, when an employee is absent from scheduled work, this is treated as an “occurrence.” Each occurrence results in a point. The “no fault” term means that the policy is indifferent to the reason for the employee’s absence — with exceptions noted below. Once an employee reaches six points, he is terminated.

The system operates on a rolling calendar. Suppose the employee is absent on the first day of every month, starting in July. He accumulates his first point July 1st, his second point on August 1st, his third point on September 1st, his fourth point on October 1st and his fifth point on November 1st. He must avoid accumulating another point until next July 1st rolls around, at which time his point total drops to four. If he avoids any more absences through August 1st, his total decreases to three.

But again, the no-point system has exceptions. The Company’s policy pre-dates the collective bargaining relationship. It was largely, if not entirely, codified in the CBA and states:

ARTICLE 10
Attendance Guidelines
...
Section 2. Definitions: . . .

Occurrence— Any unapproved time off or absence not excepted by the policies identified below.
Section 3. Exceptions: Absence, tardiness and/or early quit due to the following circumstances may not subject an employee to corrective action. Documentation/verification may be required at the discretion of the supervisor.

- Exceptions (when properly scheduled and approved):
 - Vacation

- Jury Duty
- Bereavement Leave
- Short Term/Long Term Disability
- Family Medical Leave
- Workers Compensation Leave
- Military Leave
- Any other authorized leave granted in writing by Plant Management, or pursuant to federal or state or local law
- Personal Time

B. Events Related to the Discharge

Adrian Lacy is the Grievant. Mr. Lacy was hired in 2010. Before his hire, he served in the U.S. military for four years. He performed a variety of roles at the Company, including flaking, bulk loading, and warehouse duties. Mr. Lacy was fired from his job on May 13, 2011. His termination notice explained:

You were absent from work on May 4, 2011, May 5, 2011, May 9, 2011 and May 10, 2011. These absences were unexcused absences and result in one occurrences for each day or a total of 4 occurrences which brings your total number of occurrences to 8.5 within a rolling 12-month period. In accordance with the Rhodia attendance policy, proper attendance is required to maintain employment. As such your poor attendance of 8.5 occurrences warrants termination of your employment.

The four days that Mr. Lacy missed— May 4, 2011, May 5, 2011, May 9, 2011 and May 10, 2011—corresponded to the fact that he regularly worked the 12-hour rotating schedule for production employees. In other words, he was scheduled to work on May 4th and May 5th and was scheduled to be off on May 6th, May 7th, and May 8th. He was then scheduled to work on May 9th and May 10th.

As the record discloses more fully below, the Union and Company disagree about how to characterize this sequence of dates. The Union contends that Mr. Lacy was unavailable for work for more than five days (counting calendar days) due a documented, serious infection. The Company believes, however, that Mr. Lacy was absent for four consecutively scheduled work days—with emphasis on scheduled days. Because he missed fewer than five consecutive work days, he was not eligible for short-term disability leave as is provided in the CBA.

Mr. Lacy had accumulated absence points prior to this sequence of missed work days. By July 19, 2010 he received a disciplinary notice because he had accumulated four occurrences. He reported to work late on August 27th and received one-half point, and he called off work on August 28 and received an additional full point. This brought him to 5.5 occurrences. The Company issued him another disciplinary notice.

For the remainder of 2011, Mr. Lacy did not accumulate occurrences. He continued in this satisfactory manner until he missed work on May 4, 2011. During the evening of May 3rd he sought medical treatment at an emergency room. He was sent home with a form that referred him for a follow-up visit. The letter stated that he received materials for cellulitis (the infection) and clindamycin (medication). The form also directed him to be off work for two days. The next day (May 4th), he had an appointment with his health care provider. Under the signature of a Physician Assistant Certified (PAC), he received an excuse slip. Two boxes were checked on the form— one indicated that he was seen in the office that day, and the other box released him back to work on May 11th.

Mr. Lacy testified that he gave these notes to his sister to present to his supervisor. He also testified that his sister delivered these notes on May 5th. Several Company witnesses testified that they received the second note. Regardless, even if a second note had been received, the note alone would not allow Mr. Lacy to take short term disability. Ms. Rhonda Quigley, a system administrator who processes medical leave forms, testified that Mr. Lacy would need to apply for short term leave and also be approved by a Company physician. Under HIPAA, the Company physician would be entitled to see more extensive medical documentation than Mr. Lacy provided to his supervisor.

III. ARGUMENT

Company: Pursuant to its authority under Article 10, the Company applied four points for Mr. Lacy's four missed days of work in May 2010. These penalties took Mr. Lacy beyond the six point limit under the absence policy. Under Article 29, Section 1 a short term disability cannot be granted unless an employee misses five consecutive work days due to illness.

When language is clear and unambiguous, it must be applied as it is written. Here, the CBA is clear and unambiguous. Quoting Arbitrator Julius in the seminal treatise, *How Arbitration Works*, the Company states: "The intent of the Parties is to be found in the words which they, themselves, employed to express their intent. When language used is clear and explicit, the arbitrator is constrained to give effect to the thought used by the words." The language in Article 10 is lengthy and detailed. It provides a point system and certain exceptions for the application of the absence control policy. The Company implores the Arbitrator to respect the words of the CBA, and the Parties' clear intent. He should therefore deny the grievance.

Union: Mr. Lacy had medically documented absences that prevented him from working from May 3 through May 11. The length of his absence made him eligible for short-term disability. Article 29, Section 1 of the CBA provides that "eligibility for salary and benefits continuation when medical absences are in excess of five consecutive working days shall require a statement from a licensed physician on the applicable Rhodia designated forms." The Union emphasizes that the language in the CBA does not reference five scheduled working days. In fact, this language says nothing at all about a schedule. Mr. Lacy was withheld from work by his treating

physician from May 3 through May 10, and was not available to work until May 13 because he was not scheduled to work until that day. Mr. Lacy was ill for seven consecutive work days. “Work days” is defined by reference to the operations of the plant, not Mr. Lacy’s schedule. The record shows that the facility at University Park operates on a 24/7 basis seven days a week. Thus, Mr. Lacy’s illness met the requirements for a short-term disability. The fact that the language in Article 29, Section 1 makes no distinction between employees who work a five-day per week schedule and those who have intermittent schedules like Mr. Lacy means that the short-term disability policy is applied unfairly. The Parties did not intend to bargain for this inequality. The language must apply equally to all employees.

In addition, the Company failed to issue Mr. Lacy a final warning per the attendance policy, nor did the Company provide him a copy of a final warning. Thus, progressive discipline was not used before terminating his employment.

Therefore, the grievance should be granted. Mr. Lacy should be reinstated with backpay, restored seniority, and also with a make-whole provision for all loss of benefits during the termination period.

IV. ANALYSIS

The just cause issue in this matter requires the Arbitrator to resolve a contract interpretation disagreement. To begin, it is necessary to define the meaning of “consecutive working days” in Article 29, Section 1 of the CBA. The pertinent language states that “eligibility for salary and benefits continuation when medical absences are in excess of five consecutive working days shall require a statement from a licensed physician on the applicable Rhodia designated forms [emphasis added].”

The Company contends that this language is clear and unambiguous, and therefore requires no interpretation. Furthermore, the Company reads the “working days” provision to mean that the employee must be absent for five consecutive days that he is scheduled to work. But the Union disagrees. It says that the term is defined by reference to the operations of the plant. Thus, if the Company runs a seven day per week operation, the employee must be medically disabled for five consecutive days during the week, regardless of his personal work schedule.

Both interpretations are plausible. More to the point, this contract language is ambiguous and unclear on its face. Thus, the Arbitrator must rely on standard contract interpretation principles to resolve this dispute.

The record shows that this language reflected the bargaining intent of the Parties. In particular, the CBA’s short term disability policy was intended to conform to federal disability and medical leave laws.

With this bargaining intent in mind, the analysis turns to the Family and Medical Leave Act (FMLA). That law is relevant to the issue of bargaining intent insofar as it defines how working days are to be counted.

The law defines short-term disability in these terms:

Serious Health Condition – “Serious health condition” means an illness, injury, impairment, or *physical* or mental *condition* that involves:

any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility; or *a period of incapacity requiring absence of more than three calendar days from work*, school, or other regular daily activities *that also involves continuing treatment by (or under the supervision of) a health care provider*;

A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(a) Incapacity and treatment. A period of incapacity of more than *three consecutive, full calendar days*, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(1) *Treatment two or more times, within 30 days of the first day of incapacity*, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

(3) *The requirement in paragraphs (a)(1) and (2) of this section for treatment by a health care provider means an in-person visit to a health care provider*. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity [emphasis added].²

The emphasized portions of the federal regulations are germane to resolving this grievance. The law states that a serious health condition occurs when there is “a period of incapacity requiring absence of more than three calendar days from work.”

Notably, the federal regulation uses a calendar day definition. It does not use the scheduled working days approach advocated by the Company.

Mr. Lacy was absent more than three consecutive calendar days, beginning May 4, 2011 and extending through May 10, 2011. In addition, he had a “physical condition” that “involve[d] continuing treatment by . . . a health care provider.” Consistent with the law, he was treated twice

² Title 29: Labor, PART 825—THE FAMILY AND MEDICAL LEAVE ACT OF 1993, § 825.115 (Continuing treatment, at <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=48d6ee3b99d3b3a97b1bf189e1757786&rgn=div5&view=text&node=29:3.1.1.3.53&idno=29#29:3.1.1.3.53.1.477.13>).

within the period of incapacity and remained under the care of his physician until he was released back to work on May 11.

Thus, the Company's policy that consecutive "working days" refers to the employee's work schedule is at odds with the calendar day approach that is defined in the Code of Federal Regulations.

In addition, under a basic canon of contract interpretation, harsh, absurd or non-sensical results should be avoided. In this case, maintenance employees work a schedule that allows them to qualify for short term leave under FMLA. This is because the Company schedules them to work five consecutive work days.

However, production workers are scheduled on an intermittent basis. In the first week of the scheduling cycle, they are assigned 12 hour shifts that occur on Monday, Tuesday, Friday, Saturday, and Sunday. For the second week, the schedule provides 12-hour shifts on Wednesday and Thursday.

The point is that the Company's interpretation differentiates short term medical leave based on whether an individual is a production employee or a maintenance employee. While the Company has a clear rationale to work these individuals on different rotations and for different lengths of time, that rationale pertains to production needs. When, however, a production or a maintenance employee has a short term serious medical condition, it is harsh, absurd and non-sensical to provide one individual with relief from the absence policy while subjecting the other employees to discipline.

This comparison implicates the just cause issue. The common law of labor arbitration embodies seven key tests of just cause. One tenet, equal treatment, poses the question: Has the Employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees? As illustrated in the forgoing comparison of maintenance and production employees, the Company's interpretation of its short term leave policy did not treat all employees evenhandedly.

In sum, if Mr. Lacy worked a maintenance employee's schedule, there is no doubt that his one week medical absence for a serious infection would have been approved as a short term leave. He would not have been assessed points under the attendance policy. However, because the Company's assessment of points did not comply with FMLA leave regulations, and also treated him differently than a maintenance employee, there was no just cause for the Company to terminate his employment.

Turning to the remedy, the Arbitrator cannot accept the Union's argument that Mr. Lacy should be reinstated with backpay. Prior to the events in May 2011, Mr. Lacy had accumulated nearly enough absence points to warrant termination. By July 19, 2010 he received a disciplinary notice

because he had accumulated four occurrences. He reported to work late on August 27th and received one-half point, and he called off work on August 28 and received an additional full point. This brought him to 5.5 occurrences—at the threshold of termination. Again, this is not a work history that warrants a full remedy. A more appropriate remedy is reinstatement, with seniority restored but with no backpay. It is so ordered.

V. AWARD

1. The grievance is sustained. The Company shall reinstate Mr. Lacy, with his seniority restored. However, the requested remedy of backpay is denied.

Arbitrator Michael H. LeRoy

This Ruling Entered Into
this 22nd Day of March, 2012.

United States District Court, N.D. Illinois, Eastern Division.

Lisa PEATRY, individually, and on behalf of all others similarly situated, Plaintiff,

v.

BIMBO BAKERIES USA, INC., Defendant.**2020 WL 919202****Signed 02/26/2020**

OPINION AND ORDER

SARA L. ELLIS, United States District Judge

Plaintiff Lisa Peatry, an employee of Defendant Bimbo Bakeries USA, Inc. (“Bimbo”), filed this putative class action lawsuit alleging that Bimbo violated the Illinois Biometric Information Privacy Act (“BIPA”), 740 Ill. Comp. Stat. 14/1 et seq., through its collection, storage, and use of Peatry’s biometric information.

Specifically, Peatry brings claims for (1) Bimbo’s failure to institute, maintain, and adhere to a publicly available retention schedule in violation of BIPA § 15(a); (2) Bimbo’s failure to obtain informed, written consent before obtaining biometric information in violation of BIPA § 15(b); and (3) Bimbo’s disclosure of biometric information before obtaining consent in violation of BIPA § 15(d). Bimbo moves to dismiss the complaint, arguing that § 301 of the Labor Management Relations Act of 1947 (the “LMRA”) and the National Labor Relations Act of 1935 (the “NLRA”) preempt Peatry’s claims.

Alternatively, Bimbo argues that Peatry has failed to state a BIPA claim and that the Illinois Workers Compensation Act (the “IWCA”), 820 Ill. Comp. Stat. 305/1 et seq., bars her claims. The Court finds that § 301 of the LMRA preempts Peatry’s claims arising after May 8, 2018, when a collective bargaining agreement governing Peatry’s employment went into effect.

But Peatry may proceed on her pre-May 8, 2018 claims, which neither the NLRA or IWCA preempt and sufficiently allege BIPA violations.

BACKGROUND

Bimbo, a bakery product manufacturing company, uses a biometric timekeeping device, provided by a third party, to track employees’ hours. Upon hiring an employee, Bimbo scans their fingerprints and enrolls them in an employee database. Employees must then use their fingerprints to clock in and clock out. Bimbo does not inform its employees that it discloses the biometric information it collects to its third-party vendor and other third parties that host the database. Bimbo also does not obtain written releases before collecting the fingerprints or provide employees with a written, publicly available policy identifying a retention schedule and guidelines for permanently destroying employees’ fingerprints.

Peatry worked for Bimbo as a machine operator at Bimbo’s facility at 1540 S. 54th Avenue in Cicero, Illinois. Aryzta owned this facility until Bimbo acquired it on February 9, 2018. **Bimbo entered into a collective bargaining agreement (“CBA”) with the Chemical and Production Workers Union Local No. 30, AFL-CIO (the “Union”), which became effective May 8, 2018**

(emphasis added by Prof. LeRoy). Among other things, the CBA provides Bimbo with certain exclusive management rights, including “to make and enforce reasonable plant rules of conduct and regulations not inconsistent with the provisions” of the CBA, “to introduce new and improved methods, materials, equipment or facilities,” and “to change or eliminate existing methods, materials, equipment, or facilities.” Doc. 18-1 at 8. The CBA also sets forth negotiated wage tables. Finally, as relevant here, the CBA includes a grievance procedure, requiring employees to pursue “dispute[s] regarding the meaning and application of the terms of” the CBA in accordance with that procedure. *Id.* at 12.

During her employment at the facility between September 2016 and February 2019, Peatry scanned her fingerprints every time she clocked in and out of work as part of the facility’s timekeeping method. Bimbo never informed her of the purposes or length of time for which Bimbo collected, stored, used, and disseminated her biometric data. Bimbo also never informed her of a biometric data retention policy or whether Bimbo would at some point permanently delete her biometric data. Peatry never received or signed a written release authorizing the collection, storage, use, and dissemination of her biometric data. She would not have provided her biometric data if she knew that Bimbo would retain it for an indefinite period of time without her consent. She also would not have agreed to the compensation she received had she known that Bimbo would retain her biometric data indefinitely.

LEGAL STANDARD

A motion to dismiss under Rule 12(b)(1) challenges the Court’s subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The party asserting jurisdiction has the burden of proof.

ANALYSIS

I. Section 301 Preemption

First, Bimbo argues that § 301 of the LMRA preempts Peatry’s claims arising after May 8, 2018, when the CBA between Bimbo and the Union went into effect. Section 301 preempts “claims founded directly on rights created by collective-bargaining agreements, and also claims ‘substantially dependent on analysis of a collective-bargaining agreement.’” *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394 (1987) (quoting *Elec. Workers v. Hechler*, 481 U.S. 851, 859 n.3 (1987)). “If the resolution of a state law claim depends on the meaning of, or requires interpretation of, a collective bargaining agreement, the application of state law is preempted and federal labor law principles must be employed to resolve the dispute.” *Atchley v. Heritage Cable Vision Assocs.*, 101 F.3d 495, 499 (7th Cir. 1996).

Bimbo argues that Peatry’s BIPA claims arising after May 8, 2018 require the Court to interpret the CBA’s management rights provision, which gives Bimbo the right “to make and enforce reasonable plant rules of conduct and regulations,” as well as “to introduce new and improved

methods, materials, equipment or facilities, or to change or eliminate existing methods, materials, equipment or facilities.” Doc. 18-1 at 8.

Bimbo claims that determining whether the CBA authorized Bimbo to use the timekeeping system at issue requires consideration of the scope of these management rights. See *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1179 (7th Cir. 1993) (privacy violation suit arose under § 301 because “the company has a nonfrivolous argument that the surveillance of which the plaintiffs complain is authorized, albeit implicitly, by the management-rights clause of the agreement, so that the plaintiffs’ claim that the surveillance invaded their privacy cannot be resolved without an interpretation of the agreement”).

Bimbo also argues that Peatry’s allegations that Bimbo did not sufficiently compensate her for the retention and use of her biometric data implicates the CBA’s wages provision because the Court would have to consider whether the wage provision in the CBA intended to compensate Peatry for the use of the timekeeping system.

Because Peatry did not submit any grievance or request for arbitration, Bimbo contends that Peatry failed to comply with § 301’s procedural requirements and so the Court must dismiss those claims.

In *Miller v. Southwest Airlines Co.*, the Seventh Circuit recently considered a similar preemption argument under the Railway Labor Act (“RLA”), 45 U.S.C. § 181 et seq. 926 F.3d 898. In both of the cases consolidated before the Seventh Circuit, the plaintiffs alleged that the defendants implemented biometric timekeeping systems without the plaintiffs’ consent, did not publish protocols as required by BIPA, and improperly disclosed the plaintiffs’ biometric information. *Id.* at 901.

The defendants argued that the plaintiffs had consented to the use of their biometric identifiers through the applicable collective bargaining agreements’ management rights clauses. *Id.* The Seventh Circuit rejected the plaintiffs’ argument that their union could not qualify as an “authorized agent” that could provide consent and receive notices for BIPA purposes, noting that “[n]either the statutory text nor any decision by a state court suggests that Illinois wants to exclude a collective-bargaining representative from the category of authorized agents.” *Id.* at 903; see 740 Ill. Comp. Stat. 14/15(b), (d) (requiring entities collecting biometrics to provide notice to and receive release from “the subject or the subject’s legally authorized representative”).

Therefore, Miller found that the RLA preempted the plaintiffs’ claims, which involved “retention and destruction schedules for biometric data, and whether [the defendants] may use third parties to implement timekeeping and identification systems,” as well as whether the management rights clauses granted authority to the unions to consent to the collection and use of biometric data. 926 F.3d at 903.

Miller governs the Court's resolution of the preemption question raised here because the RLA preemption standard is "virtually identical to the pre-emption standard the Court employs in cases involving § 301 of the LMRA." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 260 (1994).

The facts are also almost identical here. Therefore, under Miller, Peatry's claims require interpretation of the CBA so that § 301 preempts her post-May 8, 2018 claims. 926 F.3d at 903–04 (because dispute about collection and use of biometric information required interpretation of CBA's management rights and wage provisions, the "state law is preempted to the extent that a state has tried to overrule the union's choices on behalf of the workers").

Peatry ignores the Seventh Circuit's Miller decision, despite the fact that the Seventh Circuit issued Miller before Peatry filed her response. Instead, Peatry only addresses the underlying district court decisions that the Seventh Circuit considered in Miller, attempting to distinguish her claims from the facts there. Peatry contends that the plaintiffs in those cases challenged the defendants' "decision to implement and use a biometric timekeeping device" and sought actual damages, while her claims involve statutory violations "stemming from [Bimbo's] failure to obtain consent prior to [its] collection, obtainment, use, storage and dissemination of [Peatry's] biometrics, as well as its failure to provide public retention and destruction guidelines." Doc. 34 at 5–7.

But, having compared Peatry's complaint to the complaints in those cases, the Court observes no material differences where the plaintiffs in those cases alleged the same statutory violations and only requested statutory damages as compensation for the BIPA violations. See *Miller v. Sw. Airlines Co.*, No. 18 C 86, Doc. 22 ¶¶ 72–81, Prayer for Relief (N.D. Ill. April 2, 2018); *Johnson v. United Airlines, Inc.*, No. 17 C 8858, Doc. 1-1 ¶¶ 46–55, Prayer for Relief (N.D. Ill. Dec. 8, 2017).

In another attempt to avoid Miller, Peatry argues that BIPA provides her with non-waivable rights that § 301 cannot preempt. Miller rejected Peatry's contention that only she, and not the Union, could consent to Bimbo's use of her biometric information. 926 F.3d at 903. As in Miller, the Union was Peatry's "sole and exclusive bargaining agent with respect to rates of pay, hours of work and other conditions of employment." Doc. 18-1 at 8; see 29 U.S.C. §§ 158(a)(5), 158(d), 159(a). And instead of excluding a union from acting on its members' behalf with respect to their privacy rights under BIPA, BIPA explicitly allows "an authorized agent" to receive notices and consent to the collection of biometric information. 740 Ill. Comp. Stat. 14/15(b), (d); Miller, 926 F.3d at 903–04 ("That biometric information concerns workers' privacy does not distinguish it from many other subjects, such as drug testing, that are routinely covered by collective bargaining and on which unions give consent on behalf of the whole bargaining unit.").

More importantly, however, Peatry ignores that § 301 may even preempt a nonnegotiable state remedy that “turns on the interpretation of a collective bargaining agreement.” *Atchley*, 101 F.3d at 501; *Carter v. Tyson Foods, Inc.*, No. 3:08-CV-209, 2009 WL 4790761, at *8 (N.D. Ind. Dec. 3, 2009) (“[E]ven non-negotiable statutory rights may be preempted if interpretation of a collective bargaining agreement was required to resolve the statutory claims.” (citing *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 n.7 (1988))).

Here, Peatry’s BIPA claims require interpretation of the CBA, meaning that § 301 preempts her BIPA claims regardless of whether the Court treats her rights under BIPA as nonnegotiable. See *Atchley*, 101 F.3d at 501. And although the LMRA does not provide a separate vehicle for asserting claims like the RLA, the CBA includes a grievance procedure through which Peatry arguably could have raised her claims.

Because § 301 preempts Peatry’s post-May 8, 2018 claims, the Court must determine the appropriate remedy. The Supreme Court has indicated that a preempted state law claim “must either be treated as a § 301 claim, or dismissed as pre-empted by federal labor-contract law.” *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). Employees must exhaust administrative remedies before bringing suit in federal court unless certain exceptions apply. See *McLeod v. Arrow Marine Transp., Inc.*, 258 F.3d 608, 616 (7th Cir. 2001).

Peatry has not set forth allegations to allow the Court to treat her claims as § 301 claims, and it appears she did not properly exhaust her administrative remedies. Although Peatry may have an argument concerning the futility of exhaustion or the unavailability of the grievance procedure, the Court cannot make such determinations on the information before it.

The Court therefore finds it appropriate to dismiss Peatry’s post-May 8, 2018 claims without prejudice and allow Peatry to evaluate how she wishes to proceed with respect to these preempted claims.

II. NLRA Preemption

Bimbo also argues that the NLRA preempts Peatry’s remaining pre-May 8, 2018 claims. The Supreme Court has developed two NLRA preemption doctrines, known as *Garmon* preemption and *Machinists* preemption. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Lodge 76, Int’l Ass’n of Machinists & Aerospace Workers, AFL-CIO v. Wis. Emp’t Relations Comm’n*, 427 U.S. 132 (1976).

Garmon preemption “seeks to prevent conflicts between state and local regulation and Congress’s integrated scheme of regulation embodied in Section 7 and 8 of the NLRA” and ensures “the NLRB’s primary jurisdiction in cases involving” those NLRA sections. *520 S. Mich. Ave. Assocs., Ltd. v. Shannon*, 549 F.3d 1119, 1125 (7th Cir. 2008). *Machinists* preemption “forbids both the National Labor Relations Board (NLRB) and States to regulate

conduct that Congress intended ‘be unregulated [and] left to be controlled by the free play of economic forces.’” *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 65 (2008) (quoting *Machinists*, 427 U.S. at 140); *Cannon v. Edgar*, 33 F.3d 880, 885 (7th Cir. 1994) (“Machinists preemption prohibits state and municipal regulations of areas that Congress left to the free play of economic forces.”).

As the *Miller* court recognized, and contrary to Peatry’s position, “how workers clock in and out is a proper subject of negotiation between unions and employers—is, indeed, a mandatory subject of bargaining.” *Miller*, 926 F.3d at 903; see 29 U.S.C. § 158(d). “Similarly, the retention and destruction schedules for biometric data, and whether [employers] may use third parties to implement timekeeping and identification systems, are topics for bargaining between unions and management.” *Id.*

But this does not automatically mean that the NLRA preempts Peatry’s claims. 520 S. Mich. Ave., 549 F.3d at 1128 (“[A] state law is not preempted by the NLRA merely because it regulates a mandatory subject of bargaining.”); *Spoerle v. Kraft Foods Glob., Inc.*, 527 F. Supp. 2d 860, 870–71 (W.D. Wis. 2007) (rejecting argument that “if Congress requires employers to engage in collective bargaining on a particular matter, states are powerless to impose any requirements that touch on any aspect of that matter”).

“[T]he NLRA is concerned primarily with establishing an equitable process for bargaining, and not the substantive terms of bargaining.” 520 S. Mich. Ave., 549 F.3d at 1128. Its preemptive reach does not extend to a state law that “establishes a minimum labor standard that does not intrude upon the collective-bargaining process.” *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 7 (1987); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 754–55 (1985) (“No incompatibility exists, therefore, between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA.”).

Although *Bimbo* argues that Peatry’s claims interfere with and attempt to regulate an aspect of labor relations, the Court disagrees and finds BIPA comparable to a state statute that establishes a minimum labor standard with which all employers must comply. See *Fort Halifax*, 482 U.S. at 23 (state statute requiring employers to provide severance pay to certain employees not preempted by the NLRA); *Metro. Life Ins. Co.*, 471 U.S. at 755 (“Minimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA.”).

Nor has *Bimbo* sufficiently explained how BIPA’s requirements are incompatible with the NLRA’s concerns “with establishing an equitable process for determining terms and conditions of employment.” See *Metro. Life Ins. Co.*, 471 U.S. at 753, 758 (state insurance regulation

“designed to implement the Commonwealth’s policy on mental-health care” did not “limit the rights of self-organization or collective bargaining protected by the NLRA”).

Therefore, the Court cannot find that the NLRA preempts Peatry’s pre-May 8, 2018 claims so as to require their dismissal.

III. Sufficiency of the Pleadings

Alternatively, Bimbo argues that Peatry has failed to state a BIPA claim because she has not adequately pleaded negligence, recklessness, or intent. BIPA provides that a plaintiff may recover statutory damages of \$1,000 for negligent violations and \$5,000 for intentional or reckless violations. 740 Ill. Comp. Stat. 14/20(1)–(2).

But the need to demonstrate negligence, intentional action, or recklessness impacts a plaintiff’s recovery, not the underlying substantive violation of BIPA. See *Rosenbach v. Six Flags Entm’t Corp.*, 2019 IL 123186, ¶¶ 33, 36 (“[W]hen a private entity fails to comply with one of section 15’s requirements, that violation constitutes an invasion, impairment, or denial of the statutory rights of any person or customer whose biometric identifier or biometric information is subject to the breach.... The violation, in itself, is sufficient to support the individual’s or customer’s statutory cause of action.”); *Woodard v. Dylan’s Candybar LLC*, Doc. 46 at 9 (Ill. Cir. Ct. Cook Cty. Nov. 20, 2019) (BIPA’s inclusion of states of mind serve as “standards of culpability for determining damages,” not as elements of the violation).

Rule 8 does not require a plaintiff to plead damages with particularity and instead only requires “a demand for the relief sought.” Fed. R. Civ. P. 8(a)(3).

Peatry has sufficiently complied with this requirement. And even treating state of mind as an element of the violation, by alleging that Bimbo has made no effort to comply with BIPA, Peatry has pleaded facts to suggest Bimbo acted with negligence, recklessness, or intent. See *Neals v. PAR Tech. Corp.*, — F. Supp. 3d —, 2019 WL 6907995, at *3 (N.D. Ill. Dec. 18, 2019) (rejecting the defendant’s argument that the plaintiff failed to include facts that would entitle her to statutory damages because the rules do not require a plaintiff to prove her case at the pleading stage); *Rogers v. BNSF Ry. Co.*, No. 19 C 3083, 2019 WL 5635180, at *5 (N.D. Ill. Oct. 31, 2019) (“[T]he BIPA took effect more than ten years ago, and if the allegations of his complaint are true—as the Court must assume at this stage—BNSF has made no effort to comply with its requirements. This is certainly enough, at the pleading stage, to make a claim of negligence or recklessness plausible.”). But see *Namuwonge v. Kronos, Inc.*, No. 1:19-cv-03239, 2019 WL 6253807, at *5 (N.D. Ill. Nov. 22, 2019) (“Namuwonge’s abstract statements regarding damages are insufficient for the Court to infer that Kronos acted recklessly or intentionally.”); *Rogers v. CSX Intermodal Terminals, Inc.*, 409 F. Supp. 3d 612, 618 (N.D. Ill. 2019) (“Rogers’ conclusory statement of CSX’s intent is insufficient to allow us to infer that CSX acted intentionally or

recklessly and does nothing to distinguish this case from every possible BIPA case where the defendant is alleged to have failed to meet the strictures of Section 15.”).

...

CONCLUSION

For the foregoing reasons, the Court grants in part and denies in part Bimbo’s motion to dismiss. The Court dismisses Peatry’s post-May 8, 2018 claims without prejudice.

All Citations

Slip Copy, 2020 WL 919202, 2020 L.R.R.M. (BNA) 70,154

...

Pennsylvania State Police v. Suders, 542 U.S. 129 (2005)

Justice GINSBURG delivered the opinion of the Court.

Plaintiff-respondent Nancy Drew Suders alleged sexually harassing conduct by her supervisors, officers of the Pennsylvania State Police (PSP), of such severity she was forced to resign. The question presented concerns the proof burdens parties bear when a sexual harassment/ constructive discharge claim of that character is asserted under Title VII of the Civil Rights Act of 1964. To establish hostile work environment, plaintiffs like Suders must show harassing behavior “sufficiently severe or pervasive to alter the conditions of [their] employment.” *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22, (1993). Beyond that, we hold, to establish “constructive discharge,” the plaintiff must make a further showing: She must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response.

An employer may defend against such a claim by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus.

This affirmative defense will not be available to the employer, however, if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions. In so ruling today, we follow the path marked by our 1998 decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, and *Faragher v. Boca Raton*, 524 U.S. 775.

Because this case was decided against Suders in the District Court on the PSP’s motion for summary judgment, we recite the facts, as summarized by the Court of Appeals, in the light most favorable to Suders. In March 1998, the PSP hired Suders as a police communications operator for the McConnellsburg barracks. Suders’ supervisors were Sergeant Eric D. Easton, Station Commander at the McConnellsburg barracks, Patrol Corporal William D. Baker, and Corporal Eric B. Prendergast. Those three supervisors subjected Suders to a continuous barrage of sexual harassment that ceased only when she resigned from the force.

Easton “would bring up [the subject of] people having sex with animals” each time Suders entered his office. He told Prendergast, in front of Suders, that young girls should be given instruction in how to gratify men with oral sex. Easton also would sit down near Suders, wearing spandex shorts, and spread his legs apart. Apparently imitating a move popularized by television wrestling, Baker repeatedly made an obscene gesture in Suders’ presence by grabbing his genitals and shouting out a vulgar comment inviting oral sex. Baker made this gesture as many as five-to-ten times per night throughout Suders’ employment at the barracks. Suders once told Baker she “‘didn’t think he should be doing this’”; Baker responded by jumping on a chair and again performing the gesture, with the accompanying vulgarity. Further, Baker would “rub his rear end in front of her and remark ‘I have a nice ass, don’t I?’” Prendergast told Suders “‘the village idiot could do her job’”; wearing black gloves, he would pound on furniture to intimidate her.

In June 1998, Prendergast accused Suders of taking a missing accident file home with her. After that incident, Suders approached the PSP’s Equal Employment Opportunity Officer, Virginia Smith-Elliott, and told her she “might need some help.” Smith-Elliott gave Suders her telephone number, but neither woman followed up on the conversation. On August 18, 1998, Suders contacted Smith-Elliott again, this time stating that she was being harassed and was afraid. Smith-Elliott told Suders to file a complaint, but did not tell her how to obtain the necessary form. Smith-Elliott’s response and the manner in which it was conveyed appeared to Suders insensitive and unhelpful.

Two days later, Suders’ supervisors arrested her for theft, and Suders resigned from the force. The theft arrest occurred in the following circumstances. Suders had several times taken a computer-skills exam to satisfy a PSP job requirement. Each time, Suders’ supervisors told her that she had failed. Suders one day came upon her exams in a set of drawers in the women’s locker room.

She concluded that her supervisors had never forwarded the tests for grading and that their reports of her failures were false. Regarding the tests as her property, Suders removed them from the locker room. Upon finding that the exams had been removed, Suders’ supervisors devised a plan to arrest her for theft. The officers dusted the drawer in which the exams had been stored with a theft-detection powder that turns hands blue when touched. As anticipated by Easton, Baker, and Prendergast, Suders attempted to return the tests to the drawer, whereupon her hands turned telltale blue. The supervisors then apprehended and handcuffed her, photographed her blue hands, and commenced to question her. Suders had previously prepared a written resignation, which she tendered soon after the supervisors detained her. Nevertheless, the supervisors initially refused to release her. Instead, they brought her to an interrogation room, gave her warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966), and continued to question her. Suders reiterated that she wanted to resign, and Easton then let her leave. The PSP never brought theft charges against her.

In September 2000, Suders sued the PSP in Federal District Court, alleging that she had been subjected to sexual harassment and constructively discharged, in violation of Title VII of the Civil Rights Act of 1964. At the close of discovery, the District Court granted the PSP’s motion for summary judgment. Suders’ testimony, the District Court recognized, sufficed to permit a trier of fact to conclude that the supervisors had created a hostile work environment. The court nevertheless held that the PSP was not vicariously liable for the supervisors’ conduct.

In so concluding, the District Court referred to our 1998 decision in *Faragher v. Boca Raton*, 524 U.S. 775. In *Faragher*, along with *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, decided the

same day, the Court distinguished between supervisor harassment unaccompanied by an adverse official act and supervisor harassment attended by “a tangible employment action.” Both

decisions hold that an employer is strictly liable for supervisor harassment that “culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.”

But when no tangible employment action is taken, both decisions also hold, the employer may raise an affirmative defense to liability, subject to proof by a preponderance of the evidence: “The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”

Suders’ hostile work environment claim was untenable as a matter of law, the District Court stated, because she “unreasonably failed to avail herself of the PSP’s internal procedures for reporting any harassment.” Resigning just two days after she first mentioned anything about harassment to Equal Employment Opportunity Officer Smith-Elliott, the court noted, Suders had “never given [the PSP] the opportunity to respond to [her] complaints.” The District Court did not address Suders’ constructive discharge claim.

The Court of Appeals for the Third Circuit reversed and remanded the case for disposition on the merits. The Third Circuit agreed with the District Court that Suders had presented evidence sufficient for a trier of fact to conclude that the supervisors had engaged in a “pattern of sexual harassment that was pervasive and regular.” But the appeals court disagreed with the District Court in two fundamental respects. First, the Court of Appeals held that, even assuming the PSP could assert the affirmative defense described in Ellerth and Faragher, genuine issues of material fact existed concerning the effectiveness of the PSP’s “program ... to address sexual harassment claims.” Second, the appeals court held that the District Court erred in failing to recognize that Suders had stated a claim of constructive discharge due to the hostile work environment.

This Court granted certiorari [a petition for review of a lower court ruling] to resolve the disagreement among the Circuits on the question whether a constructive discharge brought about by supervisor harassment ranks as a tangible employment action and therefore precludes assertion of the affirmative defense articulated in Ellerth and Faragher. We conclude that an employer does not have recourse to the Ellerth/Faragher affirmative defense when a supervisor’s official act precipitates the constructive discharge; absent such a “tangible employment action,” however, the defense is available to the employer whose supervisors are charged with harassment. We therefore vacate the Third Circuit’s judgment and remand the case for further proceedings.

Under the constructive discharge doctrine, an employee’s reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee’s position would have felt compelled to resign?

The Courts of Appeals have recognized constructive discharge claims in a wide range of Title VII cases. See, e.g., *Robinson*, 351 F.3d, at 336-337 (sexual harassment); *Moore v. KUKA Welding Systems & Robot Corp.*, 171 F.3d 1073, 1080 (C.A.6 1999) (race); *Bergstrom-Ek v. Best Oil Co.*, 153 F.3d 851, 858-859 (C.A.8 1998) (pregnancy); *Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1132-1133 (C.A.4 1995) (national origin); *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 343 (C.A.10

1986) (sex); *Young v. Southwestern Sav. & Loan Assn.*, 509 F.2d 140,143-144 (C.A.5 1975) (religion).

Although this Court has not had occasion earlier to hold that a claim for constructive discharge lies under Title VII, we have recognized constructive discharge in the labor-law context. Furthermore, we have stated that “Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment.” ... We agree with the lower courts and the EEOC that Title VII encompasses employer liability for a constructive discharge.

This case concerns an employer’s liability for one subset of Title VII constructive discharge claims: constructive discharge resulting from sexual harassment, or “hostile work environment,” attributable to a supervisor. Our starting point is the framework Ellerth and Faragher established to govern employer liability for sexual harassment by supervisors.

As earlier noted, those decisions delineate two categories of hostile work environment claims: (1) harassment that “culminates in a tangible employment action,” for which employers are strictly liable; and (2) harassment that takes place in the absence of a tangible employment action, to which employers may assert an affirmative defense, *Ellerth*, 524 U.S., at 765, 118 S.Ct.2257; accord *Faragher*, 524 U.S., at 807.

With the background set out above in mind, we turn to the key issues here at stake: Into which Ellerth/Faragher category do hostile-environment constructive discharge claims fall-and what proof burdens do the parties bear in such cases.

In *Ellerth* and *Faragher*, the plaintiffs-employees sought to hold their employers vicariously liable for sexual harassment by their supervisors, even though the plaintiffs “suffer[ed] no adverse, tangible job consequences.” ... We then identified “a class of cases where, beyond question, more than the mere existence of the employment relation aids in commission of the harassment: when a supervisor takes a tangible employment action against the subordinate.”

A tangible employment action, the Court explained, “constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” Unlike injuries that could equally be inflicted by a co-worker, we stated, tangible employment actions “fall within the special province of the supervisor,” who “has been empowered by the company as ... [an] agent to make economic decisions affecting other employees under his or her control.”

The tangible employment action, the Court elaborated, is, in essential character, “an official act of the enterprise, a company act.” It is “the means by which the supervisor brings the official power of the enterprise to bear on subordinates.” Often, the supervisor will “use [the company's] internal processes” and thereby “obtain the imprimatur of the enterprise.” Ordinarily, the tangible employment decision “is documented in official company records, and may be subject to review by higher level supervisors.” In sum, we stated, “when a supervisor takes a tangible employment action against a subordinate[,] ... it would be implausible to interpret agency principles to allow an employer to escape liability.”

When a supervisor’s harassment of a subordinate does not culminate in a tangible employment action, the Court next explained, it is “less obvious” that the agency relation is the driving force. We acknowledged that a supervisor’s “power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the

agency relation.” But we also recognized that “there are acts of harassment a supervisor might commit which might be the same acts a coemployee would commit, and there may be some circumstances where the supervisor's status [would] mak[e] little difference.” ...

Ellerth and Faragher also clarified the parties’ respective proof burdens in hostile environment cases. Title VII, the Court noted, “borrows from tort law the avoidable consequences doctrine,” under which victims have “a duty ‘to use such means as are reasonable under the circumstances to avoid or minimize the damages’ that result from violations of the statute,”

The Ellerth/Faragher affirmative defense accommodates that doctrine by requiring plaintiffs reasonably to stave off avoidable harm. But both decisions place the burden squarely on the defendant to prove that the plaintiff unreasonably failed to avoid or reduce harm.

The constructive discharge here at issue stems from, and can be regarded as an aggravated case of, sexual harassment or hostile work environment. For an atmosphere of sexual harassment or hostility to be actionable, we reiterate, the offending behavior “must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.” A hostile-environment constructive discharge claim entails something more: A plaintiff who advances such a compound claim must show working conditions so intolerable that a reasonable person would have felt compelled to resign.

Suders’ claim is of the same genre as the hostile work environment claims the Court analyzed in Ellerth and Faragher. Essentially, Suders presents a “worse case” harassment scenario, harassment ratcheted up to the breaking point. Like the harassment considered in our pathmarking decisions, harassment so intolerable as to cause a resignation may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts. Unlike an actual termination, which is always effected through an official act of the company, a constructive discharge need not be. A constructive discharge involves both an employee’s decision to leave and precipitating conduct: The former involves no official action; the latter, like a harassment claim without any constructive discharge assertion, may or may not involve official action. To be sure, a constructive discharge is functionally the same as an actual termination in damages-enhancing respects. ... And as Ellerth and Faragher further point out, an official act reflected in company records—a demotion or a reduction in compensation, for example—shows “beyond question” that the supervisor has used his managerial or controlling position to the employee's disadvantage. Absent such an official act, the extent to which the supervisor's misconduct has been aided by the agency relation, as we earlier recounted, is less certain. That uncertainty, our precedent establishes, justifies affording the employer the chance to establish, through the Ellerth/Faragher affirmative defense, that it should not be held vicariously liable.

We see no cause for leaving the district courts thus unguided. Following Ellerth and Faragher, the plaintiff who alleges no tangible employment action has the duty to mitigate harm, but the

defendant bears the burden to allege and prove that the plaintiff failed in that regard. The plaintiff might elect to allege facts relevant to mitigation in her pleading or to present those facts in her case in chief, but she would do so in anticipation of the employer's affirmative defense, not as a legal requirement.

We agree with the Third Circuit that the case, in its current posture, presents genuine issues of material fact concerning Suders' hostile work environment and constructive discharge claims.

We hold, however, that the Court of Appeals erred in declaring the affirmative defense described in *Ellerth* and *Faragher* never available in constructive discharge cases. Accordingly, we vacate the Third Circuit's judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Terry v. Sapphire Gentlemen's Club, 336 P.3d 951 (2014)

By the Court, PICKERING, J.:

This case presents the question of whether appellants, performers at Sapphire Gentlemen's Club, are Sapphire employees within the meaning of NRS [Nevada Revised Statutes] 608.010 and thus entitled to the minimum wages guaranteed by NRS Chapter 608. Because NRS 608.010's definition of employee hinges on NRS 608.011's definition of employer, we must decide the larger issue of when an entity is an employer under NRS 608.011, and in particular whether Sapphire is the performers' employer under that section.

Given that the Legislature has long used federal minimum wage laws as a platform for this state's minimum wage scheme, that the statutes in question do not signal any intent to deviate from that course, and that for practical reasons the two schemes should be harmonious in terms

of which workers are entitled to protection, we herein adopt the Fair Labor Standards Act's "economic realities" test for employment in the minimum wage context. 29 U.S.C. §§ 201–219 (2012). Under that test, the performers are Sapphire's employees within the meaning of NRS 608.010. We therefore reverse and remand.

I.

Sapphire Gentlemen's Club contracts for semi-nude entertainment with approximately 6,600 performers. Under these contracts, the performers may determine their own schedules (but agree to work a minimum shift length of six hours any day they decide to work unless they advise a Sapphire employee of their early clock-out); set prices for their private performances (provided that they comply with the club's established minimum charge); control the "artistic aspects" of their performances (though the club D.J. chooses the music they dance to, and they must obey club rules as to body

positioning and physical contact with customers); and perform at other venues should they wish to. The performers also agree to abide by certain “house rules,” including a minimum standard of coverage by their costumes and a minimum heel height; payment of a “house fee,” which ranges in amount, any night they work; and performing two dances per shift on the club stage unless they pay an “off-stage” fee.

Sapphire pays no wages to the performers; their income is dependent upon tips and dancing fees paid by Sapphire patrons. In the district court, the performers challenged this practice, claiming that they were “employees” within the meaning of NRS 608.010 and thus guaranteed a minimum wage. The district court applied a five-factor test formerly used to determine employment status under the Nevada Industrial Insurance Act, now codified at NRS Chapters 616A–616D, and found that the performers were not “employees” within the meaning of NRS Chapter 608. The district court then granted a motion for summary judgment brought by Sapphire. The performers appeal.

II.

Only an “employee” is entitled to minimum wages under NRS Chapter 608. NRS 608.010 defines employees as “persons in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed.” Sapphire argues that the performers had no “contract of hire” and alternatively that the performers were not “in the service of” Sapphire.

But these arguments lack merit. First, the signed entertainment agreement, which describes in detail the terms under which Sapphire permits the performers to dance at its facility, is an express contract of hire, despite that therein the parties state that they “intend that the relationship created [by the agreement] will be only that of Sapphire and Entertainer and not any other legal relationship.”

Particularly where, as here, remedial statutes are in play, a putative employer’s self-interested disclaimers of any intent to hire cannot control the realities of an employment relationship. See

Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 755 (9th Cir.1979); *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668, 669 (5th Cir.1968).

Thus, Sapphire’s protestations that the performers “never intended to be employees,” and agreed to be independent contractors are beside the point.

Second, ordinarily one is “in the service of” another where one is “of use” to that person. See *Merriam–Webster’s Collegiate Dictionary* 1137 (11th ed.2007) (defining “serve” and “service”). And given that Sapphire concedes that the performers “are an important part of the business of a gentlemen’s club, and moreover, that it is ... the dancers that patrons come to see,” the performers undeniably are “of use” to Sapphire, Sapphire’s claims that the performers only “provided services to their own customers at Sapphire’s facility” notwithstanding.

Thus, whether the performers are “employees” under NRS 608.010 turns on whether Sapphire is their “employer.”

As relevant to this appeal, an employer “includes every person having control or custody of any employment, place of employment or any employee.” NRS 608.011. One has control where one has the “power to govern the management and policies of a person or entity.” Black’s Law Dictionary 378 (9th ed.2009); see also Merriam–Webster’s Collegiate Dictionary 212 (11th ed.2007) (defining “control” as “power or authority to guide or manage”). Custody is “[t]he care and control of a thing or person for ... preservation, or security.” See also Merriam–Webster’s, *supra*, at 308 (defining “custody” as the “guarding” or “safekeeping” by one with authority).

In the abstract, these definitions may sufficiently describe an employment relationship as one where a person has the power to direct the management of or the policies governing a worker, or is to some extent responsible for that worker’s preservation and security. But this court is faced with a practical problem; namely, identifying which workers, and specifically whether these workers, are entitled to minimum wage protections.

And our interpretation of NRS 608.011 must provide a structure that lower courts may also use to assess the realities of various working relationships under the section. Viewed with an eye toward such practical necessities, it is clear that these definitions are insufficiently precise—a security guard, for example, may be somewhat responsible for the safety of employees in the facility he or she guards and thus fall within the definition of “employer” suggested by the conventional dictionary definition of “custody,” but it seems unreasonable to deem such an individual responsible for the wages of his or her coworkers.

The performers urge this court to adopt the economic realities test that federal courts use under the federal Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–219 (2012), as that interpretive aid. ... [T]he Legislature has long relied on the federal minimum wage law to lay a foundation of worker protections that this State could build upon, see 1965 Nev. Stat., ch. 333, § 2, at 696

(extending Nevada’s minimum wage protections to those not covered under the FLSA), and so in many significant respects, Nevada’s minimum wage laws and those set federally run parallel. See, e.g., NRS 608.250 (directing the Labor Commissioner to set the minimum wage “in accordance with federal law”); see also Hearing on A.B. 219 Before the Assembly Labor & Mgmt. Comm., 58th Leg. (Nev., February 18, 1975) (testimony by Raymond D. Bohart, Federated Employers of Nev.) (acknowledging that the bill in question, which extended Nevada’s minimum wage statutory protections to both men and women, was “a duplication of the [FLSA] in many aspects”).

Such parallels are part of a larger national pattern of laws that have emerged to deal with common problems in the minimum wage context, and many other states have adopted the economic realities test to determine whether an employment relationship exists under their respective state minimum wage laws. See, e.g., *Campusano v. Lusitano Const. LLC*, 208 Md.App. 29, 56 A.3d 303, 308 (Md.Ct.Spec.App.2012); *Cejas Commercial Interiors, Inc. v. Torres–Lizama*, 260 Or.App. 87, 316 P.3d 389, 394 (2013); *Commonwealth, Dep’t of Labor & Indus., Bureau of Labor Law Compliance v. Stuber*, 822 A.2d 870, 873 (Pa.Comm.w.Ct.2003), *aff’d*, 580 Pa. 66, 859 A.2d 1253 (2004);

Anfinson v. FedEx Ground Package Sys., Inc., 159 Wash.App. 35, 244 P.3d 32, 40–41 (2010), *affd*, 174 Wash.2d 851, 281 P.3d 289 (2012).

... Thus, the Legislature has not clearly signaled its intent that Nevada’s minimum wage scheme should deviate from the federally set course, and for the practical reasons examined above, our state’s and federal minimum wage laws should be harmonious in terms of which workers qualify as employees under them. We therefore adopt the FLSA’s “economic realities” test for employment in the context of Nevada’s minimum wage laws.

III.

While it is not necessary to list exhaustively every factor that could be relevant in the totality of circumstances that make up a working relationship's economic reality, there are some factors which courts nearly universally consider:

- (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 requires 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.

Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 754 (9th Cir.1979). With this in mind, we examine the district court’s summary judgment regarding the performers’ relationship with Sapphire, and because the material facts in this case are undisputed, we decide whether an employment relationship exists between them as a matter of law. As to the “control” factor considered under the totality of the circumstances, at first look, the facts may appear mixed. Sapphire did not produce a set schedule for performers, theoretically allowing them to work any day they wished for as long as they wished, provided that they met a six-hour shift minimum or received permission to depart early. Additionally, though the club set a two stage-dance minimum for performers not paying the off-stage fee, and discouraged performers from refusing to give a lap dance if a customer requested one, the decision of whether or not to stage dance ultimately lay in the discretion of the performers, as did their acceptance or rejection of a patron’s invitation for a private dance. And, while Sapphire required performers to accept “dance dollars”—from which the club took a cut—whether or not they preferred to, performers were also permitted to accept cash, to which the club laid no claim.

But this court is mindful that Sapphire’s supposed lack of control may actually reflect “a framework of false autonomy” that gives performers “a coercive ‘choice’ between accruing debt to the club or redrawing personal boundaries of consent and bodily integrity.” Sapphire emphasizes that performers may “choose[] not to dance on stage at Sapphire” so long as they also “choose to pay an optional ‘off-stage fee,’” and similarly that a performer may “choose[] not to dance for a patron she knows will pay with dance

dollars, she may make that choice,” though the performer may not ask that patron to pay in cash, and in making either choice the performers also risk taking a net loss for their shift. But by forcing them to make such “choices,” Sapphire is actually able to “heavily monitor [the performers], including dictating their appearance, interactions with customers, work schedules and minute to minute movements when working,” while ostensibly ceding control to them. This reality undermines Sapphire’s characterization of the “choices” it offers performers and the freedom it suggests that these choices allow them; the performers are, for all practical purposes, “not on a pedestal, but in a cage.” *Frontiero v. Richardson*, 411 U.S. 677, 684, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973).

Added to this is the weight of other economic realities factors. First, given that the performers risked little more than their daily house fees, personal grooming expenditures, costume costs, and time, and that the one who “takes the risks ... reaps the returns,” their opportunity for profit was limited accordingly. That a performer might increase her profits through “hustling,” that is using her interpersonal skills to solicit larger tips, is not dispositive—“[a]s is the case with the zealous waiter at a fancy, four star restaurant, a dancer’s stake, her take and the control she exercises over each of these are limited by the bounds of good service....”

With regard to the relative investment of the parties, we note that Sapphire provides all the risk capital, funds advertising, and covers facility expenses. The performers’ financial contributions are limited to those noted above—their costume and appearance-related expenses and house fees. Thus, the performers are “far more closely akin to wage earners toiling for a living, than to independent entrepreneurs seeking a return on their risky capital investments,” *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 328 (5th Cir.1993) and this factor also weighs in the performers’ favor.

All work requires some skill, so in the economic realities context, courts look specifically for workers’ “special” skills; namely, whether their work requires the initiative demonstrated by one in business for himself or herself. Sapphire suggests that the performers’ ability to “hustle” clients is one such skill. But inasmuch as Sapphire does not appear to have interviewed the

performers for any indication of their hustling prowess, it is not apparent that their work actually requires such initiative. In any case, though it may well be that a good “hustle” is a considerable boon in the field, “the ability to develop and maintain rapport with customers is not the type of ‘initiative’ contemplated by this factor.” *Id.*

According to Sapphire, “[d]ancers are itinerant because they have the freedom to ply their dancing trade at a multitude of gentlemen’s clubs,” and so the factor looking to the permanency of the relationship should weigh in its favor. True, Sapphire allowed the performers to work at other venues, and different performers testified that they continued schooling or other employment during their tenure at Sapphire. But, that the performers “were free to work at other clubs or in other lines of work ... do[es] not distinguish them from countless workers in other areas of endeavor who are undeniably employees ... for example, waiters, ushers, and bartenders.” *Rick’s Cabaret*, 967 F.Supp.2d at 921. Thus, though the temporary nature of the relationship at issue weighs

against it being that of employer/employee, this factor carries little persuasive value in the context of topless dancers and the clubs at which they perform, and cannot alone tilt the scales in Sapphire's favor. See *Priba Corp.*, 890 F.Supp. at 593–94.

Sapphire contends that “[e]xotic dancing is customarily performed by independent contractors, and therefore, is not an integral part of Sapphire’s business.” Sapphire argues that “the test is not one of whether the subcontractor’s activity is useful, necessary, or even absolutely indispensable to the statutory employer’s business[,] ... [t]he test ... is whether that indispensable activity is, in that business, normally carried on through employees rather than independent contractors.”

Even assuming it is true that “exotic dancing” is typically performed by independent contractors—a tenuous proposition given that most foreign precedent demonstrates it is performed by employees, see, e.g., *Circle C.*, 998 F.2d at 330 (holding that exotic dancers were employees not independent contractors); *Rick’s Cabaret*, 967 F.Supp.2d at 925–26 (accord); *Clincy*, 808 F.Supp.2d at 1350 (accord); *Thompson v. Linda & A*, 779 F.Supp.2d 139, 151 (D.D.C.2011)(accord); *Harrell*, 992 F.Supp. at 1354 (accord); *Priba Corp.*, 890 F.Supp. at 594 (accord); *Jeffcoat*, 732 P.2d at 1078 (accord)—Sapphire cites no authority supporting the application of the Meers “normal work” test to this factor in the economic realities context. And to do so simply makes no sense; if we are examining whether work is “integral” to an employer’s business, the test must be whether it is “useful, necessary, or even absolutely indispensable” to the business. See *Merriam–Webster’s Collegiate Dictionary* 650 (11th ed.2007) (defining “integral” as “essential to completeness”). Given that Sapphire bills itself as the “World’s Largest Strip Club,” and not, say, a sports bar or night club, we are confident that the women strip-dancing there are useful and indeed necessary to its operation.

Thus, based on our review of the totality of the circumstances of the working relationship’s economic reality, Sapphire qualifies as an employer under NRS 608.011, and the performers therefore qualify as employees under NRS 608.010. In so holding, this court is in accord with the great weight of authority, which has almost “without exception ... found an employment relationship and required ... nightclub[s] to pay [their] dancers a minimum wage.” See *Clincy*, 808 F.Supp.2d at 1343 (internal quotation omitted) (collecting cases). We therefore reverse the district court’s grant of summary judgment in favor of Sapphire and remand for further proceedings consistent with this opinion.

