

GOVERNMENT REGULATION II (LER 590-E)**Professor Michael H. LeRoy**244-4092/e-mail: mhl@illinois.edu**Spring 2020 Semester**

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Course Description: This course examines a variety of federal and state statutes, agency regulations, and court rulings that regulate employment relationships. Topics include:

- (1) legal theories associated with discharge and the erosion of employment-at-will (e.g., breach of contract, breach of oral agreement, breach of employee handbook policy; covenant of good-faith dealing; and public policy exceptions to employment at will);
- (2) breach of contract by an employee and post-employment restrictions;
- (3) a variety of retirement issues, including forced and mandatory retirement; retiree health benefits; plant closings; fiduciary duties under ERISA; administration of retirement trust benefits; pension plan termination; discrimination in private pensions; and Social Security retirement benefits;
- (4) worker's compensation issues, including scope of employment, determination of benefit levels, and exclusivity of compensation claims;
- (5) legal theories and remedies involving occupational disease (e.g., long-term exposure to workplace toxins, and stress-induced heart attacks) and occupational injury;
- (6) tort claims arising out of employment relationship (e.g., co-worker or customer assaults on employee);
- (7) occupational safety and health issues arising under OSHA, such as employer duties and defenses, employee rights, hazardous refusal to work, common law safety duties, and anti-discrimination theories.

Course Goals: LER 590E prepares you to apply and analyze employment regulations that are likely to be part of your professional work. My goal is to integrate your growing knowledge of employment law with a problem-solving methodology that you can use as a professional. In addition, the course covers a variety of business and financial subjects that are intertwined with employment regulation issues. Examples include bankruptcy priorities for employees and retirees, tax treatment of health insurance benefits, and the impact of downsizing and "legacy benefits" on an employer's financial statement.

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.

Class attendance is necessary and absolutely required. You **must** keep up with casebook readings. Experience shows, however, that you are unlikely to make sense of these materials on your own— at least for the first few classes. If you keep up with assignments **and** attend class regularly, you will learn a great deal by the end of the semester.

Text: All readings are from Mark Rothstein and Lance Liebman, **EMPLOYMENT LAW** (8th ed.). If you wish to use the 7th or 6th edition, or an excerpted online edition, this is doable though not ideal (however, it is cheaper). You are still responsible for all assignments. Most cases in the 8th edition are also in the earlier editions. You might need to borrow a book to complete homework on some occasions.

Grades: To succeed in this course, you must devote regular thought to the materials you read. The readings seem short— about 30-50 pages per week.

ASSIGNMENTS: Read every assignment **at least twice**— once, to become familiar with the issues and concepts, and a second time to delve into materials more carefully. You will have weekly writing assignments on course readings.

You are required to submit a written assignment every week. See below for details. Send your paper to m-leroy@illinois.edu. **Be sure to put this exact heading in the subject line: LER 590E.**

Repeat: Be sure to put this exact heading in the subject line: LER 590E. This will enable me to count your work as timely submitted.

You should write one page (or more) per case 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, or using single spaced formats. Excellent summaries are often longer than one page.

GRADES:

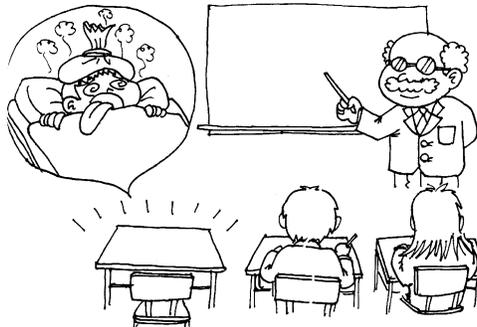
Attendance (10% of your course grade): An attendance roster will be circulated at the beginning, and at the end, of every class.

Class Participation (10% of your course grade): The course is discussion-based. While some students are talkative and others are shy, there is an expectation that all students will contribute to the exchange of ideas, questions, and information.

- You will sign the roster each week that you attend class (twice, assuming that you do not leave class early).
- Falsification of a signature will result in academic discipline.

If you must be absent or leave class early, e-mail your justification to me before the start of class. I will not approve or disapprove an absence or tardy, but will take into account your reason(s), and overall track record, when I calculate this part of your grade at the end of the semester.

NOTE: Do not take risks with your health or ours. If you do not feel well enough to attend class, stay home or seek treatment. Send me an e-mail. Your absence will be excused.



Weekly Assignments (80% 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 or 5 cases.**

Grading for weekly assignments has two components: **Regularity**, and **Quality**.
Each component counts 40% toward your course grade.

Regularity (40%): If you submit 13 out of 14 assignments on time (but miss once because of a heavy midterm schedule in other courses), this part of your course grade will still be an “A.” In other words, if you are ill, or swamped by a group project, or out of town on an interview— or whatever the reason— there is no need to discuss the matter with me. *However, if you miss two timely submissions, this component will drop to a C [not an A- nor a B+, etc.]; 3*

missed assignments, to a D; 4 or more missed assignments, to an F). Also, a sloppy, incomplete, lazy, or poorly written assignment will count as unacceptable.

Quality of Submission (40%): As each week passes, you will copy your weekly assignment into a compiled or cumulative Word file.

For example, if your name is Mary Jones, name the file something such as “Mary Jones 590E Compilation.”

Each week, make an electronic copy of your weekly assignments, and paste them into this expanding file. In sum, the purpose of this document is to **correct** and **add useful detail** to the weekly assignment. More specifically, the compiled document aims to:

- improve and deepen your initial understanding of case materials
- create a cumulative document that prepares you for the final exam
- learn continuously, and de-emphasize “cramming” as a learning strategy
- learn how to improve a first draft into a much better, final submission
- go to your first job with a useful reference tool that you created and understand

Pay attention to this guidance: If you are spending several hours every week on the compiled file, something is wrong. I suggest about 30 minutes each week. Try to do this in class (**yes, it is okay to do this in class**), or shortly after class while the material is fresh in your mind.

You will be in class and realize that you misunderstood a particular case. You are not penalized for this problem in your weekly assignment; **but you are expected to correct the misunderstanding in the compiled document.**

Also, you will see more meaning in certain passages that meant little or nothing to you when you did the weekly summary. The compiled document should contain this addition to your original weekly submission.

In sum, the compiled document is simply a running record of all your weekly assignments; and it differs from the weekly assignments only slightly or moderately to include corrections and richer detail. I suggest that you save assignments to a thumb-drive or other external source in case you have a hard drive failure. I receive a remarkable number (2-3 per semester) of student e-mails that complain about sudden hard disk (or similar memory device) failures shortly before assignments are due. **You are on notice to keep a running copy of your compiled document so that if you have a computer problem near the end of the semester, you are able to present this copied file to me upon request.**

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.

Some students have never used the footnoting feature in Word. To create a footnote, look at the top of the toolbar and locate “References” on the menu. The footnote option is at the top, left-hand side of the task bar. Click on “Insert Footnote.” Word will place footnotes at the end of each page. If you need help with this feature, please ask me—I am happy to help you.

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—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.*

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).

Your Name, e-Mail, and Phone Number: _____

Affirmation: I certify that only my signature appears on this attendance record. If another person signs my attendance record, or if I sign another person’s attendance record, or if I sign-in ahead of time for a “class start”, or otherwise engage in fraud, I will be subject to academic discipline and a course grade penalty.

Your Signature

1st Class: _____

Your Signature

2nd Class: _____

Your Signature

3rd Class: _____

Your Signature

4th Class: _____

Your Signature

5th Class: _____

Your Signature

6th Class: _____

Your Signature

7th Class: _____

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8th Class: _____

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9th Class: _____

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10th Class: _____

Your Signature

11th Class: _____

Your Signature

12th Class: _____

Your Signature

13th Class: _____

Your Signature

14th Class: _____

Your Signature

ALL READINGS ARE FROM THE ROTHSTEIN CASEBOOK UNLESS OTHERWISE NOTED.

ALL ASSIGNMENTS REQUIRE READING OF CASENOTES THAT FOLLOW MAIN CASE.

Synopsis of Employment Laws Covered in LER 590E

I. Federal Law

A. U.S. Constitution

First Amendment
Fourth Amendment
Fifth Amendment
Fourteenth Amendment (Due Process and Equal Protection)

B. Statutes and Related Regulations

Older Workers Benefit Protection Act
Employee Retirement Income Security Act
U.S. Bankruptcy Code (as applied to pension terminations)
Worker Adjustment and Retraining Notification Act
Title VII, 1964 Civil Rights Act, as amended (as applied to gender-based benefits
discrimination and safety regulations)
Social Security
Occupational Safety and Health Act
Americans with Disabilities Act
Federal Employees Compensation Act

II. State Employment Laws (Selected Sample)

Illinois (Doctrine of Suitable Work under Illinois Unemployment Insurance)
California (Covenant of Good-Faith Dealing Exception to Employment-at-Will)
Texas (Intentional Infliction of Emotional Distress)
Massachusetts (Workers= Compensation Code)
Ohio (Dual Capacity Exception to Exclusive Remedy under Workers Compensation)
Michigan (Criminal Law Enforcement of Workplace Safety)
New York (Tort Liability for Wrongful Birth [Workplace Exposure to Toxins])

III. Web Sites Used in LER 590-E

A. U.S. Congress

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

B. Federal Courts

U.S. Supreme Court (current and recent decisions),
<http://supct.law.cornell.edu/supct/> (expanded Supreme Court services).

Also see <http://www.supremecourtus.gov>

U.S. Court of Appeals, First Circuit <http://www.law.emory.edu/1circuit/>
U.S. Court of Appeals, Second Circuit <http://www.tourolaw.edu/2ndCircuit/>
U.S. Court of Appeals, Ninth Circuit
<http://www.findlaw.com/casecode/courts/9th.html>

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

C. Federal Administrative Agencies

U.S. Department of Labor, Employee Benefits Security Administration
<http://www.dol.gov/ebsa/>

U.S. Department of Labor, Occupational Safety and Health Administration
<http://www.osha.gov/>

D. State Courts and Agencies

Illinois Industrial Commission (Workers Compensation)

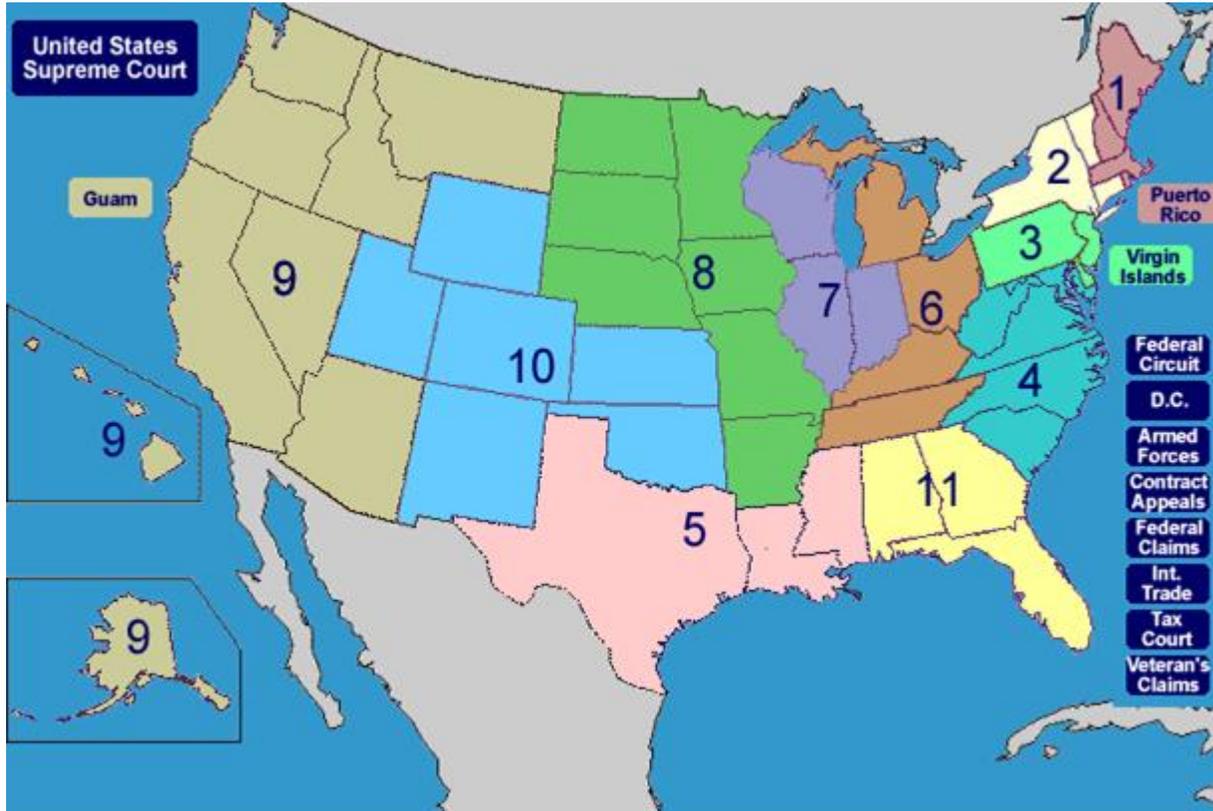
<http://www.state.il.us/agency/iic/Links.htm>

Massachusetts Division of Employment and Training <http://www.detma.org/>

New York Department of Labor <http://www.labor.state.ny.us/index.html>

Ohio Bureau of Workers' Compensation

<http://www.bwc.state.oh.us/home/home.htm>



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3. <i>Graziosi v. City of Greenville</i> , __ F.3d __ (5th Cir. 2015) (READ DECISION AT THE LINK HERE: http://www.ca5.uscourts.gov/opinions%5Cpub%5C13/13-60900-CV0.pdf)	
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b. Read Michael H. LeRoy, “From Docks to Doctor Offices After 9/11: Refusing to Work under Abnormally Dangerous Conditions,” <u><i>Administrative Law Review</i></u> , Vol. 56, No. 3 (2004), 585-656. Download the article from: http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=825595 (Cursor down the page to locate the article’s link; click on the link and download.) Read pp. 26-49. In your one-page summary, focus on the <i>Whirlpool</i> decision. In one- page or so, assess the scope of <i>Whirlpool</i> , and using summaries of post- <i>Whirlpool</i> cases, explain whether the Supreme Court’s ruling has been broadened or narrowed.	
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CASE SUPPLEMENT

Please read the following case in conjunction with Casebook pp. 838-39.

**Nelson v. James H. Knight DDS, P.C.,
--- N.W.2d ----, 2012 WL 6652747 (Iowa)**

MANSFIELD, Justice.

Can a male employer terminate a female employee because the employer's wife, due to no fault of the employee, is concerned about the nature of the relationship between the employer and the employee? This is the question we are required to answer today. For the reasons stated herein, we ultimately conclude the conduct does not amount to unlawful sex discrimination in violation of the Iowa Civil Rights Act.

I. Facts and Procedural Background.

Because this case was decided on summary judgment, we set forth the facts in the light most favorable to the plaintiff, Melissa Nelson.

In 1999, Dr. Knight hired Nelson to work as a dental assistant in his dental office. At that time, Nelson had just received her community college degree and was twenty years old.

Over the next ten-and-a-half years, Nelson worked as a dental assistant for Dr. Knight. Dr. Knight admits that Nelson was a good dental assistant. Nelson in turn acknowledges that Dr. Knight generally treated her with respect, and she believed him to be a person of high integrity.

On several occasions during the last year and a half when Nelson worked in the office, Dr. Knight complained to Nelson that her clothing was too tight and revealing and "distracting." Dr. Knight at times asked Nelson to put on her lab coat. Dr. Knight later testified that he made these statements to Nelson because "I don't think it's good for me to see her wearing things that accentuate her body." Nelson denies that her clothing was tight or in any way inappropriate.

During the last six months or so of Nelson's employment, Dr. Knight and Nelson started texting each other on both work and personal matters outside the workplace. Neither objected to the other's texting. Both Dr. Knight and Nelson have children, and some of the texts involved updates on the kids' activities and other relatively innocuous matters. Nelson considered Dr. Knight to be a friend and father figure, and she denies that she ever flirted with him or sought an intimate or sexual relationship with him.

Dr. Knight acknowledges he once told Nelson that if she saw his pants bulging, she would know her clothing was too revealing. On another occasion, Dr. Knight texted Nelson saying the shirt she had worn that day was too tight. After Nelson responded that she did not think he was being fair, Dr. Knight replied that it was a good thing Nelson did not wear tight pants too because then he would get it coming and going. Dr. Knight also recalls that after Nelson allegedly made a statement regarding infrequency in her sex life, he responded to her, "[T]hat's like having a Lamborghini in the garage and never driving it." Nelson recalls that Dr. Knight once texted her to ask how often she experienced an orgasm. Nelson did not answer the text. However, Nelson does not remember ever telling Dr. Knight not to text her or telling him that she was offended.

In late 2009, Dr. Knight took his children to Colorado for Christmas vacation. Dr. Knight's wife Jeanne, who was also an employee in the dental practice, stayed home. Jeanne Knight found out that her husband and Nelson were texting each other during that time. When Dr. Knight returned home, Jeanne Knight confronted her husband and demanded that he terminate Nelson's employment. Both of them consulted with the senior pastor of their church, who agreed with the decision.

Jeanne Knight insisted that her husband terminate Nelson because "she was a big threat to our marriage." According to her affidavit and her deposition testimony, she had several complaints about Nelson. These included Nelson's texting with Dr. Knight, Nelson's clothing, Nelson's alleged flirting with Dr. Knight, Nelson's alleged coldness at work toward her (Ms. Knight), and Nelson's ongoing criticism of another dental assistant. She added that "[Nelson] liked to hang around after work when it would be just her and [Dr. Knight] there. I thought it was strange that

after being at work all day and away from her kids and husband that she would not be anxious to get home like the other [women] in the office.”

At the end of the workday on January 4, 2010, Dr. Knight called Nelson into his office. He had arranged for another pastor from the church to be present as an observer. Dr. Knight told Nelson he was firing her, reading from a prepared statement. The statement said, in part, that their relationship had become a detriment to Dr. Knight’s family and that for the best interests of both Dr. Knight and his family and Nelson and her family, the two of them should not work together. Dr. Knight handed Nelson an envelope which contained one month’s severance pay. Nelson started crying and said she loved her job.

Nelson’s husband Steve phoned Dr. Knight after getting the news of his wife’s firing. Dr. Knight initially refused to talk to Steve Nelson, but later called back and invited him to meet at the office later that same evening. Once again, the pastor was present. In the meeting, Dr. Knight told Steve Nelson that Melissa Nelson had not done anything wrong or inappropriate and that she was the best dental assistant he ever had. However, Dr. Knight said he was worried he was getting too personally attached to her. Dr. Knight told Steve Nelson that nothing was going on but that he feared he would try to have an affair with her down the road if he did not fire her.

Dr. Knight replaced Nelson with another female. Historically, all of his dental assistants have been women.

After timely filing a civil rights complaint and getting a “right to sue” letter from the Iowa Civil Rights Commission, Nelson brought this action against Dr. Knight on August 12, 2010. Nelson’s one-count petition alleges that Dr. Knight discriminated against her on the basis of sex. Nelson does not contend that her employer committed sexual harassment. See *McElroy v. State*, 637 N.W.2d 488, 499–500 (Iowa 2001) (discussing when sexual harassment amounts to unlawful sex discrimination and restating the elements of both quid pro quo and hostile work environment sexual harassment). Her argument, rather, is that Dr. Knight terminated her because of her gender and would not have terminated her if she was male.

Dr. Knight moved for summary judgment. After briefing and oral argument, the district court sustained the motion. The court reasoned in part, “Ms. Nelson was fired not because of her gender but because she was threat to the marriage of Dr. Knight.” Nelson appeals.

III. Analysis.

Section 216.6(1)(a) of the Iowa Code makes it generally unlawful to discharge or otherwise discriminate against an employee because of the employee’s sex. Iowa Code § 216.6(1)(a) (2009). “When interpreting discrimination claims under Iowa Code chapter 216, we turn to federal law, including Title VII of the United States Civil Rights Act...” Generally, an employer engages in unlawful sex discrimination when the employer takes adverse employment action against an employee and sex is a motivating factor in the employer’s decision. See *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 861 (Iowa 2001).

Nelson advances a straightforward “but for” argument: I would not have been terminated “but for” my gender. See, e.g., *Watson v. Se. Pa. Transp. Auth.*, 207 F.3d 207, 213, 222 (3d Cir.2000) (affirming a jury verdict in a Title VII case because the charge, taken as a whole, adequately informed the jury that sex had to be a but-for cause of the adverse employment action). Dr. Knight responds that Nelson was terminated not because of her sex—after all, he only employs women—but because of the nature of their relationship and the perceived threat to Dr. Knight’s marriage. Yet Nelson rejoins that neither the relationship nor the alleged threat would have existed if she had not been a woman.

Several cases, including a decision of the United States Court of Appeals for the Eighth Circuit, have found that an employer does not engage in unlawful gender discrimination by discharging a female employee who is involved in a consensual relationship that has triggered personal jealousy. This is true even though the relationship and the resulting jealousy presumably would not have existed if the employee had been male.

Tenge v. Phillips Modern Ag Co., like the present case, centered on a personal

relationship between the owner of a small business and a valued employee of the business that was seen by the owner's wife as a threat to their marriage. 446 F.3d 903, 905–06 (8th Cir. 2006). In that case, unlike here, the plaintiff had pinched the owner's rear. *Id.* at 906. She admitted that the owner's wife “could have suspected the two had an intimate relationship.” *Id.* Further, the plaintiff acknowledged she wrote “notes of a sexual or intimate nature” to the owner and put them in a location where others could see them. *Id.* In the end, the owner fired the plaintiff, stating that his wife was “making me choose between my best employee or her and the kids.” *Id.*

Reviewing this series of events, the Eighth Circuit affirmed the summary judgment in favor of the defendants. *Id.* at 911. The Eighth Circuit first noted the considerable body of authority that “‘sexual favoritism,’ where one employee was treated more favorably than members of the opposite sex because of a consensual relationship with the boss,” does not violate Title VII. *Id.* at 908–909. The court distilled that law as follows: “[T]he principle that emerges from the above cases is that absent claims of coercion or widespread sexual favoritism, where an employee engages in consensual sexual conduct with a supervisor and an employment decision is based on this conduct, Title VII is not implicated because any benefits of the relationship are due to the sexual conduct, rather than the gender, of the employee.” *Id.* at 909.

The Eighth Circuit believed these sexual favoritism precedents were relevant. The court's unstated reasoning was that if a specific instance of sexual favoritism does not constitute gender discrimination, treating an employee unfavorably because of such a relationship does not violate the law either.

Yet the court acknowledged that cases where the employee was treated less favorably would be “more directly analogous.” *Id.* The court then discussed a decision of the Eleventh Circuit where an employee had been terminated for being a perceived threat to the marriage of the owner's son. *Id.* (discussing *Platner v. Cash & Thomas Contractors, Inc.*, 908 F.2d 902, 903–05 (11th Cir.1990)). It also cited three federal district court cases, each of which had “concluded that terminating an employee based on the employee's consensual sexual conduct does not violate Title VII absent allegations that the conduct stemmed from unwelcome sexual advances or a hostile work environment.” *Id.* (citing *Kahn v. Objective Solutions, Int'l*, 86

F.Supp.2d 377, 382 (S.D.N.Y.2000); *Campbell v. Masten*, 955 F.Supp. 526, 529 (D.Md.1997); *Freeman v. Cont'l Technical Serv., Inc.*, 710 F.Supp. 328, 331 (D.Ga.1988)).

After reviewing these precedents, the Eighth Circuit found the owner had not violated Title VII in terminating the employee at his wife's behest. As the court explained, "The ultimate basis for Tenge's dismissal was not her sex, it was Scott's desire to allay his wife's concerns over Tenge's admitted sexual behavior with him." *Id.* at 910.

In our case, the district court quoted at length from Tenge, stating it found that decision "persuasive." However, as Nelson notes, there is a significant factual difference between the two cases. As the Eighth Circuit put it, "Tenge was terminated due to the consequences of her own admitted conduct with her employer, not because of her status as a woman." *Id.* The Eighth Circuit added a caveat:

The question is not before us of whether it would be sex discrimination if Tenge had been terminated because Lori [the owner's wife] perceived her as a threat to her marriage but there was no evidence that she had engaged in any sexually suggestive conduct.

Id. at 910 n. 5.

Nelson contrasts that situation with her own, where she "did not do anything to get herself fired except exist as a female."

So the question we must answer is the one left open in Tenge—whether an employee who has not engaged in flirtatious conduct may be lawfully terminated simply because the boss views the employee as an irresistible attraction.

Notwithstanding the Eighth Circuit's care to leave that question unanswered, it seems odd at first glance to have the question of whether the employer engaged in unlawful discrimination turn on the employee's conduct, assuming that such conduct (whatever it is) would not typically be a firing offense. Usually our legal

focus is on the employer's motivation, not on whether the discharge in a broader sense is fair because the employee did something to "deserve it." Title VII and the Iowa Civil Rights Act are not general fairness laws, and an employer does not violate them by treating an employee unfairly so long as the employer does not engage in discrimination based upon the employee's protected status.

In some respects, the present case resembles *Platner*. There a business owner chose to terminate a female employee who worked on the same crew as the business owner's son, after the wife of the business owner's son became "extremely jealous" of her. *Platner*, 908 F.2d at 903. The district court found that the son was "largely to blame for fueling [the wife's] jealousy," and that the plaintiff's conduct was "basically blameless and no different from that of the male employees." *Id.* Nonetheless, the Eleventh Circuit found no unlawful discrimination had occurred:

It is evident that Thomas, faced with a seemingly insoluble conflict within his family, felt he had to make a choice as to which employee to keep. He opted to place the burden of resolving the situation on *Platner*, to whom he was not related, and whose dismissal would not, as firing Steve obviously would, fracture his family and its relationships. It is thus clear that the ultimate basis for *Platner's* dismissal was not gender but simply favoritism for a close relative. *Id.* at 905.

Significantly, although Dr. Knight discusses *Platner* at some length in his briefing, Nelson does not refer to the decision in her briefing or attempt to distinguish it.^{FN4}

Nelson does, however, have three responses to Dr. Knight's overall position. First, she does not necessarily agree with Tenge. She argues that any termination because of a boss's physical interest in a subordinate amounts to sex discrimination: "Plaintiff's sex is implicated by the very nature of the reason for termination."

Second, she suggests that without some kind of employee misconduct requirement, Dr. Knight's position becomes simply a way of enforcing stereotypes and permitting pretexts: The employer can justify a series of adverse employment actions against persons of one gender by claiming, "My spouse thought I was

attracted to them.” Third, she argues that if Dr. Knight would have been liable to Nelson for sexually harassing her, he should not be able to avoid liability for terminating her out of fear that he was going to harass her.

Nelson’s arguments warrant serious consideration, but we ultimately think a distinction exists between (1) an isolated employment decision based on personal relations (assuming no coercion or *quid pro quo*), even if the relations would not have existed if the employee had been of the opposite gender, and (2) a decision based on gender itself. In the former case, the decision is driven entirely by individual feelings and emotions regarding a specific person. Such a decision is not gender-based, nor is it based on factors that might be a proxy for gender.

The civil rights laws seek to insure that employees are treated the same regardless of their sex or other protected status. Yet even taking Nelson’s view of the facts, Dr. Knight’s unfair decision to terminate Nelson (while paying her a rather ungenerous one month’s severance) does not jeopardize that goal.

This is illustrated by the fact that Dr. Knight hired a female replacement for Nelson. As the Platner court observed, “[W]e do not believe that Title VII authorizes courts to declare unlawful every arbitrary and unfair employment decision.” *Id.* at 905 (quoting *Holder v. City of Raleigh*, 867 F.2d 823, 825–26 (4th Cir.1989)).

Nelson’s viewpoint would allow any termination decision related to a consensual relationship to be challenged as a discriminatory action because the employee could argue the relationship would not have existed but for her or his gender. This logic would contradict federal caselaw to the effect that adverse employment action stemming from a consensual workplace relationship (absent sexual harassment) is not actionable under Title VII. See, e.g., *Benders v. Bellows & Bellows*, 515 F.3d 757, 768 (7th Cir.2008) (holding that allegations that an employee’s termination was based on the owner’s desire to hide a past consensual relationship from his wife were “insufficient to support a cause of action for sex discrimination”); see also *Blackshear v. Interstate Brands Corp.*, No. 10–3696, 2012 WL 3553499, at *3 (6th Cir.2012) (affirming summary judgment for the employer where the employee presented evidence that she was treated unfairly due to her supervisor’s jealousy of her relationship with another employee, and noting that “personal animus ... cannot

be the basis of a discrimination claim under federal or Ohio law”); *West v. MCI Worldcom, Inc.*, 205 F.Supp.2d 531, 544–45 (E.D.Va.2002) (granting summary judgment to an employer when an employee was removed from a project because of a supervisor’s animosity toward the employee over her termination of their consensual relationship but there was no evidence the supervisor had made unwanted advances to the employee following the termination of that relationship).

Nelson raises a legitimate concern about a slippery slope. What if Dr. Knight had fired several female employees because he was concerned about being attracted to them? Or what if Ms. Knight demanded out of jealousy that her spouse terminate the employment of several women? The short answer is that those would be different cases. If an employer repeatedly took adverse employment actions against persons of a particular gender because of alleged personal relationship issues, it might well be possible to infer that gender and not the relationship was a motivating factor.

It is likewise true that a decision based on a gender stereotype can amount to unlawful sex discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S.Ct. 1775, 1791, 104 L.Ed.2d 268, 288 (1989) (“As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for [i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” (citation and internal quotation marks omitted)). . . .

Nelson also raises a serious point about sexual harassment. Given that sexual harassment is a violation of antidiscrimination law, Nelson argues that a firing by a boss to avoid committing sexual harassment should be treated similarly. But sexual harassment violates our civil rights laws because of the “hostile work environment” or “abusive atmosphere” that it has created for persons of the victim’s sex. See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 786–90, 118 S.Ct. 2275, 2283–84, 141 L.Ed.2d 662, 675–78 (1998). On the other hand, an isolated decision to terminate an employee before such an environment arises, even if the reasons for

termination are unjust, by definition does not bring about that atmosphere.

IV. Conclusion.

As we have indicated above, the issue before us is not whether a jury could find that Dr. Knight treated Nelson badly. We are asked to decide only if a genuine fact issue exists as to whether Dr. Knight engaged in unlawful gender discrimination when he fired Nelson at the request of his wife. For the reasons previously discussed, we believe this conduct did not amount to unlawful discrimination, and therefore we affirm the judgment of the district court.

AFFIRMED.

Cotto v. United Technologies, Corp., 711 A.2d 1180 (Conn. 1998)

Before FRANCIS X. HENNESSY, DUPONT and DALY, JJ.

DUPONT, Judge.

. . . The sole issue to be resolved is whether General Statutes § 31-51q FN2 provides the plaintiff employee with a cause of action for monetary damages against the defendant, his private employer, after discharge from his employment resulting from an alleged exercise by the plaintiff of his federal or state constitutional right of free speech, when the speech took place at the site of the workplace. The defendant, in its motion to strike, claimed that (1) a cause of action based on § 31-51q is unavailable to an employee whose alleged expressive activity occurs exclusively on the private property of his employer, and (2) the plaintiff employee's words and actions, as alleged in his complaint, were not constitutionally protected.

FN2. General Statutes § 31-51q provides: "Any employer, including the state and any instrumentality or political subdivision thereof, who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages caused by such discipline or discharge, including punitive damages, and for reasonable attorney's fees as part of the costs of any such action for damages. If the court determines that such action for damages was brought without substantial justification, the court may award costs and reasonable attorney's fees to the employer."

The plaintiff alleged in his complaint that he was employed on a full-time basis by the defendant for approximately twelve years. The relevant portions of other allegations of the plaintiff's complaint are quoted as follows: "On or about April 22, 1991, the defendant, acting through [its] management personnel, distributed American flags to employees in the plaintiff's department and it was expected that all employees would display American flags at their workstations.

The plaintiff declined to display the American flag and further gave his opinion on the propriety of coercing or exerting pressure on employees to display the American flag. As a result of the plaintiff's refusal to display the American flag and as a direct and proximate result of his comments with respect to displaying the flag, he was subjected to threats and harassment from his coworkers. Said threats and harassment were directed toward him by his coworkers with the full support and encouragement of the defendant.

PLAINTIFF'S ARGUMENTS: The plaintiff's refusal to display the American flag and his expression of his opinion regarding the company's policy that employees must display the American flag at their workstations were absolutely protected by the First Amendment of the United States Constitution and Article First of the Constitution of the State of Connecticut. Subsequent to the plaintiff's suspension from employment, he was permanently discharged from employment on or about May 16, 1992, on account of the plaintiff's aforementioned behavior and expression of opinion, all of which were constitutionally protected.

The defendant's act of discharging the plaintiff from employment violated the plaintiff's rights pursuant to Connecticut General Statutes § 31-51q, as the plaintiff's refusal to display the American flag and his expression of opinion regarding the same did not substantially or materially interfere with his bona fide job performance or the working relationship between him and the defendant."

ANALYSIS: It is clear from the facts alleged in the complaint that the expressive conduct alleged by the plaintiff occurred exclusively in the workplace, on the private property of the defendant. The trial court held that the "[p]laintiff's speech at his workplace is not protected by the first amendment to the United States constitution or §§ 3, 4 or 14 of article first of the Connecticut constitution," and, therefore, § 31-51q cannot afford relief.

FN4. The first amendment to the United States constitution provides in part: "Congress shall make no law ... abridging the freedom of speech..."

Article first, § 4, of the Connecticut constitution provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

Article first, § 14, of the Connecticut constitution provides: “The citizens have a right, in a peaceable manner, to assemble for their common good, and to apply to those invested with the powers of government, for redress or grievances, or other proper purposes, by petition, address or remonstrance.”

The trial court determined that § 31-51q did not protect the plaintiff’s expressive activities occurring on his employer’s private property because such on-site activities are not “guaranteed by” either the United States constitution or the constitution of this state.

In so holding, the trial court primarily relied on *Cologne v. Westfarms Associates*, 192 Conn. 48, 469 A.2d 1201 (1984). In *Cologne*, the question was whether the rights of free speech and petition guaranteed by the Connecticut constitution may be exercised on the private property of the defendants, which property consisted of a large regional shopping center.

No statute was involved in *Cologne* and no relationship, such as employer and employee, existed between the plaintiffs and the defendants, nor was any claim made that the speech was not otherwise constitutionally protected. The plaintiffs, relying on §§ 4 and 14 of article first of the state constitution, did not take the position that individuals may exercise their rights of free speech on any private property, but instead, limited their claim to speech activities occurring on private properties with a “uniquely public character.” *Id.*, at 64, 469 A.2d 1201.

In analyzing this claim, the *Cologne* court reviewed the history of the adoption of the Connecticut bill of rights and found “no evidence of any intention to vest in those seeking to exercise such rights as free speech and petition the privilege of doing so upon the property of others.” *Id.*, at 62, 469 A.2d 1201. Accordingly, the court concluded that the free speech and petition rights of the state constitution do not extend to expressive activities exercised on private property against the wishes of the owner, even where the private property is vested with a public character. *Id.*, at 65-66, 469 A.2d 1201.

The present case involves the determination of an issue not yet decided by an appellate court of this state. Unlike *Cologne*, which was based entirely on a constitutional analysis, we are here determining whether § 31-51q provides a cause of action, under the circumstances alleged by the plaintiff, to an employee who is discharged for the exercise of an alleged constitutional right when, without the statute, no remedy or cause of action would be available.

In other words, the question is whether § 31-51q protects particular speech occurring on the private property of an employer when, pursuant to *Cologne*, such speech would not otherwise have been protected.

FN8. General Statutes § 31-51q has been interpreted by the Connecticut Supreme Court to resolve other issues. In actions based on the statute, there must be a causal connection between

the disciplinary action against an employee and the exercise of a constitutional right of the employee. *D'Angelo v. McGoldrick*, 239 Conn. 356, 685 A.2d 319 (1996). There is no right to a jury in an action brought by an employee pursuant to § 31-51q against a state employer, nor may such an action be dismissed on the ground of sovereign immunity. *Skinner v. Angliker*, 211 Conn. 370, 373, 559 A.2d 701 (1989).

FN9. Employment may be terminated at the will of the employer unless it comes within a statutory, contractual or decisional exception. *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 474, 427 A.2d 385 (1980).

The defendant's motion to strike in the present case was based on two grounds. The defendant claimed, first, that the rights protected by § 31-51q do not apply when exercised on private property and, second, that even if they do apply the plaintiff's words and actions were not constitutionally protected free speech.

Attached to the defendant's motion to strike were a memorandum of law and a decision of arbitrators who had determined that the plaintiff was properly discharged. The plaintiff's cause of action pursuant to § 31-51q does not, nor could it, seek reinstatement of employment, but, rather, seeks money damages.

The trial court concluded that the plaintiff's speech was not protected because it occurred on private property. It did not consider the second ground for the defendant's motion, namely, that the particular words and actions of the plaintiff were not constitutionally protected.

The basis for the latter claim, according to the memorandum of law filed with the motion to strike, was that the speech did not involve a matter of public concern, but instead involved a matter concerning a condition of private employment. Although the trial court did not consider this second ground, we may do so. . . .

Statutory analysis is a search for the intention of the legislature. "[W]e look to the words of the statute itself, to the legislative history ... to the legislative policy it was designed to implement, and to its relationship to existing legislation ... governing the same general subject matter." *Carriero v. Naugatuck*, 243 Conn. 747, 753, 707 A.2d 706 (1998).

We begin our analysis of whether a cause of action pursuant to § 31-51q has been alleged with the words of the statute. First, a private employer is placed in the same category as a state employer because of the words "[a]ny employer, including the state...." (Emphasis added.) General Statutes § 31-51q.

The statute next prohibits the discharge of an employee who exercises those rights that are guaranteed by particular sections of the state and federal constitutions, provided that the exercise

of those rights do not interfere with the employee's bona fide job performance or the working relationship between the employee and the employer.

The question is whether the words of the statute were intended to extend constitutional protections of speech to the workplace. Nothing in the statute's legislative history answers that question, and the statute itself is silent. It is instructive, however, to review related state legislation governing the same general subject matter.

A state may adopt, in its own constitution, individual liberties more expansive than those conferred by the federal constitution and a state statute is, for that purpose, in the same category as a state constitution. Thus, the legislature, if it so chooses, may enlarge a constitutional right; see *Cologne v. Westfarms Associates*, supra, 192 Conn. at 72, 469 A.2d 1201 (Peters, J., dissenting); and may pass a statute to protect speech or expressive activity beyond that guaranteed by either the state or federal constitutions; *PruneYard Shopping Center v. Robins*, supra, at 78, 81, 100 S.Ct. 2035, and, until such time as that legislation is successfully attacked as unconstitutional or is repealed, the subject activity of the legislation is protected.

For example, the legislature has enacted other statutes to protect employee speech or activity that would not otherwise be protected by the federal or state constitutions. These statutes govern situations where there is no state action, and where the activity relates to a private employer.

Such statutes include General Statutes § 2-3a, which prohibits retaliatory action by a private employer against an employee who runs for or serves in the state legislature; General Statutes § 31-51m, which prohibits retaliatory action by a private employer against an employee who reports a violation or suspected violation of laws or regulations (employee "whistle-blowing" protection); General Statutes §§ 31-40k and 31-40 o, which prohibit retaliatory action by a private employer against an employee for seeking information about toxic substances used at the workplace; General Statutes § 31-48b, which provides criminal sanctions against a private employer who records or monitors activities of employees in areas designed for the personal health or comfort of the employees, or in areas for the safeguarding of employee possessions such as restrooms, lockers and lounges; General Statutes § 31-51, which provides for a fine against a private employer who acts to prevent an employee from securing employment elsewhere; General Statutes § 31-51g, which provides for a fine against a private employer for requiring an employee to take a polygraph test; General Statutes §§ 31-104 and 31-105, which make it an unfair labor practice for private employers to prevent employees from bargaining collectively; General Statutes § 31-290a, which prevents private employers from using retaliatory measures against an employee who files a claim for workers' compensation benefits; General Statutes § 31-379, which prevents private employers from using retaliatory measures against an employee who files a complaint concerning a violation of the Occupational Safety and Health Act; General Statutes § 51-247a, which prohibits retaliatory measures by a private employer against an employee for responding to a summons to act as a juror or for serving as a juror;

General Statutes § 52-361a (j), which prohibits a private employer from retaliatory measures against an employee because of a wage execution; General Statutes § 53-303e (b), which prohibits a private employer from retaliatory measures against an employee for not working on Saturdays because of religious observance; General Statutes § 27-33, which prohibits retaliatory action by a private employer against an employee who absents himself from his work duties while engaging in military or naval duty; General Statutes § 28-17, which prohibits the discharge of an employee because of membership in an organization engaged in civil preparedness or because of eligibility for induction into the armed services of the United States; and General Statutes § 9-365, which provides for a fine of “any person” who threatens a person in his employ or who discharges an employee because of any vote of the employee at any election.

Clearly, some of the protected activities described in these statutes involve speech or expressive activity that, either of necessity or in all probability, will occur at the work site of a private employer, and involve prohibition of speech unrelated to state action.

We conclude that § 31-51q applies to some activities and speech that occur at the workplace because there are no words in the statute limiting the place at which the constitutionally protected activity occurs, there is no prohibition that prevents a legislature from protecting employee speech wherever it occurs, and other legislation governing the same general subject matter includes speech occurring at the workplace.

The real question in this case, however, is not governed by where the activity occurred but of what the activity consisted. Section 31-51q protects only that activity guaranteed safe from private employer interference by either certain sections of our constitution or by the federal constitution. If the rights exercised by the employee do not fall into the specified constitutional category, the statute cannot apply.

Not all speech is guaranteed to be “free.” “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.” *Schenk v. United States*, 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470 (1919). It is the combination, in this case, of where the speech occurred at the workplace and its particular content that determines if the speech is protected by the statute.

In deciding whether the allegations of the plaintiff’s complaint state a cause of action for the deprivation of a constitutionally protected right, it is instructive to review federal and state cases arising under 42 U.S.C. § 1983 because § 31-51q is analogous. See *D’Angelo v. McGoldrick*, 239 Conn. 356, 367, 685 A.2d 319 (1996) (Berdon, J., dissenting). If an employee’s activity or speech can be the basis of a discharge from employment, without violating 42 U.S.C. § 1983, when the federal, state or municipal government is the employer, then it is logical to conclude that an employee’s activity can also be the basis of a discharge by a private employer, without violating § 31-51q. Three cases, two federal and one state, are relevant to this inquiry.

Conduct at a governmental employer's workplace is not constitutionally protected unless the expressive activity concerns a matter of public, social or other concern to the country. . . .

To be protected by the first amendment, "the speech must be on a matter of public concern, and the employee's interest in expressing himself on this matter must not be outweighed by any injury the speech could cause" to employee relationships. *Waters v. Churchill*, 511 U.S. 661, 668, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994).

The issue of whether the employer should have "expected" the plaintiff to display a flag may be the subject of a grievance involving a condition of employment, but it is not a matter of public interest. An employee's right as a citizen to participate in discussions concerning matters of public importance on or off the work site of the employer cannot be converted into a right guaranteed by the federal or state constitution to express a grievance about the working conditions of employment. There is a difference between allegations regarding a dispute between an employer and employee over working conditions, and allegations regarding a disagreement about matters of public concern. *Girgenti v. Cali-Con, Inc.*, supra, 15 Conn.App. at 137, 544 A.2d 655.

FN11. State statutes, such as General Statutes § 31-51m, the "whistle-blower" protection statute, as opposed to the state constitution, may give an employee such a limited right.

If the plaintiff had been an employee of the federal government or of the state government . . . the plaintiff's expression at the workplace would not have been constitutionally protected, and we here hold that on the facts as alleged, the plaintiff has no cause of action.

The judgment is affirmed.

***Graziosi v. City of Greenville*, __ F.3d __ (5th Cir. 2015) (READ DECISION AT THE LINK HERE: <http://www.ca5.uscourts.gov/opinions%5Cpub%5C13/13-60900-CV0.pdf>)**

***Dixon v. Coburg Dairy, Inc.*, 330 F.3d 250 (4th Cir. 2003)**

Affirmed in part and reversed in part by published opinion. Judge GREGORY wrote the opinion, in which Senior Judge MICHAEL joined. Judge GOODWIN wrote an opinion concurring in part and dissenting in part.

OPINION

GREGORY, Circuit Judge:

Matthew Dixon, an employee of Coburg Dairy, Inc., was asked by his employer to remove two Confederate flag stickers from his tool box after an African-American co-worker complained. Dixon refused to remove the stickers, and Coburg, relying on the company's anti-harassment policy, fired Dixon. Dixon then filed suit in South Carolina state court, alleging wrongful discharge and a "Violation of Constitutional Rights." Coburg removed the case to federal court on the ground that Dixon's complaint necessarily depended on the resolution of a substantial question of federal law. Dixon filed a motion to remand, which the district court denied. The district court then granted Coburg's motion for summary judgment and dismissed the case. Dixon appeals both of the district court's rulings. For the reasons discussed below, we affirm in part and reverse in part.

In April 1997, in Charleston, South Carolina, Matthew Dixon, began his employment as a mechanic with Coburg Dairy, Inc., ("Coburg"). In April 2000, Dixon was given a copy of Coburg's policy prohibiting harassment. The policy explained that "[h]arassment may take many forms, including ... [v]isual conduct such as derogatory posters, cartoons, drawings, or gestures." The policy also warned employees that anyone "who behaves in a manner that is inconsistent with this policy will be subject to discipline up to and including termination."

Dixon is an active member of the Sons of Confederate Veterans ("SCV"), an all-male organization whose members "can prove genealogically that one of their ancestors served honorably in the armed forces of the Confederate States of America." *Sons of Confederate Veterans v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 613 n. 1 (4th Cir.2002). Beginning in January 2000, a conflict developed among South Carolinians over whether to remove the Confederate battle flag from atop their state capitol dome. As Dixon notes, this conflict became "a burning issue in the State of South Carolina," marking a "period of intense national scrutiny and public debate." (Br. for Appellant at 4.)

It was in this context that Dixon placed two Confederate battle flag stickers on his personal tool box. One was visible on the outside of the box; the other was inside the box, but visible when the box was open. Dixon used the tool box and displayed both flag stickers while at work inside the Coburg Dairy garage.

An African-American co-worker, Leroy Garner, confronted Dixon and informed him that he found the stickers racially offensive and a violation of Coburg's harassment policy. Dixon disagreed, maintaining that his display of the stickers did not violate Coburg's policies and, notwithstanding any policy to the contrary, that it was his constitutional right to display the flag. Thereafter, Dixon, Garner, and Coburg attempted to mediate a compromise. Coburg offered to buy Dixon a new, unadorned tool box, allowing him to keep his previously decorated box for home use. Dixon responded that his heritage was "not for sale." In the end, Coburg insisted that the stickers be removed, and Dixon refused. Having reached an impasse, Coburg fired Dixon on September 5, 2000, on the ground that he had violated the company's anti-harassment policy.

Dixon filed a nine-count complaint in South Carolina state court. Count I, titled a “Violation of Constitutional Rights,” alleged that “Coburg violated the constitutional rights of its employee by its termination of Plaintiff.” In Count III, Dixon stated a claim for “Violation of Public Policy” based on S.C.Code Ann. § 16-17-560 (2002). He alleged that he was fired for displaying the Confederate flag, and that this action “constitute[d] a violation of South Carolina criminal law and therefore a violation of the public policy of this State.”

Premised on these same facts, Dixon articulated a claim in Count IV for retaliatory discharge.

....

The district court granted Coburg’s motion for summary judgment and dismissed the case. This appeal followed.

....

In Count III, Dixon alleges a violation of S.C.Code Ann. § 16-17-560, which provides the basis of a claim for wrongful discharge if an employee is terminated for one of three reasons: (1) an exercise of “political rights” protected under federal law; (2) an exercise of “political rights” protected under state law; or (3) because of an individual’s “political opinions.” Dixon does not allege a violation of the entire statute. Rather, he claims that he was discharged “for display of the Confederate flag,” and he maintains that his employment was terminated because of his exercise of his constitutional right to free speech.

Nowhere does Dixon claim that he was discharged because of his “political opinions.” Furthermore, this omission appears to have been intentional. Dixon notes that another co-worker, William Reid, “worked in the garage and also had a Confederate flag on his toolbox.” (Br. for Appellant at 5.)

Unlike Dixon, Reid agreed to remove his decal and continue working at Coburg. Both Dixon and Reid were motivated to display the flag because of their shared “political opinions.” Neither, however, were fired because of their opinions about the flag issue. Rather, Dixon was discharged because of his alleged exercise of his First Amendment right to display the flag. As explained in the joint stipulation of facts, Coburg first asked Dixon to remove the Confederate flag from his tool box. When Dixon resisted, Coburg offered to purchase him a new tool box for the garage, suggesting that Dixon could keep his flag-adorned tool box for home use. Therefore, Dixon could have kept his job, not by changing his opinions, but by altering how he chose to express them.

The crux of the claim is whether Dixon’s decision to display the Confederate flag is protected by the “political rights” language of S.C.Code Ann. § 16-17-560. A plain reading of the text of § 16-17-560 makes it clear that a court is to determine whether Dixon: (1) was engaged in the

“exercise of political rights and privileges guaranteed to every citizen by the Constitution and laws of the United States or by the Constitution and laws of this State”; and (2) was discharged as a result.

Because there is no dispute as to the reasons behind Dixon’s discharge, the case turns on the question of whether there is any protection in the Free Speech Clause for Dixon’s actions.

The act of displaying a Confederate flag is plainly within the purview of the First Amendment. “Flags, especially flags of a political sort, enjoy an honored position in the First Amendment hierarchy.” *American Legion Post 7 v. City of Durham*, 239 F.3d 601, 607 (4th Cir.2001). Even more, Dixon chose to display the Confederate battle flag at a time when South Carolinians were vigorously debating whether that flag should fly atop their state capitol. As the Supreme Court recently affirmed, “The hallmark of the protection of free speech is to allow ‘free trade in ideas,’ ” and this protection extends “to symbolic or expressive conduct as well as to actual speech.” *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536, 1547, 155 L.Ed.2d 535 (2003). Dixon’s actions, taking place amidst a charged political atmosphere, exemplify the kind of speech that the First Amendment was drafted to protect.

While Dixon may have a constitutional right to fly the Confederate flag, however, that right is not unlimited. An individual may not “exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only.” *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972) (holding that the First Amendment does not protect the actions of a protester handing out anti-war handbills at a privately owned shopping mall when that mall has a policy against all handbilling).

Had Dixon attended a pro-flag rally on the grounds of the state capitol, he clearly would have satisfied the first element of a claim under § 16-17-560. Assuming that state authorities would have permitted the rally to go forward, Dixon’s attendance at such an event would be an exercise of his rights under the Free Speech Clause of the First Amendment. This conduct would be precisely the kind of speech that the South Carolina legislature wished to protect. Under South Carolina law, an individual who attended this type of rally on Sunday could not be fired by his private employer the following Monday solely because his employer objected to the individual’s presence at the rally.

Dixon, however, chose to display the Confederate flag on the tool box he used at his workplace. For Dixon to prevail, this Court would be required to find that the First Amendment gives him the right to move the flag rally from the capitol to the Coburg Dairy garage.

Such a finding would lead to the absurd result of making every private workplace a constitutionally protected forum for political discourse. As the Supreme Court has observed, this argument “has as its major unarticulated premise the assumption that people who want to

propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.” *Adderley v. Florida*, 385 U.S. 39, 47-48, 87 S.Ct. 242, 17 L.Ed.2d 149 (1967). The Court has “vigorously and forthrightly rejected” that concept of the First Amendment. *Id.* at 48, 87 S.Ct. 242.

Dixon has a constitutionally protected right to fly the Confederate battle flag from his home, car, or truck. He has a right to attend rallies on public property, and to march in events organized by the SCV. And under South Carolina law, he could not be discharged for exercising his First Amendment right at these events. In the context of this case, however, Dixon’s First Amendment right does not extend to bringing the Confederate flag inside his employer’s privately owned workplace. Dixon has failed to establish an essential element of a cause of action for wrongful discharge under S.C.Code Ann. § 16-17-560: that he exercised one of the “political rights and privileges guaranteed to every citizen by the Constitution and laws of the United States or by the Constitution and laws of this State.” Thus, Coburg’s motion for summary judgment as to Count III was properly granted.

...

In Count IV of his complaint, Dixon alleges a cause of action for retaliatory discharge. According to Dixon, “Coburg’s actions, through its agents[’] attempts to control the content of Plaintiff’s right of free speech ... and then, ultimately terminating him for exercising that same right, constitute retaliatory discharge of Plaintiff.” As discussed above, based on the facts of this case, Dixon’s placement of the Confederate flag on his tool box was not a constitutionally protected exercise of free speech. Therefore, the district court properly dismissed this claim on summary judgment as well.

...

For the foregoing reasons, the district court’s ruling is affirmed in part and reversed in part. As explained above, Coburg is entitled to summary judgment on Counts II through IX of Dixon’s complaint. Count I, premised on a violation of constitutional rights, is so wholly insubstantial and frivolous as to fail to raise any federal question. Accordingly, that purportedly federal count is dismissed without prejudice.

AFFIRMED IN PART, REVERSED IN PART

***Patel v. Boghra*, 369 Fed.Appx. 722 (7TH Cir. 2010)**

Before FRANK H. EASTERBROOK, Chief Judge, DIANE P. WOOD, Circuit Judge and ANN CLAIRE WILLIAMS, Circuit Judge.

Order

Patel filed this suit under the diversity jurisdiction, 28 U.S.C. § 1332(a)(2), against his former employer and its principal managers. The district court concluded that under Illinois law, which applies, defendants did not break an enforceable promise. We agree with this conclusion, because the promise that Patel alleges is one illegal under federal law. If events are as Patel's complaint narrates them, Patel and the defendants jointly defrauded federal immigration officials.

Patel, a citizen of India, entered the United States in 2000 on an H-1B visa, which covers persons whose skills are in short supply. See 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n), 1184(i)(1). In 2001 he went to work for PC Products & Services, Inc., as a computer analyst. PC Products and its investor/managers (Patrick Boghra, Victor Boghra, and Amar Negealle) certified to the Department of Labor that the firm would pay Patel \$44,000 a year plus fringe benefits. Employers must pay holders of H-1B visas the higher of the prevailing wage or the amount paid to other employees performing the same services. 8 U.S.C. § 1182(n)(1)(A)(i).

According to Patel's complaint, after the H-1B visa was issued, defendants told him that PC Products could no longer afford to pay him the agreed salary, but that he could keep his job if he would accept \$32,000 a year instead. Defendants offered to pay Patel at the \$44,000 rate but insisted that he return \$1,000 monthly. He agreed. Apparently defendants continued to report to the Department of Labor that they paid Patel \$44,000 a year; they did not mention the rebates.

Patel's visa was renewed annually. In June 2006 Patel fell behind on the monthly rebates. PC Products fired him, and his visa expired. He has been living in the United States since then without a visa or any other form of permission. But this does not affect subject-matter jurisdiction: Patel is a citizen of India; defendants are citizens of Illinois; and, as long as Patel has not been admitted for permanent residence (which he has not been), the hanging paragraph of § 1332(a) does not deem Patel to be a citizen of Illinois. [**Teaching Note on Hanging Paragraph: A paragraph in which the first line is set to the left margin, but all subsequent lines are indented. This is a hanging paragraph. The second and subsequent lines are all indented from the left like this paragraph.**]

The district court analyzed Patel's claim for past and future wages and benefits as if his dealings with PC Products were a legitimate employment relation. But those dealings, as Patel describes them, were designed to evade immigration statutes by misrepresenting to federal officials that Patel's salary was \$44,000 annually, when in fact it was \$32,000. Illinois does not enforce agreements to violate federal or state law; it leaves the parties where it found them. See, e.g., *Vine Street Clinic v. HealthLink, Inc.*, 222 Ill.2d 276, 292-93 (2006) (refusing to enforce a contract that violated a statutory ban on fee sharing); *In re Marriage of Best*, 387 Ill.App.3d 948, 327 Ill.Dec. 234, 901 N.E.2d 967, 970-72 (2009) (declining to enforce an agreement designed to evade a child's right to support); *Frederick v. Frederick*, 44 Ill.App.3d 578, (1976) (declining to enforce an agreement to evade federal taxes).

What Patel wants in this suit is compensation for an illegal deal gone sour. Yet if either Patel or PC Products had informed federal officials that he was not being paid the same wage as other computer analysts, then his visa and his employment would have ended years before they did. Honest disclosure to federal officials would have cost Patel his visa and his job; disclosure also would have exposed defendants to administrative investigation and penalties. See 8 U.S.C. § 1182(n)(2)(A); 20 C.F.R. § 655.800 to .855. The truth about the agreement would have rendered Patel removable from the United States. See 8 U.S.C. § 1227(a)(1)(C)(i); *Ali v. Mukasey*, 542 F.3d 1180, 1182 (7th Cir.2008). And it could have exposed all participants to criminal penalties under 18 U.S.C. § 1546(a). Patel cannot use the courts to give him additional benefits under such an agreement.

Our point is not that aliens who lack a legal entitlement to work in the United States are without remedies if employers fail to keep their promises. Cf. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002); *Economy Packing Co. v. Illinois Workers' Compensation Commission*, 387 Ill.App.3d 283, 327 Ill.Dec. 182, 901 N.E.2d 915 (2008). Patel's problem is that, according to his own allegations, he was paid \$32,000 a year, as agreed. Our conclusion is that he can't collect the larger amount falsely reported to immigration officials, nor is he entitled to an order of reinstatement or front pay.

We have decided this case on Patel's allegations, which may be incorrect. We do not mean to imply that defendants have committed immigration fraud, only that, if Patel's description is true, the parties' arrangement was unlawful. A copy of this opinion will be forwarded to the United States Attorney for any investigation and prosecution that he deems appropriate.

The judgment of the district court is affirmed.

State v. Henderson, 762 N.W.2d 1185 (2009)

WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER–LERMAN, JJ., and SIEVERS, Judge.

Opinion

GERRARD, J.

From its very inception, the State of Nebraska has been founded upon principles of equality and tolerance that the Ku Klux Klan, from its very inception, has used violence and terror to oppose. When Robert Henderson, a veteran trooper of the Nebraska State Patrol, joined the Ku Klux Klan, he voluntarily associated himself with an organization that is expressly opposed to Nebraska's founding principles. To reinstate Henderson as a sworn officer of the Nebraska State Patrol would violate this state's explicit, well-defined, dominant public policy. For that reason, we affirm the district court's decision to vacate an arbitration award in Henderson's favor.

BACKGROUND

On November 1, 2005, an internal affairs investigator for the Nebraska State Patrol was informed that a member of the State Patrol might be participating in online discussions at a members-only Web site associated with the Ku Klux Klan. An investigation was commenced which revealed that appellant Henderson had joined the Knights Party, a Ku Klux Klan-affiliated organization, and participated in online discussions in a Knights Party online discussion forum. The investigating officer found that Henderson's membership reflected negatively on the State Patrol and brought the State Patrol into disrepute.

Henderson was fired for his activities, and the State Law Enforcement Bargaining Council (SLEBC) filed a grievance on Henderson's behalf, pursuant to the relevant collective bargaining agreement (CBA). When the grievance was not resolved, it was submitted to binding arbitration pursuant to the CBA. The arbitrator determined that the firing violated the CBA, because, according to the arbitrator, the State Patrol had violated Henderson's constitutional rights, and did not have "just cause" for terminating his employment under the CBA. The arbitrator ordered that Henderson be reinstated to his previous duties. The State Patrol, pursuant to Nebraska's Uniform Arbitration Act, filed an application in the district court to vacate the award.

The district court granted the application to vacate the award, finding that the award violated "a well-defined and dominant public policy of this state." Henderson and SLEBC appeal.

ASSIGNMENT OF ERROR

Henderson and SLEBC assign, restated and consolidated, that the district court erred in vacating the arbitrator's award and instead should have confirmed the award.

STANDARD OF REVIEW

In reviewing a district court's decision to vacate, modify, or confirm an arbitration award under Nebraska's Uniform Arbitration Act, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law. However, the trial court's factual findings will not be set aside on appeal unless clearly erroneous.

ANALYSIS

NATURE AND PRINCIPLES OF ARBITRATION

Arbitration is not a judicial proceeding; it is purely a matter of contract. In this case, the CBA between the State Patrol and SLEBC provides that if an employee's grievance is not satisfactorily resolved, it may be referred to arbitration. The parties in this case do not dispute that

Henderson's grievance was properly submitted to arbitration.

Arbitration in Nebraska is governed by the Federal Arbitration Act if it arises from a contract involving interstate commerce; otherwise, it is governed by Nebraska's Uniform Arbitration Act. In this case, there is no claim that the transaction involved interstate commerce, so Nebraska law applies. We note, however, that because the applicable provisions of the Uniform Arbitration Act and the Federal Arbitration Act are similar, we look to federal case law explaining the scope of judicial review of arbitration awards.

We have explained that judicial review of an arbitrator's award is severely circumscribed. Appellate review of an arbitrator's award is necessarily limited because “to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation.” Strong deference is due an arbitral tribunal.

And when parties agree to arbitration, they agree to accept whatever reasonable uncertainties might arise from the process. Because the parties to a collective bargaining agreement have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and the meaning of the contract that they have agreed to accept.

Courts do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. In other words, a court may not overrule an arbitrator's decision simply because the court believes that its own interpretation of the contract, or the facts, would be the better one.

Therefore, in this case, we do not revisit the arbitrator's factual findings, interpretation of the CBA, or ultimate conclusion that the State Patrol violated the CBA in its termination of Henderson's employment. Nor do we revisit the arbitrator's discussion of constitutional issues, although his conclusions on those issues are highly suspect. The State Patrol does not contend, nor is there any basis in the record to conclude, that any of the statutory bases under the Uniform Arbitration Act for vacating an arbitration award are applicable in this case. Instead, the issue in this appeal is whether the district court correctly determined that the arbitrator's award can be vacated, as the State Patrol contends, because reinstating Henderson to the State Patrol would be contrary to public policy.

In that regard, we note that the sole matter submitted to the arbitrator for disposition was, “Did the Nebraska State Patrol violate the [CBA] or its own operating procedures or policies when it disciplined the Grievant,... Henderson, on March 15, 2006? If so, what shall be the remedy?” The issue submitted for arbitration was consistent with the CBA, which defines a “grievance” subject to arbitration as “a claimed breach, misinterpretation, or misapplication of the terms of this Agreement.” The arguments of the parties, and the decision of the arbitrator, touch on

constitutional issues. But we view those issues, in light of the scope of the CBA and arbitration agreement, to be subsumed in the question whether the CBA was violated—and thus in the question whether the remedy for that violation violates public policy. In other words, we do not view this case as presenting a civil rights claim and do not address what remedy, if any, might be appropriate for any alleged violation of Henderson’s constitutional rights. We note that compensatory damages might be available to a plaintiff injured by a breach of contract even when specific performance of the contract would violate public policy. But the only issue before the arbitrator in this case was the application of the CBA, and the only issue before this court is whether the arbitrator’s remedy for violation of the CBA is enforceable.

PUBLIC POLICY EXCEPTION

We have not previously addressed whether an arbitration award, under the Uniform Arbitration Act, can be vacated by a court on public policy grounds. The State Patrol argues that we should adopt such a doctrine, using the reasoning of the U.S. Supreme Court in cases such as *W.R. Grace & Co.; Misco, Inc.*; and *Eastern Associated Coal Corp. v. Mine Workers*.

In *W.R. Grace & Co.*, an arbitrator found that an employer had unlawfully laid off employees in violation of a collective bargaining agreement, despite the fact that the employer had been attempting to comply with a conciliation agreement with the Equal Employment Opportunity Commission. The employer sought to vacate the arbitrator’s award on the ground that it violated public policy. Although the U.S. Supreme Court rejected the claim that the arbitrator’s interpretation of the collective bargaining agreement violated public policy, the Court recognized:

[A] court may not enforce a collective-bargaining agreement that is contrary to public policy.... If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. ... Such a public policy, however, must be well defined and dominant, and is to be ascertained “by reference to the laws and legal precedents and not from general considerations of supposed public interests.”

The Court extended that reasoning in *Misco, Inc.*, in which a machine operator had been fired after marijuana was found in his home and in his vehicle parked in his employer’s parking lot. An arbitrator ordered the employee reinstated with backpay, reasoning that the evidence did not establish that he had used or possessed marijuana on company property, in violation of company policy. The federal district court declined to enforce the award, and the Fifth Circuit affirmed the district court’s conclusion that “reinstatement would violate the public policy ‘against the operation of dangerous machinery by persons under the influence of drugs or alcohol.’”

The Court explained that “[a] court’s refusal to enforce an arbitrator’s award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy.” That doctrine derives from the basic notion that no court will lend

its aid to one who founds a cause of action upon an immoral or illegal act, and the doctrine is further justified by the observation that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements. In the common law of contracts, this doctrine has served as the foundation for occasional exercises of judicial power to abrogate private agreements.

But, the Court cautioned, while a court may not enforce a collective bargaining agreement that is contrary to public policy, a court's refusal to enforce an arbitrator's interpretation of a collective bargaining agreement "is limited to situations where the contract as interpreted would violate 'some explicit public policy' that is 'well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"

Thus, the Court explained, "[t]wo points follow from our decision in *W.R. Grace*. First, a court may refuse to enforce a collective-bargaining agreement when the specific terms contained in that agreement violate public policy. Second, it is apparent that our decision in that case does not otherwise sanction a broad judicial power to set aside arbitration awards as against public policy. Although we discussed the effect of that award on two broad areas of public policy, our decision turned on our examination of whether the award created any explicit conflict with other "laws and legal precedents" rather than an assessment of "general considerations of supposed public interests." ... At the very least, an alleged public policy must be properly framed under the approach set out in *W.R. Grace*, and the violation of such a policy must be clearly shown if an award is not to be enforced.

Based on that holding, the Court concluded:

[T]he formulation of public policy set out by the Court of Appeals did not comply with the statement that such a policy must be "ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" ... The Court of Appeals made no attempt to review existing laws and legal precedents in order to demonstrate that they establish a "well-defined and dominant" policy against the operation of dangerous machinery while under the influence of drugs. Although certainly such a judgment is firmly rooted in common sense, we explicitly held in *W.R. Grace* that a formulation of public policy based only on "general considerations of supposed public interests" is not the sort that permits a court to set aside an arbitration award that was entered in accordance with a valid collective-bargaining agreement.

The Court further explained that even if the Fifth Circuit's formulation of public policy was accepted, no violation of that public policy had been shown, because the marijuana found in the employee's home and car did not establish that his reinstatement violated a public policy against

the operation of dangerous machinery by persons actually under the influence of drugs. That conclusion, the Court reasoned, rested on assumptions that were insufficient to support vacating the award and inconsistent with the factual findings made by the arbitrator.

The Court elaborated upon those principles in *Eastern Associated Coal Corp.*, in which the lower courts had refused to vacate an arbitration award ordering reinstatement of a truckdriver who had tested positive for marijuana. The Court framed the issue presented in the case as “not whether [the employee’s] drug use itself violates public policy, but whether the agreement to reinstate him does so.” The Court agreed with the employer, “in principle, that courts’ authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law.” But the Court reiterated that the public policy exception is narrow and must satisfy the principles explained in *W.R. Grace & Co.* and *Misco, Inc.* And the Court reasoned that in the case before it, the employee’s reinstatement was not contrary to public policy, because it was not unlawful despite a detailed statutory and regulatory scheme that represented a careful determination of public policy by the legislative and executive branches.

Although this court has not previously recognized the public policy exception to the enforcement of arbitration awards, the basic common-law contract principles upon which the Court relied in *Misco, Inc.* are well established in Nebraska, and other jurisdictions to have considered the question have taken an approach consistent with the U.S. Supreme Court’s.

We agree with those jurisdictions and likewise hold that a court may refuse to enforce an arbitration award that is contrary to a public policy that is explicit, well defined, and dominant. Such a public policy must be ascertained by reference to laws and legal precedents, not from general considerations of supposed public interests, but the arbitration award need not itself violate positive law to be unenforceable as against public policy.

With that established, we turn to a consideration of Henderson’s relationship with the Ku Klux Klan and what it represents, and the Nebraska public policy concerns that relationship implicates.

HENDERSON’S AFFILIATION WITH KU KLUX KLAN

Henderson joined the Ku Klux Klan in 2004. In 2003, Henderson’s wife had left him in favor of a Hispanic man, and an action for dissolution of marriage was filed. This led Henderson, in June 2004, to pay a \$35 membership fee to join the Knights Party. Henderson admitted that the Knights Party is essentially the same entity as the Ku Klux Klan. A Knights Party application form, obtained by the State Patrol investigation, explained the Knights Party as follows: The Knights Party is always looking for good men and women to associate with and work toward White Christian Revival.

... The Knights’ Party is not a secret society but rather a political movement, an alternative from the November Criminals of the Republican Party and Democrat Party.

....

We are a political party building a strong foundation nation wide. We do not run candidates at this time so that all financial resources can be invested into the grass roots level—therefore we do not fall under the federal political party guidelines. Unlike the other political parties where they have to make public the names of contributors and associates. We do not. Your Klan association is kept strictly confidential.

We are a Christian organization and in spite of what enemies of the Klan say or in spite of those who appear on talk shows who claim they are Klansmen and Klanswomen, we are nonviolent and won't allow such behavior. We are not opposed, however to self-defense only aggressive behavior.

On the application form, the applicant was asked to attest to the following:

I am white and not of racially mixed descent. I am not married to a nonwhite. I do not date nonwhites no[r] do I have nonwhite dependents. I believe in the ideals of Western Christian civilization and profess my belief in Jesus Christ as the Son of God.

I understand that The Knights Party is legal and law abiding and that I will never be asked to commit an unlawful act.

....

I agree to follow the guidelines as set by headquarters to the best of my ability and to do what I am able to promote the interests of The Knights Party and its ultimate goal of political power and White Christian Revival.

....

I understand I will be expected to be honest, ethical, sacrificing, dedicated, disciplined, and loyal. And an attached letter from Knights Party National Director Thomas Robb, welcoming the applicant to the Knights Party, explained:

The Knights prides itself on being the most professional and active pro-white movement in America and we also have Klansmen and Klanswomen throughout the world. Across the nation we are recognized as the most devoted and experienced movement in the struggle for White rights, White Pride and White Power! ...

....

Again, we welcome you as you start out on the journey to Knighthood. We pray that your decision to take this very important step was a decision based upon your desire to actively promote this most noble cause and not one of mere amusement. We take the problems that our people face very seriously and wish to Knight only the most dedicated and unselfish of individuals. We believe that you can be this type of person; a Klansman of purpose, a Klansman of dedication, a Klansman of sacrifice, a Klansman of humility, and a Klansman of loyalty. You

joined the movement to make a difference. We trust you will not let our people, our faith, or our nation down. You have been given a great opportunity to make a real difference for our people. Let's make the most of it.

White Victory!

/s/

Thomas Robb

(Emphasis in original.)

As a result of his application and payment of the fee, Henderson was issued a Knights Party membership card. The card read, in part:

I pledge my loyalty. I will work for the preservation and protection of the White race. I understand Jesus Christ is our foundation and that we are not a secret army but men and women who proclaim the need of our people to put the true Christian faith in all areas of society, whether economic, judicial, social, educational, scientific, or political.

Henderson, under the user name "White knight in NE," posted messages in a Knights Party online discussion forum. In a September 20, 2005, message, Henderson stated: "I'm the new guy from Nebraska. Just want to say hi. Hope everyone is doing good. Give me hints how this works. THANKS!!!!"

And a few minutes later, Henderson posted the following:

I have been in law enforcement 23 yrs. My fiancée has been working in TV news locally 8yrs. A recent hired black anchor ie: they need people of color on the news desk, has been trying to get real friendly with her. But she has told him to leave her alone. She even complained to the higher up's. They told her not to cause trouble. So, I contacted him, the black anchor and told him the same thing. leave her alone. I was very polite and kind about it. He complained to my Capt. that I was harrassing him. I was found not to be thru and investigation done by IA. But I was told to not contact him any more by my Capt. My fiancée went to an atty. that specialize's in these matters. She was told the black card wins all the time. So she probably should start looking for another job, or just not say anything to anyone at work.

It is pretty bad when a person can not even complain about these things and they are told to stay away or not say anything. Over my 23 yrs in my job this sort of thing has been getting worse, not only at work, but also with suspects. Whites are losing there rights slowly. It's sad. I pray about it. I hope my prayers get answered. White knight in Ne.

Later that day, Henderson posted again: "Can someone put me in touch with others in the omaha, ne area that have the same beliefs that I do. God Country and Race. Your White Knight in Ne." After a response from another member suggested that Henderson contact "Headquarters,"

Henderson replied: “Thank you for your reply. I will contact them ie: HQ. I just feel like I’m fighting a up hill battle by myself here in NE. God bless. Your White Knight in Ne.” A few days later, Henderson posted:

I guess I was stupid when I asked to be put in touch with other members in Nebraska. I know evryone must be discreet. I especially need to be discreet because of my job ie: law enforcement. But if anyone wants to contact me, being discreet. You can contact me by e-mail [e-mail address redacted] or phone [telephone number redacted]. I’m in Omaha. If no one contacts me because or privacy I fully understand. Your White Knight in Ne.

P.S. I especially would like to know other law enforcement people. As we would have alot in common.

Henderson reported that no one responded to his request for contact, and there is no evidence of any further participation by Henderson in Knights Party discussion or activities. Henderson resigned his membership in the Knights Party in an e-mail sent February 20, 2006—after the State Patrol investigation had commenced, after the State Patrol investigator had concluded that the allegations against Henderson were well founded, and the day before the internal affairs conduct and procedures meeting that resulted in a recommendation that Henderson’s employment be terminated.

KU KLUX KLAN

The Ku Klux Klan was founded in Pulaski, Tennessee, in 1865 or 1866, by former officers of the Confederacy. It began as a social fraternity of pranksters, but was quickly transformed into a terrorist organization aimed to promote and preserve white supremacy. In the post-Civil War South, under the leadership of a former Confederate general, Nathan Bedford Forrest, the Ku Klux Klan became a counterrevolutionary organization that “whipped, shot, hanged, robbed, raped, and otherwise outraged Negroes and Republicans across the South in the name of preserving white civilization.” The movement was from the start, and still is, highly decentralized, but “[t]he overriding purpose of the Ku Klux movement, no matter how decentralized, was the maintenance or restoration of white supremacy in every walk of life.”

The Ku Klux Klan was officially “disbanded” by Forrest when even he proved unable to control it, but local units continued to operate until sent into hiding by federal troops empowered by federal legislation specifically enacted to combat the Ku Klux Klan.

It reorganized in 1915 and was extraordinarily successful due to a nascent civil rights movement, urbanization, northern migration of blacks, and immigration. The movement fragmented again after the Second World War but gained new strength in the wake of *Brown v. Board of Education* and in opposing the growing civil rights movement.

Between 1955 and 1965, the Ku Klux Klan or Ku Klux Klan sympathizers perpetrated more than 200 bombings and murdered 40 civil rights workers. Although the Ku Klux Klan's threat has waned since, it has recently begun to regain strength by advancing an anti-immigrant message, much as it did during its heyday in the 1920's, when its meteoric rise was fueled by fear of Catholic European immigrants. Over its long history, the Ku Klux Klan has always managed to rebuild.

Nebraska has not been immune to the Ku Klux Klan's influence. The Ku Klux Klan began actively recruiting members in Nebraska in 1921. Soon, the Ku Klux Klan claimed 45,000 members in Nebraska, and public demonstrations, parades, and cross burnings grew common. The Ku Klux Klan was vigorous in its campaigns against blacks, Jews, foreigners, Catholics, and women suffragists.

Early resistance from key political officials and newspapers, however, blunted the Ku Klux Klan's appeal in Nebraska, and "although it would linger in a number of communities well into the 1930s, [it] soon faded from the public scene." But not before it divided communities with anger and hostility and engendered fear of violence among those that it targeted for exclusion.

The Ku Klux Klan's history and notoriety give it, and its symbols, influence and meaning greatly disproportionate to its remaining membership. The Ku Klux Klan has been characterized as ""[t]he world's oldest, most persistent terrorist organization."" There is little doubt that the Ku Klux Klan's main objective remains to establish a racist white government in the United States.

The Ku Klux Klan, like the burning cross that is its most dramatic and visible sign, is a symbol of organized violence, physical as well as verbal, directed against blacks. "[N]o single group more starkly demonstrates the endurance of dark social forces in the United States—racism, religious bigotry, extralegal vigilantism, moral authoritarianism—than the Klan, a hooded secret order now well into its second century of existence."

Nor is there any doubt that the Knights Party is heir to the historical Ku Klux Klan. The Knights Party attempts to make itself respectable by presenting itself as representing Christian family values, and this approach has made it one of the largest traditional Ku Klux Klan groups operating today. But the record establishes that the Knights Party, while it purports to discourage violence, expressly claims to be the Ku Klux Klan founded in Pulaski over 140 years ago and the Ku Klux Klan that marched in Washington, D.C., in the 1920s. The Knights Party invokes and claims the legacy of Nathan Bedford Forrest. The Knights Party uses the ceremonial robes and Celtic cross that have traditionally represented the Ku Klux Klan. And the Knights Party invokes the same political views, declaring, "God gave the entire earth to be the white man and woman's domain. That is our purpose in being here; to subdue and rule. Under our Christian guidance, all races will lead a much happier existence. Law and order is what they need."

The Knights Party claims to be nonviolent, and there is no evidence in the record that it is not. But it is also worth noting that while the Knights Party officially disclaims violence, distance from violence is a tactic that traditional Ku Klux Klan groups have used in the past. It has been historically common for the Ku Klux Klan to publicly deny that its movement has engaged in illegal activity, or even that it is racist or anti-Semitic.

Among the first prescripts of the Ku Klux Klan, dating to 1868, is a “formal statement of character and purpose” that proclaims the Ku Klux Klan to be “an institution of Chivalry, Humanity, Mercy, and Patriotism” intended “to protect the weak, the innocent, and the defenceless (sic), from the indignities, wrongs, and outrages of the lawless, the violent, and the brutal” and to support the U.S. Constitution and constitutional laws. But despite that rhetoric, not dissimilar to that advanced by the Knights Party today, [i]t would be hard to imagine a greater parody than this on the Ku Klux Klan as it actually operated. It frequently pandered to men’s lowest instincts; it bullied or brutalized the poor, the weak, and the defenseless; it was often the embodiment of lawlessness and outrage; ... and it set at defiance the Constitution and laws of the United States.

The Ku Klux Klan’s public statements disavowing lawlessness have often been self-serving attempts to avoid prosecution for acts of violence. But beyond that, even when technically true, they are not entirely compelling, given the nature of Ku Klux Klan ideology. As one historian has observed, the Ku Klux Klan provides “cultural sanction” for violence from each of the strands in the Klan’s world view: its reactionary populism, its racialism, its gender conventions, and its overall alarm about the state of society and government.

Together, they worked to prompt and ennoble white male violence undertaken in defense of family and community. To put it another way, there were no significant restraining elements in Klan culture that might act to inhibit violence against outsiders to Klansmen’s idea of community.

Stated another way, the Knights Party’s attempt to disclaim violence is insufficient to excuse its continued endorsement of a historical legacy of violence, and the inevitably violent consequences of its hateful political and social propaganda. Given the history of the Ku Klux Klan, and the Knights Party’s express claim to that history, we have little difficulty in concluding that for all practical purposes, joining the Knights Party is the same as joining the historical Ku Klux Klan. Nor is it difficult to conclude that the historical Ku Klux Klan represents discrimination, violence, and armed resistance to lawful authority.

NEBRASKA PUBLIC POLICY

The State of Nebraska was founded only a year or two after the Ku Klux Klan. Nebraska entered the Union on March 1, 1867, upon the “fundamental condition,” imposed by Congress as a

requirement for Nebraska's statehood, that "there shall be no denial of the elective franchise, or of any other right, to any person, by reason of race or color." Among the first official acts of the newly assembled Nebraska Legislature was to transmit to the President of the United States its authenticated assent to that condition, so that the President could proclaim Nebraska's admission to the Union.

The principle that laws should be enforced without regard to race is, in this sense, not only a fundamental public policy of the State of Nebraska—it is the most fundamental public policy of the State, as the condition upon which Nebraska's admission to the Union depended. That "fundamental condition," as an expression of public policy, is reflected throughout Nebraska law. The Nebraska Constitution provides that "[n]o person shall be ... denied equal protection of the laws" and, as recently amended, also provides that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

And since 1867, this state's motto, expressed on the Great Seal of the State of Nebraska, has been "Equality Before the Law."

More recent enactments reflect the same principles. Nebraska law expressly prohibits discrimination on the basis of race or religion in a variety of contexts, including public accommodations, housing, employment, insurance, borrowing and lending, collective bargaining, military procurement, libraries, and National Guard service. The Legislature has also authorized cities and villages to enact their own antidiscrimination provisions.

Nebraska law expressly provides that "[a] person in the State of Nebraska has the right to live free from violence, or intimidation by threat of violence ... regardless of his or her race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability"⁸⁸ and imposes enhanced criminal penalties upon those who violate those rights.

It is the clearly established public policy of the State of Nebraska that the law should be enforced without discriminating based on the race of its citizens. It is for that reason that this court, pursuant to the administrative authority conferred upon it by the Nebraska Constitution, has promulgated a Code of Judicial Conduct providing that a judge shall perform judicial duties without bias or prejudice. Because the appearance of bias or prejudice is detrimental to the administration of justice, the code also provides that [a] judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so.

And because membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired, a judge "shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin."

But the most direct expression of the importance of ensuring that citizens perceive law enforcement to be free of discrimination is Nebraska's racial profiling act. The act explains, "Racial profiling is a practice that presents a great danger to the fundamental principles of a democratic society. It is abhorrent and cannot be tolerated." The act prohibits police, expressly including a member of the State Patrol, from engaging in racial profiling and requires law enforcement agencies, including the State Patrol, to adopt a written policy prohibiting the practice. And it imposes requirements intended to measure and prevent the practice of racial profiling.

The act is particularly pertinent because of the determination of public policy that led to its enactment. As the senator introducing the measure to the Legislature explained, "[t]he problem is that regardless of whether there is racial profiling in Nebraska or not, there is the perception of unfairness." The executive director of the Nebraska Equal Opportunity Commission, testifying in support of the legislation, agreed that "we must admit that there is a perception, and I use the word perception loosely because actually, it's more than a perception, that some officers are engaging in racial profiling, and this has created resentment and distrust of the police, particularly in communities of color."

And the chairperson of the Judiciary Committee explained that "[t]he people of Nebraska greatly appreciate the hard work and dedication of law enforcement officers in protecting the public" and that "[t]he good name of these officers should not be tarnished by the actions of those few who commit discriminatory practices."

As the introducing senator explained, Nebraska has always been a diverse state with an immigrant background. Our heritage and disposition has been that of being inclusive and accepting [in] nature. This is one of the greatest traits of our state. That's why I believe it's important to present an open, fair law enforcement image for our state.... The problem that we have, regardless of whether there's racial profiling existing in Nebraska or not, [is that] we have the perception of unfairness. Because of that perception, many people who are stopped for a legitimate reason may think that they're being stopped [or] targeted due to their race. We need to collect data to determine whether the racial profiling does exist in our state, and to remove the perception of unfairness that we have.

Taken as a whole, this authority evidences an explicit, well-defined, and dominant public policy of the State of Nebraska that is as old as the State itself: that the laws of Nebraska should be enforced without racial or religious discrimination. But more importantly, this public policy

incorporates, and depends upon, the public's reasonable perception that the laws are being enforced without discrimination. And the Legislature's determination in that regard makes sense. Under our system of government, the duty of law enforcement can be performed effectively only with the consent of the vast majority of those citizens policed. Efficient law enforcement requires mutual respect, trust, and support.

As the Supreme Judicial Court of Massachusetts has persuasively explained, "One of the most important police functions is to create and maintain a feeling of security in communities. To that end, it is extremely important for the police to gain and preserve public trust, maintain public confidence, and avoid an abuse of power by law enforcement officials." ... "The image presented by police personnel to the general public ... 'also permeates other aspects of the criminal justice system and impacts its overall success.'"

We agree, and we hold that Nebraska public policy precludes an individual from being reinstated to serve as a sworn officer in a law enforcement agency if that individual's service would severely undermine reasonable public perception that the agency is uniformly committed to the equal enforcement of the law and that each citizen of Nebraska can depend on law enforcement officers to enforce the law without regard to race. We emphasize that this public policy is only implicated by behavior of the gravest nature. But we find that Henderson's knowing and willing affiliation with the Ku Klux Klan is such behavior.

HENDERSON'S REINSTATEMENT VIOLATES NEBRASKA PUBLIC POLICY

The State Patrol argues that the arbitration award violates public policy because it requires the State Patrol "to employ as a law enforcement officer an individual who has voluntarily associated himself with the [Ku Klux Klan] and the principles it espouses—arguably the most reviled, feared, violent, and racist organization in this country's history." The State Patrol concludes that requiring Henderson's reinstatement "ignores the reality that a law enforcement officer who embraces a creed of racial bias and racial superiority breeds distrust, fear, and apprehension among members of the public [and] raises concerns among the public that his employer and fellow officers may harbor similar beliefs." We agree.

Given the Ku Klux Klan's history, any choice to join that organization is a choice to associate with a symbol of violence and terrorism. We also note that Henderson's membership in the Knights Party is consistent with a long-established Ku Klux Klan strategy of recruiting and publicizing the membership of law enforcement officers.

The Ku Klux Klan has historically enrolled or enlisted the support of law enforcement officers, to stave off indictment when victims of violence, "having recognized law enforcement officials among their assailants, understandably believed prosecution futile." Consistent with that strategy, Henderson's continued service as a sworn employee of the State Patrol would directly advance

the interests of the Ku Klux Klan by fostering the perception that some citizens of Nebraska do not enjoy the same protection by law enforcement as others.

We recognize that Henderson was not an overly active member of the Ku Klux Klan. But this was not a case of, as Henderson contended at oral argument, merely “getting on the wrong web site at the wrong time.”

It is beyond dispute that he willingly joined the Knights Party, knowing that he was effectively joining the Ku Klux Klan. In joining, he endorsed a point of view that is completely antithetical to the principles of Nebraska law that he was bound by oath to enforce. He provided direct financial support for the Ku Klux Klan’s racist activities. And his membership has provided the Ku Klux Klan with valuable publicity and propaganda.

The fact is that Henderson chose to associate himself with the Ku Klux Klan and everything that the Ku Klux Klan represents—a legacy of hatred, bigotry, violence, and terror that is utterly inconsistent with the responsibilities of a member of the Nebraska State Patrol. One cannot simultaneously wear the badge of the Nebraska State Patrol and the robe of a Klansman without degrading what that badge represents when worn by any officer.

Although arbitration decisions are given great deference, they are not sacrosanct.¹⁰⁸ Here we cannot say that the strong public policy favoring arbitration should trump the explicit, well-defined, and dominant public policy that laws should be enforced without racial or religious discrimination, and the public should reasonably perceive this to be so. Having associated himself with the Ku Klux Klan, Henderson’s return to duty would involuntarily associate the State Patrol with the Ku Klux Klan and severely undermine public confidence in the fairness of law enforcement and the law itself. Therefore, we conclude that the arbitrator’s decision reinstating Henderson to the Nebraska State Patrol violates Nebraska public policy and that the district court correctly refused to enforce the award. Henderson and SLEBC’s assignment of error lacks merit.

CONCLUSION

For the foregoing reasons, the decision of the district court is affirmed.

AFFIRMED.

HEAVICAN, C.J., not participating.

WRIGHT, J., not participating in the decision.

STEPHAN, J., dissenting.

To most people, it would seem patently obvious that the termination of Robert Henderson’s employment with the Nebraska State Patrol was justified because his membership in the Knights Party, an affiliate of the Ku Klux Klan, reflects negatively on the State Patrol and could impair its operations or efficiency. But that is not what the arbitrator concluded. While I share the

majority's doubt that the arbitrator decided this case correctly, I respectfully disagree with its conclusion that the narrow public policy exception to binding arbitration bars judicial enforcement of the award.

As the majority acknowledges, judicial review of an arbitration award is severely circumscribed. We have noted:

Appellate review of an arbitrator's award is necessarily limited because "to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation." ... "[S]trong deference [is] due an arbitral tribunal." ... Furthermore, "[w]hen ... parties [agree] to arbitration, they [agree] to accept whatever reasonable uncertainties might arise from the process."

Arbitration is not a judicial proceeding; it is purely a matter of contract. Because parties to a collective bargaining agreement have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, "it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." "[I]mprovident, even silly," factfinding by an arbitrator does not permit a court to set aside an award.

In this case, the arbitrator found that Henderson was fired not "because of his actions on the job," but, rather, "because of his beliefs and because he sought out others who shared his beliefs." The arbitrator determined that "the antagonism [Henderson] seems to feel towards non-white racial groups has never reared its ugly head on the job" and that the State Patrol "was not able to point to a single instance on the job" where Henderson's actions "exhibited any hatred, anger, disgust, or discrimination towards any minority group." The arbitrator found, based on the State Patrol's own data, that Henderson conducted traffic stops "in a race-neutral manner." The arbitrator found that while Henderson may have personal philosophies that would disgust many citizens of Nebraska, nevertheless, he has well-hidden those beliefs and they have not interfered with his impartial enforcement of the law. The Arbitrator has been persuaded that, to just about anyone he knows or interacts with professionally, [Henderson] projects himself as "an example of stability, fidelity and morality." Furthermore, there is no evidence or credible testimony that [Henderson's] affiliation with the Knight's Party/KKK impaired "the operation or efficiency of the State Patrol or the employee" or that his reinstatement will likely impair "the operation or efficiency of the State patrol or the employee."

Based upon the record made during a 12-hour hearing, the arbitrator concluded that "the State Patrol violated the Constitution, the Contract, and its own policies and procedures" when it discharged Henderson. In a finding particularly relevant to the issue before this court, the

arbitrator stated:

It is very likely that, under [several] decisions of the United States Supreme Court, the State Patrol could have successfully defended the constitutionality of its decision to terminate [Henderson] by either showing some actual harm to its ability to maintain discipline and good order within the ranks, or by showing some actual diminution in the State Patrol's ability to perform its police function.

That said, the State Patrol bore the burden of showing such disruptions, and the Patrol failed to meet this burden. In the final analysis, all that the Agency presented to the Arbitrator was surmise and speculation that some operational or community-relations harm could occur; this was precious little upon which to hang the "hat" of deciding to terminate [Henderson].

The arbitrator also found that the State Patrol failed to show "any minimally-persuasive evidence that [Henderson's] actions or beliefs would cause disruptions in [Henderson's] ability to effectively work with the Patrol's black Troopers, or that [Henderson's] actions or beliefs would cause the Patrol difficulties with respect to the morale, efficiency, or good order of the State Patrol."

As much as we may disagree with these findings, we are bound by them under well-established principles of arbitration law. I agree with the majority that in deciding whether the arbitrator's award should be enforced, our focus is solely on the remedy, which in this case is an order of reinstatement. To paraphrase *Eastern Associated Coal Corp. v. Mine Workers*, the issue presented is not whether Henderson's conduct violated public policy, but whether the enforcement of the arbitration award requiring his reinstatement would do so.

The majority correctly states that it is the "public policy of the State of Nebraska that the law should be enforced without discriminating based on the race of its citizens." But in light of the arbitrator's factual findings, Henderson's reinstatement would not, in and of itself, automatically result in racial profiling or some other form of discriminatory law enforcement. The mere fact of Henderson's reinstatement, without more, would not violate any constitutional or statutory provision making racial discrimination unlawful. Only some unlawful conduct committed by Henderson after reinstatement could violate such laws and the public policy upon which they are based. And it cannot be said on this record that such conduct is even likely, given the arbitrator's finding that despite his personal beliefs, Henderson has never breached his duty to enforce the law fairly and impartially in the past. With respect to his future conduct, Henderson would be bound by his oath to enforce the law fairly and in a nondiscriminatory manner, and he would be subject to the same civil and criminal liabilities as any other public officer if he failed to do so.

The majority reasons that the public policy of nondiscriminatory law enforcement "incorporates, and depends upon, the public's reasonable perception that the laws are being enforced without

discrimination.” It then accepts the State Patrol’s argument that a law enforcement officer with Henderson’s affiliations “ ‘breeds distrust, fear, and apprehension among members of the public [and] raises concerns among the public that his employer and fellow officers may harbor similar beliefs.’ ” Were we deciding this issue in the first instance, I would agree. But our review requires that we give deference to the findings of the arbitrator, and the conclusion reached by the majority necessarily rejects the arbitrator’s specific finding that Henderson’s past affiliation had not and would not impair the mission of the State Patrol. By defining public policy so broadly as to incorporate public perception of possible future harm, the majority has simply upheld the State Patrol’s initial determination that Henderson’s affiliation with the Knights Party reflected negatively on the State Patrol and brought the Patrol into disrepute. While this may seem perfectly logical, it necessarily repudiates the arbitrator’s findings that Henderson’s personal affiliations and beliefs, however reprehensible, have not affected his ability or that of the State Patrol to fairly and impartially enforce the law.

Reasoning similar to that of the majority in this case was explicitly rejected by the Supreme Court in *United Paperworkers v. Misco, Inc.* That case involved a machine operator who was apprehended in the back seat of a car that was parked on the employer’s premises. There was marijuana smoke in the vehicle and a lighted marijuana cigarette in the front seat ashtray. The employee did not own the car. The employee was discharged for violating rules prohibiting the possession of drugs on company premises, and the matter was submitted to arbitration. The arbitrator determined that there was no proof that the employee had actually possessed marijuana on company property and, thus, that there was no just cause for the discharge. The arbitrator ruled the employee was entitled to reinstatement with full seniority and backpay. A federal district court refused to enforce the award on public policy grounds, and an appeals court affirmed, concluding that reinstatement would violate the public policy against operation of dangerous machinery by persons under the influence of drugs or alcohol. The Supreme Court determined that while this judgment was “firmly rooted in common sense,” it did not justify refusal to enforce the award. The Court held that the appeals court had improperly drawn inferences from the facts, and it stressed that whether the employee “had ever been or would be under the influence of marijuana while he was on the job and operating dangerous machinery is an exercise in factfinding” which was the arbitrator’s function, not the appellate court’s. The Supreme Court made it very clear that even an inquiry into a “possible violation of public policy” does not “excuse a court for doing the arbitrator’s task,” noting:

Had the arbitrator found that [the employee] had possessed drugs on the property, yet imposed discipline short of discharge because he found as a factual matter that [the employee] could be trusted not to use them on the job, the Court of Appeals could not upset the award because of its own view that public policy about plant safety was threatened.

... With respect to Henderson, the majority here is doing precisely what the Supreme Court prohibited. The arbitrator’s findings in this case are similar to those considered by a New York appellate court in *State Corr. Officers & Pol. Benev. v. State*. There, a correctional officer was

suspended from duty for flying a Nazi flag from the front porch of his home on the 55th anniversary of Adolph Hitler's declaration of war on the United States. Several newspapers through-out the state reported the event. The department of correctional services charged the officer with violating rules prohibiting off-duty conduct which would "reflect discredit upon the Department or its personnel" and prohibiting an officer from affiliating with groups having interests which would "interfere with the impartial and effective performance" of the officer's duties. The suspension was submitted to arbitration, and the arbitrator found no nexus between the officer's off-duty misconduct and his employment, noting the absence of "evidence that his conduct harmed the Department's business, adversely affected [the officer's] ability to perform his job, or caused co-workers not to work with him." The arbitrator concluded that the projection of possible harm, as opposed to actual harm, was not sufficient to permit restriction of the officer's symbolic free speech or regulation of his off-duty conduct.

The court rejected the department's request that the arbitration award be vacated on public policy grounds. It noted that it was bound by the arbitrator's decision unless it could determine that the award violated public policy in the form of a "well-defined constitutional, statutory or common law of this State." It concluded that because neither state statutes, regulations, nor the employee manual "proscribes the reinstatement of an employee who engaged in conduct as established here but who nevertheless is found not guilty of the charges as submitted to the arbitrator," it could not vacate the award as violative of public policy. The court noted that "[a]s abhorrent as [the officer's] personal conduct is, Judges cannot reject the factual findings of an arbitrator simply because they do not agree with them." The court also rejected the department's request that it apply a balancing test to determine that the officer's right to freedom of expression was outweighed by the governmental interest in the safe and efficient operation of the correctional facility, concluding [t]o do so ... would require us to invade the province of the arbitrator under the guise of public policy, and to reexamine and redetermine the merits of the case. By submitting the issue of [the officer's] conduct to arbitration, the parties placed upon the arbitrator the responsibility of passing on the implications of [his] offensive conduct under the collective bargaining agreement. We must honor the choice of the parties to have their controversy decided in that forum.

In my view, the majority has rejected the findings of the arbitrator and redecided the merits of this case under the guise of public policy. I could accept the reasoning of the majority that Henderson's reinstatement would foster "the perception that some citizens of Nebraska do not enjoy the same protection by law enforcement as others" if the arbitrator had made any findings that Henderson's affiliation with the Knights Party affected the performance of his duties, because in that circumstance there would be a factual basis upon which to conclude that Henderson could not be trusted with the duties and responsibilities of law enforcement.

But the arbitrator actually made specific affirmative findings that Henderson's beliefs "have not interfered with his impartial enforcement of the law," and it is therefore entirely speculative to

conclude that the public would have a contrary perception if he were reinstated.

In concluding that Henderson's reinstatement would violate public policy by creating a public perception of discriminatory law enforcement, the majority disregards the following provision of the award specifically designed to prevent or mitigate any such perception:

Nothing in this Award shall prevent the Nebraska State Patrol from reassigning [Henderson] in the future, if necessary to maintain the good order and efficiency of the Agency, or to eliminate/mitigate actual civil disruptions that may occur as a result of the public becoming aware of [Henderson's] association with the Knight's [sic] Party, Christian Concepts, the Ku Klux Klan, or any other such group[.]

Henderson's counsel acknowledged at oral argument that if the award were enforced and Henderson were reinstated, the State Patrol "could assign him to the supply division. They could [assign] him to communications. They could have him cleaning out desks for the next three or four years if they wished to do that." Other courts, including the Supreme Court, have considered the flexibility of an arbitral award of reinstatement in considering whether it violated public policy.

Finally, I am concerned that the majority understates the significance of the arbitrator's finding that Henderson's discharge violated his First Amendment rights. Again, while we may disagree strongly with this finding, we are bound by it in the procedural posture of this case. That being so, the result reached by the majority necessarily implies that it is willing to ignore the State's violation of Henderson's constitutional rights because if he were reinstated, the public may perceive that he may violate someone else's rights in the future, despite the arbitrator's specific findings that he has never done so in the past. In my view, this apparent subordination of individual constitutional rights to the "greater good" poses a far greater risk of harm to the public policy of this state than reinstating one misguided trooper and reassigning him to some mundane position well behind the front lines of law enforcement, where he would pose no actual or reasonably perceivable threat to the mission of the State Patrol or the welfare of the public it serves.

In summary, while I disagree with many of the arbitrator's factual findings and legal conclusions and share the majority's revulsion toward Henderson's affiliation with the Knights Party and everything that organization stands for, I cannot conclude that the award of reinstatement would violate public policy under the restrictive standard prescribed by the U.S. Supreme Court in *W.R. Grace & Co. v. Rubber Workers*²⁴; *Misco, Inc.*²⁵; and *Eastern Associated Coal Corp.*²⁶ I therefore respectfully dissent.
CONNOLLY, J., joins in this dissent.

Hagan v. Feld Entertainment, Inc.

365 F.Supp.2d 700 (E.D.Va.2005)

REBECCA BEACH SMITH, District Judge.

This matter is before the court on plaintiff's motion to remand and defendant's motion to dismiss. For the reasons outlined below, plaintiff's motion to remand is GRANTED in part and MOOTED in part. Defendant's motion to dismiss is GRANTED in part and DENIED in part.

I. Factual and Procedural History

Plaintiff, Frank Hagan ("Hagan"), is a resident and citizen of Virginia. Defendant, Feld Entertainment, Incorporated ("Feld"), is a Virginia corporation with its principal place of business in Virginia. Beginning in March 1993, Hagan was hired by Feld to work for Ringling Bros. and Barnum & Bailey Circus ("Ringling Bros."). Hagan worked intermittently for Feld from March 1993 until 2000. Beginning on or about March 7, 2000, Hagan worked continuously for Feld without interruption until he was terminated on July 21, 2004.

In December 2003 Feld assigned Hagan to work as a lion handler for Ringling Bros. As part of his job, he fed and watered the lions, cleaned their cages, cared for their transport on the train, and cared for them at the performance site. He spent between twelve and fourteen hours every day with the lions.

On or about 11:00 a.m. on July 12, 2004, the Ringling Bros. train left Phoenix, Arizona, headed for Fresno, California. At the three train stops during the day, Hagan checked on the lions, during which time the lions seemed healthy. The next day, July 13, 2004, Hagan watered down the lions at approximately 8:30 a.m. That day the train traveled through the Mojave Desert where temperatures reached upwards of one hundred degrees. At approximately 9:30 a.m. Hagan called Ringling Bros.' Train Master Gene Petis ("Petis") to inform him that the train needed to be stopped so that Hagan could again water down the lions. Petis advised Hagan that the train could not stop because it was behind schedule. Thereafter Jarak, another lion handler, attempted without success to contact Jeff Steele, General Manager of Ringling Bros., to request a train stop to water down the lions. Finally, at 2:45 p.m., the train stopped in Arizona. Between 8:30 a.m. and 2:45 p.m. the lions had no drinking water and they were not watered down.

When the train stopped, Hagan immediately went to the lion car where he discovered that a two-year-old lion named Clyde was unresponsive and was lying in the fetal position with his tongue hanging out, eyes rolled back in his head, and barely breathing. When Hagan placed his hands on Clyde in an attempt to help him, he realized that Clyde's body was extremely hot. As Hagan attempted to help Clyde, the lion died. After sitting and crying with Clyde's body for a period of time, Hagan once again tried to contact Steele, but was unsuccessful. He was, however, able to reach Ringling Bros.' Operations Manager, John Griggs ("Griggs"), who told him to move

Clyde's body to the meat truck and to not say a word about it to anyone.

The train arrived in Fresno, California, shortly before midnight on July 13, 2004. On or about July 14, 2004, Hagan was ordered to move Clyde's body from the meat car to a Ryder rental truck. He was also ordered to pressure wash the meat car to remove Clyde's hair and blood before the United States Department of Agriculture ("U.S.D.A.") inspectors arrived. When the U.S.D.A. inspectors arrived, Hagan was taken to another location where he was questioned by Feld's legal counsel. Hagan was told not to talk to anyone about Clyde's death, which Hagan understood to mean no conversations with the U.S.D.A. inspectors. Hagan continued to talk about Clyde's death and was threatened and intimidated by Steele not to talk about it with anyone. On July 21, 2004, while still in California, Hagan was terminated and he and his daughter were left in California with no way to get home. The reason given for the termination was that Hagan caused a power outage.

On October 8, 2004, plaintiff filed a Motion for Judgment in the Norfolk Circuit Court; an Amended Motion for Judgment was filed on October 13, 2004. Plaintiff asserts claims of wrongful discharge and intentional infliction of emotional distress ("emotional distress"). On November 4, 2004, defendant filed a notice of removal to federal district court on the grounds that plaintiff's claims are completely preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

II. Analysis

In the case at bar, defendant argues that while plaintiff only alleged state law claims in his complaint, plaintiff's state law claims are completely preempted by federal law because plaintiff and defendant are parties to a collective bargaining agreement. Section 301 of the Labor Management Relations Act of 1947 ("§ 301") grants federal courts jurisdiction over cases involving collective bargaining agreements and authorizes federal courts to establish a body of federal law interpreting collective bargaining agreements. See *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). Additionally, "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law ... is pre-empted and federal labor-law principles-necessarily uniform throughout the nation-must be employed to resolve the dispute." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 406, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988).

However, if the state law cause of action is independent from the collective bargaining agreement, meaning that resolution of the state law claim does not require interpretation of the collective bargaining agreement, the state law claim is not preempted. Thus, in order to determine whether the plaintiff's state law claims are preempted by federal law, it is necessary to determine whether an interpretation of the collective bargaining agreement is required to resolve the state law claims.

Thus, the court first determines whether plaintiff has stated a colorable state law claim and then proceeds to determine whether such claim is preempted by § 301.

A. Governing Law

The parties are in disagreement regarding the appropriate state law to apply to the claims at bar. Defendant argues that Virginia law should apply, whereas plaintiff states that California law should apply. . . .

In regard to the wrongful discharge claim, it is clear that the place of the wrong as alleged by the plaintiff is California. Prior to his discharge, plaintiff claims that Feld told him not to talk to anyone, including U.S.D.A. investigators, about Clyde's death, and, because plaintiff continued to talk about the incident, plaintiff was fired. One of these conversations between plaintiff and Feld occurred in Arizona, but all others occurred in California. Plaintiff was discharged from his employment with Feld while in California. The actual discharge was the last event necessary to make Feld liable; thus, the wrong occurred in California and the proper substantive law to apply to that claim is California law.

B. Underlying State Claims

1. Wrongful Discharge

California recognizes the tort of wrongful discharge. See *Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167, 164 Cal.Rptr. 839, 610 P.2d 1330 (1980). A claim for wrongful discharge exists when an "employer's discharge of an employee violates fundamental principles of public policy." *Id.* at 1331. Generally, California courts have found that an employee was discharged in violation of public policy where the employee was discharged after the employee: "(1) refused to violate a statute; (2) performed a statutory obligation; (3) exercised a constitutional or statutory right or privilege; or (4) reported a statutory violation for the public's benefit." *Green v. Ralee Engineering Co.*, 19 Cal.4th 66, 78 Cal.Rptr.2d 16, 960 P.2d 1046, 1051 (1998). A claim for wrongful discharge also exists if the employee is discharged after reporting a statutory violation to management and other employees, but not to a government official or other enforcement entity.

Plaintiff alleges a prima facie case of wrongful discharge. He alleges that he was discharged for reporting to management and other employees a statutory violation of the Animal Welfare Act, 7 U.S.C. § 2131 et seq., and the California Penal Code § 597 et seq. (prohibiting cruelty to animals). The Animal Welfare Act ("the Act") authorizes the Secretary of Agriculture to promulgate standards and rules governing the humane handling, care, treatment and transportation of animals by exhibitors. 7 U.S.C. § 2143(a). Pursuant to this grant of rulemaking

authority, the Secretary of Agriculture promulgated rules requiring that animals in transit be observed at least once every four hours to ensure that ambient temperature is within a specified range and that animals are not in physical distress. 9 C.F.R. § 3.140. If animals are in obvious physical distress, the carrier is required to provide veterinary care as soon as possible. 9 C.F.R. § 3.140. Live animals are not to be subjected to surrounding air temperatures in excess of 85 degrees Fahrenheit and care must be taken to ensure that animals do not suffer physical trauma. 9 C.F.R. § 3.142. The facts as alleged by plaintiff indicate that these regulations were violated when no one observed the lions for over six hours, the ambient air temperature was greater than it should have been, and care was not taken to insure that animals suffered no physical distress. Allegedly, as a result of these violations, a lion died and plaintiff was fired because he complained to management and other employees about violations of the Animal Welfare Act.

While it may be difficult to determine what constitutes a public policy source, at the core it must have a legislative root and be of fundamental concern to the general public, rather than to an individual. See *Gantt v. Sentry Ins.*, 1 Cal.4th 1083, 4 Cal.Rptr.2d 874, 824 P.2d 680, 684, 687-88 (1992). The regulations accompanying the Animal Welfare Act are closely related to the statutory language and advance the stated purpose of the Animal Welfare Act. The stated purpose of the Act is “to insure that animals intended for use ... for exhibition purposes ... are provided humane care and treatment.” 7 U.S.C. § 2131. The Act grants the Secretary of Agriculture the authority to promulgate rules and standards to govern the humane handling of animals. The Secretary is directed to set minimum standards for “handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care ... necessary for humane handling, care or treatment of animals.” 7 U.S.C. § 2143. The rules and standards promulgated under this grant of power are found in 9 C.F.R. 3 et seq. The rules that defendant allegedly violated about which plaintiff complained, namely failure to observe animals at regular intervals, failure to water animals properly, failure to maintain proper handling temperatures, and failure to prevent physical distress, directly flow from the legislative grant of power to the Secretary in 7 U.S.C. § 2143. Furthermore, these regulations carry out the stated purpose of the Act in insuring that animals in interstate commerce are treated humanely. See 7 U.S.C. § 2143. In sum, while the alleged violations by the defendant are regulatory in nature, they are sufficiently tethered to a statute to constitute public policy.

In sum, plaintiff has presented a prima facie case of wrongful discharge under California law. As alleged, he was fired after complaining to management about violations of a federal statute. A colorable state law claim has been made, and the court DENIES defendant’s motion to dismiss the wrongful discharge claim. The court must now determine whether the claim has been preempted by § 301.

2. Intentional Infliction of Emotional Distress

Plaintiff asserts a claim of emotional distress against his employer Feld Entertainment. Under

California's Labor Code, the state's workers' compensation system generally provides the sole remedy for an employee's injury sustained on the job. In particular, an employee cannot bring a civil suit for physical or emotional injury, or both, if the injury occurred during the normal course of the employment relationship. See, e.g., *Livitsanos v. Superior Court*, 2 Cal.4th 744, 7 Cal.Rptr.2d 808, 828 P.2d 1195, 1201-02 (1992); *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal.3d 148, 233 Cal.Rptr. 308, 729 P.2d 743, 748-50 (1987) (rule applies when employer is guilty of "intentional," even "malicious or deceitful," misconduct).

In determining whether worker's compensation is the exclusive remedy, the court must look at whether the actions of misconduct attributed to the employer are "a normal part of the employment relationship." *Cole*, 233 Cal.Rptr. 308, 729 P.2d at 750. Actions such as "demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances" are all part of the normal employment relationship, even if the actions can be characterized as unfair or outrageous.

All of the actions of which plaintiff complains in regard to his emotional distress claim, while arguably outrageous, involved a normal part of the employment relationship. As pled by plaintiff, the claim for emotional distress arises from defendant's actions in regard to plaintiff's job of taking care of the lions: defendant's refusing to stop the train for watering down and water for the lions, at plaintiff's request; having plaintiff dispose of Clyde's body; directing plaintiff to clean the area where Clyde's body was stored; and telling plaintiff not to discuss Clyde's death. These are all actions incident to plaintiff's normal employment of taking care of the lions. The defendant's conduct itself may have been abnormal and inhumane, making the circumstances surrounding Clyde's death distasteful or outrageous. However, the acts constituting defendant's misconduct all occurred during the normal course of the employment relationship between plaintiff and defendant, and were part of that relationship. The circumstances of Clyde's death did not change plaintiff's job duties to take care of the lions, rather defendant's actions may have kept plaintiff from properly performing his job.

Plaintiff has not stated a colorable state law claim for emotional distress under California law, and the court **DISMISSES** plaintiff's claim for emotional distress.

C. Preemption Under § 301

Section 301 of the Labor Management Relations Act ("LMRA") provides that:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185. This section gives federal courts jurisdiction over cases involving collective bargaining agreements and authority to establish federal common law to resolve such cases. See *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985); *McCormick v. AT & T Technologies, Inc.*, 934 F.2d 531, 534 (1991).

The Supreme Court has been consistent in holding that § 301 preempts state law claims, only when resolution of the state law claim requires interpretation of a collective bargaining agreement. In *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962), the underlying state law issue was whether a collective bargaining agreement implicitly prohibited a union strike. The Washington state court held that state contract interpretation rules applied. The Supreme Court reversed, holding that federal common law applied and § 301 preempted the claim.

In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, the Court considered whether the Wisconsin tort for bad-faith handling of an insurance claim in a case involving a claim for disability benefits authorized by a collective bargaining agreement, was preempted by § 301. Following the reasoning articulated in *Lucas Flour*, the Court in *Allis-Chalmers* held that because the tort grew from a breach of a duty implied in a collective bargaining agreement that the claim was preempted by § 301. 471 U.S. at 220-21, 105 S.Ct. 1904.

Applying the same reasoning to a factually different case, the Court in *Lingle*, 486 U.S. 399, 108 S.Ct. 1877, held that a retaliatory discharge claim was not preempted by § 301. In order for the plaintiff in *Lingle* to prove her underlying state claim, she was required to show that she was discharged, or threatened to be discharged, and the employer's motive was to deter her from exercising her rights under the Illinois Worker's Compensation Act. *Id.* at 406-07, 108 S.Ct. 1877. While the plaintiff in *Lingle* was covered by a collective bargaining agreement, it was unnecessary to look to the collective bargaining agreement in resolving the retaliatory discharge claim. *Id.* at 407, 108 S.Ct. 1877. Therefore, the retaliatory discharge claim existed outside the collective bargaining agreement and was not preempted by § 301. See *id.* at 413, 108 S.Ct. 1877.

Plaintiff's wrongful discharge claim at bar is similar to that in *Lingle*. Because a prima facie claim for wrongful discharge exists if plaintiff was discharged from employment in violation of public policy, and existence or non-existence of a prima facie case does not depend on the provisions of the collective bargaining agreement, § 301 does not preempt plaintiff's state law claim. A court need not interpret any provision of the collective bargaining agreement between plaintiff and defendant. Feld's obligation to refrain from discharging Hagan does not depend on an express or implied promise set forth in the collective bargaining agreement, but instead reflects a duty imposed by law on all employers in California in order to implement fundamental public policies embodied in statutes, constitutions, and regulations. See *Tameny*, 164 Cal.Rptr. 839, 610 P.2d at 1335. Furthermore, the California Supreme Court, in dicta, specifically stated that the tort of wrongful discharge is "not a vehicle for enforcement of an employer's internal

policies or the provisions of its agreements with others.” Green, 78 Cal.Rptr.2d 16, 960 P.2d at 1053.

Finally, while defendant has the burden of proving jurisdiction, defendant fails to identify any provision of the collective bargaining agreement that a court would need to interpret in resolving plaintiff’s wrongful discharge claim. In fact, defendant’s response to plaintiff’s motion to remand lacks any argument as to why § 301 preempts the wrongful discharge claim under California law. Instead, defendant argues that the court has jurisdiction because § 301 preemption of the emotional distress claim then provides supplemental jurisdiction over the wrongful discharge claim. The emotional distress claim has been dismissed; thus, there is no preemption of the emotional distress claim, much less supplemental jurisdiction flowing from its preemption. Since plaintiff’s wrongful discharge claim does not rely on an interpretation of the collective bargaining agreement, § 301 does not preempt this valid state law claim.

III. Conclusion

For the reasons set forth above, defendant’s motion to dismiss plaintiff’s wrongful discharge claim is DENIED, and defendant’s motion to dismiss the emotional distress claim is GRANTED. Plaintiff’s state wrongful discharge claim is not preempted by federal law, and consequently there is no federal question jurisdiction under 28 U.S.C. § 1331. As there is no federal question or diversity jurisdiction, the court REMANDS plaintiff’s wrongful discharge claim to the Circuit Court for the City of Norfolk, Virginia, for all further proceedings.FN8 The Clerk is DIRECTED to send a copy of this Opinion and Order to counsel for plaintiff and defendant, and to the Circuit Court of the City of Norfolk. Further, the Clerk shall take the necessary steps to effect the remand to the state court.

IT IS SO ORDERED.

Maksimovic v. Tsogalis, No. 81493 (10/17/97)

JUSTICE HEIPLE delivered the opinion of the court:

Must a claim of intentional tort related to allegations of sexual harassment be litigated before the Illinois Human Rights Commission (the Commission), or, stated differently, does the exclusive remedy provision of the Illinois Human Rights Act (Act) (775 ILCS 5/8-- 111(C) (West 1994)) divest the circuit court of jurisdiction to adjudicate such common law tort claims? This court visited this question in Geise v. Phoenix Co. of Chicago, Inc., 159 Ill. 2d 507, 517 (1994), and held that where a tort claim is "inextricably linked" to claims of sexual harassment

such that there is "no independent basis for imposing liability" apart from the Act itself, those claims must be litigated before the Commission--and only before the Commission. We allowed the instant plaintiff leave to appeal (155 Ill. 2d R.315) so that we could clarify the scope of this court's holding in Geise as it regards tort claims which, though related to sexual harassment, have an independent basis in the common law.

We conclude that the plaintiff's common law tort claims of assault, battery and false imprisonment are not inextricably linked with claims of sexual harassment, because the plaintiff has established the necessary elements of each tort independent of any legal duties created by the Act. The plaintiff has established a basis for imposing liability on the defendant independent of any statutory cause of action under the Act, and therefore the circuit court does have jurisdiction to adjudicate the plaintiff's common law tort claims. We reverse and remand.

I

This case comes to us on a grant of summary judgment, so our review is de novo. *McInerney v. Charter Golf, Inc.*, 176 Ill. 2d 482, 484 (1997). From October 1992 until August 1993, Rada Maksimovic worked as a waitress at a restaurant owned and operated by William T. Tsogalis located in Des Plaines, Illinois. Maksimovic quit her job after Tsogalis allegedly made repeated sexual advances towards her.

Subsequently, Maksimovic filed a complaint with the Illinois Human Rights Commission in November 1993, alleging that she was the victim of sexual harassment at the hands of her former manager, Tsogalis, and she sought backpay and reinstatement. Several months later, Maksimovic filed an action for damages in the circuit court of Cook County against defendants William T. Tsogalis, William T. Inc., d/b/a Tiffany's Restaurant, and P.C. Partners, d/b/a Comfort Inn. In the three counts of the complaint relevant to this appeal, the plaintiff alleged that Tsogalis committed the intentional torts of assault, battery and false imprisonment.

In the assault count, Maksimovic alleged that Tsogalis threatened to "give her a stiff one up the ass," ordered her to perform oral sex on him, made comments about her breasts and accused her of being too friendly with the customers. In the battery count, the plaintiff alleged that Tsogalis placed his hand under her skirt and grabbed her leg, grabbed her buttocks and touched her while attempting to kiss her. In the false imprisonment count, the plaintiff alleged that Tsogalis confined her in a walk-in cooler where he made sexual advances toward her.

The circuit court held that it lacked subject matter jurisdiction to adjudicate the plaintiff's case because her tort claims were in the nature of sexual harassment and granted summary judgment for the defendants. The appellate court affirmed and held that the circuit court was without jurisdiction to adjudicate claims of intentional tort related to allegations of sexual harassment: "Because the fundamental nature of plaintiff's claims are offensive touchings of a sexual

nature and she cannot support a cause of action independent of these allegations, her claims for assault, battery, and false imprisonment are barred by the Act and Geise.” 282 Ill. App. 3d 576, 586.

II

Our analysis of whether the Act precludes the circuit court from adjudicating common law tort claims related to allegations of sexual harassment naturally begins with a careful reading of the statute. The Act provides in relevant part:

“Except as otherwise provided by law, no court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in this Act.” 775 ILCS 5/8--111(C) (West 1994).

The Act goes on to state that it is a “civil rights violation” for any employer or employee “to engage in sexual harassment.” 775 ILCS 5/2--102(D) (West 1994).

Sexual harassment is defined as:

“any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when *** such conduct has the purpose or effect of substantially interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment.” 775 ILCS 5/2--101(E) (West 1994).

Thus, this court has held that if a common law action is in essence one which seeks redress for a "civil rights violation" as defined by the Act and there is no basis for the action other than the Act, the circuit court lacks jurisdiction to adjudicate the claim. Geise, 159 Ill. 2d at 516; Mein v. Masonite Corp., 109 Ill. 2d 1, 7 (1985).

But does the Act preclude the circuit court from exercising jurisdiction over all tort claims factually related to incidents of sexual harassment? Our appellate court answered "yes," construing Geise as barring the circuit court from hearing any claim of intentional tort related to allegations of sexual harassment. 282 Ill. App. 3d at 585. The appellate court’s reading of Geise, however, is overly broad.

In Geise, the plaintiff alleged that her employer negligently hired and retained a manager who sexually harassed the plaintiff. Geise, 159 Ill. 2d at 511-12. This court observed that, but for the Act’s proscription against sexual harassment, the plaintiff would have had no legally cognizable claim against her employer. Geise, 159 Ill. 2d at 517. Although the plaintiff in Geise dressed her claims as "negligent hiring" and "negligent retention," the allegations of negligence on the part of the employer were premised on the allegation that the employer hired and retained a manager who engaged in sexual harassment. Geise, 159 Ill. 2d at 518. Absent the Act’s prohibition of sexual harassment, the employer’s hiring and retention of an employee whose conduct created a

hostile work environment would not have been an actionable tort. That is to say, in *Geise* the Act furnished the legal duty that the defendant was alleged to have breached. This court held that such tort claims were in essence claims of a "civil rights violation" and, accordingly, could only be brought before the Commission. *Geise*, 159 Ill. 2d at 518.

The rule from *Geise* is not that the Act precludes the circuit court from exercising jurisdiction over all tort claims related to sexual harassment. Rather, whether the circuit court may exercise jurisdiction over a tort claim depends upon whether the tort claim is inextricably linked to a civil rights violation such that there is no independent basis for the action apart from the Act itself.

The issue in this case then is whether the plaintiff's claims of assault, battery and false imprisonment are inextricably linked to her claim of sexual harassment. Clearly under the standard of *Geise* they are not. The sexual harassment aspect of this case is merely incidental to what are otherwise ordinary common law tort claims. The plaintiff here has alleged facts sufficient to establish the elements of assault, battery and false imprisonment. These are long-recognized tort actions which exist wholly separate and apart from a cause of action for sexual harassment under the Act. To the extent that the plaintiff has alleged the elements of each of these torts without reference to legal duties created by the Act, she has established a basis for imposing liability on the defendants independent of the Act. Therefore, the plaintiff's tort claims are not inextricably linked to a civil rights violation and the circuit court may exercise jurisdiction over these tort claims.

Our holding here, as in *Geise*, rests squarely on the language of the Act and the policy underlying it. Common law rights and remedies are in full force in this state unless repealed by the legislature or modified by the decision of our courts. 5 ILCS 50/1 (West 1994); *People v. Gersch*, 135 Ill. 2d 384, 395-97 (1990). A legislative intent to abrogate the common law must be clearly and plainly expressed, and such an intent will not be presumed from ambiguous or doubtful language. *Barthel v. Illinois Central Gulf R.R. Co.*, 74 Ill. 2d 213, 220-22 (1978). The provision of the Act at issue here--which by its terms provides an exclusive remedy for "civil rights violations"--makes no mention of common law actions. A legislative intent to abolish all common law torts factually related to sexual harassment is not apparent from a plain reading of the statute.

An action to redress a civil rights violation has a purpose distinct from a common law tort action. A civil rights action under the Act is designed, in part, to eradicate sexual harassment in the workplace. 775 ILCS 5/1--102(B) (West 1994). To achieve this goal, the legislature saw fit to create a Commission vested with exclusive jurisdiction over sexual harassment claims amounting to civil rights violations. This grant of exclusive jurisdiction was intended to promote the efficient and uniform processing of state civil rights claims--not common law tort claims. Assault, battery and false imprisonment existed long before the legislature became interested in sexual harassment and are intended to redress violations of bodily integrity and personal liberty.

See 3 W. Blackstone, Commentaries, 127-28. The adjudication of tort claims has traditionally been within the province of our courts, and we can find nothing in the language of the Act, or the policy underlying it, which indicates that the legislature intended to preclude the circuit court from exercising jurisdiction over all tort claims related to incidents of sexual harassment.

III

We conclude that a common law tort claim is not inextricably linked with a civil rights violation where a plaintiff can establish the necessary elements of the tort independent of any legal duties created by the Illinois Human Rights Act. In such a case, the plaintiff has established a basis for imposing liability on the defendant independent of any statutory cause of action under the Act, and therefore the circuit court does have jurisdiction to adjudicate the plaintiff's common law tort claim. The judgments of the circuit and appellate courts are reversed and the cause is remanded to the circuit court for further proceedings.

Judgments reversed; cause remanded.

KGB, Inc. v. Giannoulas
104 Cal.App.3d 844 (1980)

BROWN (Gerald), P. J.

Viewed in its most obvious aspect, this controversy about a chicken suit poses the simple issue whether a local radio station may prevent its ex-employee/mascot from wearing a chicken suit. Silly though the issues appear at first glance, the underlying principles are serious. We deal with a conflict between an employer's asserted contract rights and the fundamental rights of an employee to earn a living, even in possible violation of the employer's bargain with him. We are also concerned with interpreting the application of California's restraint of trade statute (Bus. & Prof. Code, FN1 § 16600) to an entertainment contract which ostensibly restricts the entertainer from continuing to perform after a breach.

FN1 All section references are to the Business and Professions Code unless otherwise specified.

Appellant Ted Giannoulas seeks a writ of supersedeas to stay a preliminary injunction which he has appealed.

While employed by respondent radio station, KGB, Inc., Giannoulas made public appearances as a character known as the "KGB Chicken," a costumed chicken performing comic routines. Giannoulas stopped working for KGB. The station brought this lawsuit alleging breach of employment contract, unfair competition, servicemark infringement, and other causes. KGB sought both damages and an injunction preventing Giannoulas from appearing in a chicken suit.

Although at present all counts of the complaint except that for breach of contract have been dismissed on demurrer with leave to amend, the trial court granted KGB a preliminary injunction. Paragraph (1)FN2 of the injunction prevents Giannoulas from appearing anywhere wearing the “KGB Chicken Ensemble,” a described costume which includes a vest bearing the KGB initials. Subsection (c) of paragraph (1) forbids appearing in a chicken costume “substantially similar” to the KGB chicken costume registered as a servicemark. Paragraph (2) restrains Giannoulas from appearing in “any chicken ensemble or suit whatsoever” in San Diego County or any adjacent county. Paragraph (3) similarly forbids appearances in any chicken suit at any sports or public event where a team from San Diego County appears. The trial court found “likelihood of confusion” in the public mind if Giannoulas appears in the manner forbidden. The meaning of that finding is when Giannoulas appears locally in a chicken suit the public probably thinks about KGB and may believe Giannoulas still works there.

FN2 Paragraph (1) prohibits Giannoulas from: “Appearing anywhere wearing the KGB Chicken ensemble or suit. The KGB Chicken is defined to be: (a) a design of a chicken red in color, with brown face, yellow beak, yellow webbed feet, blue eyelids, blue vest with the letters ‘KGB,’ and a red comb on the top of his head, or (b) a design of a chicken as depicted in Plaintiff’s Certificate of Registration of Service Mark No. 5049 from the State of California attached as Exhibit ‘C’ to the complaint herein, or (c) any design substantially similar to (a) or (b) above.” Exhibit “C” is a picture of a chicken costume with KGB letters on it.

Instructor note

KGB CHICKEN SUIT:

TED GIANNOULAS IN OWN CHICKEN SUIT:



We have decided to issue a writ of supersedeas to stay subsection (c) of paragraph (1) and all of paragraphs (2) and (3) of the injunction pending appeal. Those provisions, preventing appearances in any chicken suit whatsoever, invalidly restrict Giannoulas' rights to earn a living and to express himself as an artist. The burden is on KGB to justify an injunction restricting such vital rights. When the injunction issued, KGB had not so much as pleaded a good cause of action for unfair competition or infringement. Its factual showing to date is inadequate to sustain a prohibitory injunction, for reasons we will state.

Public policy disfavors injunctions restraining the right to pursue a calling. On the national scene, the weight of authority shows great reluctance to issue such restraints unless the former employer can show irreparable injury. (See, e.g., 11 Williston on Contracts (3d ed. 1968) §§ 1423, 1450, pp. 789-791, 1044; Rest., Contracts (1932) § 380, com. (g); Arthur Murray Dance Studios of Cleveland v. Witter (1952) 62 Ohio L.Abs. 17 [105 N.E.2d 685].)

California goes beyond judicial reluctance to possible illegality of such injunctions, under section 16600, which provides in relevant part: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." This statute presents an absolute bar to postemployment restraints and represents a strong public policy of this state (Golden State Linen Service, Inc. v. Vidalin (1977) 69 Cal.App.3d 1, 12-13 [137 Cal.Rptr. 807]; Muggill v. Reuben H. Donnelley Corp. (1965) 62 Cal.2d 239, 242 [42 Cal.Rptr. 107, 398 P.2d 147]; Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1972) 24 Cal.App.3d 35, 43 [100 Cal.Rptr. 791], affd., 414 U.S. 117 [38 L.Ed.2d 348, 94 S.Ct. 383]). Although there are a few statutory exceptions to the ban against restraints of trade, none of them apply to this situation, where the employer seeks to restrain a performer from continuing to perform after the term of employment expires. Here it expired in September 1979.

The classic exposition of the topic of enforcement of employee covenants not to compete is Arthur Murray Dance Studios of Cleveland v. Witter, supra., 105 N.E.2d 685, decided in a state (Ohio) which did not have a statute like California's Business and Professions Code section

16600. That case, with wit but also much scholarly erudition, documented the “sea” of authority evidencing judicial reluctance to enforce such covenants. According to the court, this hostility first judicially appears in the reign of Henry V in 1415, when a guild sought to restrain a dyer from working in a town for half a year, enraging the judge, who “in bad French...cursed the deal void: ‘By God, if the plaintiff were here he should go to prison until he paid a fine to the king.’” *Id.* at p. 691.) Since then the courts have become more temperate, and will sometimes enforce such covenants at least in states not having statutes like section 16600, if such enforcement is reasonable; but even in those states, reasonableness is not lightly decreed, and always, the burden rests on the person seeking such a restraint to justify it.

Further, of the many circumstances relevant to reasonableness (detailed in the Arthur Murray case, *supra.*), the most important is irreparable harm to the employer. Nothing less justifies preventing an employee from continuing to work. The court in that case compared the so-called sale covenant with the employee covenant and explained the stronger aversion to enforcing the latter: “In contrasting the employee covenant with the sale covenant, some of the typical pronouncements are— the employee covenant is more critically examined, more strictly construed— it is construed favorably to the employee— it is viewed with askance and more jealousy— it is not viewed as liberally or with the same indulgence— it is looked upon with less favor, more disfavor— courts are more loathe, less disposed and more reluctant to sustain or enforce it— not identical tests but different considerations apply— there is more freedom of contract between seller and buyer than between employer and employee,— the latitude of permissible restraint is more limited between employer and employee, greater seller and buyer.

The following are some of the reasons given for making the above distinction. The average, individual employee has little but his labor to sell or to use to make a living. He is often in urgent need of selling it and in no position to object to boiler plate restrictive covenants placed before him to sign. To him, the right to work and support his family is the most important right he possesses. His individual bargaining power is seldom equal to that of his employer. Moreover, an employee ordinarily is not on the same plane with the seller of an established business. He is more apt than the seller to be coerced into an oppressive agreement. Under pressure of need and with little opportunity for choice, he is more likely than the seller to make a rash, improvident promise that, for the sake of present gain, may tend to impair his power to earn a living, impoverish him, render him a public charge or deprive the community of his skill and training. The seller has the proceeds of sale on which to live during his period of readjustment. A seller is usually paid an increased price for agreeing to a period of abstention. The abstention is a part of the thing sold and is often absolutely necessary in order to secure to the buyer the things he has bought. Usually the employee gets no increased compensation for agreeing to the abstention; it is usually based on no other consideration than the employment itself.” (Arthur Murray Dance Studios of Cleveland v. Witter, *supra.*, 105 N.E.2d at pp. 703-704.)

In California under section 16600, even reasonableness may not save an injunction like that here.

Here the written contract of employment expired on September 15, 1979, if it was not sooner terminated, as alleged, in late May 1979.

Further, even if the injunction were permissible despite section 16600, such an injunction must rest on a finding of injury to KGB. As the court said in *Arthur Murray, supra.*, we must consider whether an “ex-employee is a threatening menace.” (105 N.E.2d at p. 708.) There is no evidence of menace to KGB from the free publicity complained of, aside from a conclusionary allegation of irreparable harm. The court noted in *Arthur Murray, supra.*: “Remembering that the burden is on Arthur Murray to prove irreparable injury, where is the proof? Certainly there is not one microscopic bit of evidence of actual injury. It is not shown that Arthur Murray lost one pupil or one penny.” (105 N.E.2d at p. 703.) To paraphrase, where are the lost listeners? Likelihood of confusion is insufficient; the confusion must be hurtful to the employer before an injunction is justified.

In this state, as elsewhere, under the general umbrella of the tort of unfair competition, a number of employee practices may be enjoined, such as purloining of trade secrets or misleading copying of products or services. KGB seeks to justify this injunction on that basis, resting on the finding of likelihood of confusion, which is the jargon of unfair competition law. We think, however, Giannoulas’ performances in a chicken costume are neither competitive nor unfair because he does not sport the KGB logos or otherwise imply he represents KGB.

The essence of the tort of unfair competition is the inequitable pirating of the fruits of another’s labor and then either “palming off” those fruits as one’s own (deception) or simply gaining from them an unearned commercial benefit. (See, e.g., *Warner Bros. Pictures v. Columbia Broadcasting System* (9th Cir. 1954) 216 F.2d 945, 951 [use of character “Sam Spade” from “The Maltese Falcon” not unfair competition because no deception or palming off, and not within scope of copyright protection on novel]; *Geisel v. Poynter Products, Inc.* (S.D.N.Y. 1968) 283 F.Supp. 261, 267 [TRO issued to prevent sale of dolls and toys like “Dr. Seuss” characters because of false impression of authorization by Seuss]; *Sullivan v. Ed Sullivan Radio & T.V.* (1956) 1 App.Div.2d 609 [152 N.Y.S.2d 227] [restraining use of diminutive “Ed” because of threat of public confusion with name of celebrity Ed Sullivan]; *International News Service v. Associated Press* (1918) 248 U.S. 215 [essence of unfair competition is taking another’s labor and exploiting it, reaping what another has sown; palming off not essential].)

First, and probably most essential, the remedies sought in the above cases were not injunctions restraining pursuit of one’s livelihood. Thus, even if we had a case of unfair competition here, the injunctive remedy would probably be inappropriate for the reasons already stated.

Next, probably there is no case of unfair competition here, for the evidence so far shown to us does not establish misappropriation by Giannoulas of KGB’s labor. We are not in a position to determine the relative inputs of KGB and Giannoulas to the KGB chicken concept, but we note

the inevitable significance of the performer's contribution to a fluid, changing, clownish role of the type here considered. It is created spontaneously through gestures, movements and responses to changing situations. KGB cannot be said to own such a routine.

As a writer for the San Francisco Chronicle expressed it: "He was suspended Monday, and KGB is looking for a new man behind the outfit.

"Which is about as hopeless as having an understudy step in for Lawrence Olivier.

"The Chicken suit itself is amusing, but Giannoulas' artistry is what makes it work. He's a dancer, a showman, and an athlete, and his timing is flawless. When the Padres return home May 3, there's a pretty good chance he'll be there. A replacement? Forget it."

Or, in Giannoulas' words: "My 'act' was developed through five hard years of conscious effort in front of mirrors and working out of techniques and style at my home. In addition, a large part of my act evolved through spontaneity, keeping in those gestures and actions which evoked a favorable audience reaction. My style is a combination of mannerisms, gestures, posture, and timing which evolved from years of taking chances in live performances gauging the audience reaction. When I attend an athletic event, I am required to provide continuous entertainment for periods of from two to three hours. It would be impossible to have a planned routine to depend on for this type of entertainment. Rather, I must react to people and situations as they are presented. However, my years as the Chicken has caused me to evolve into that whacky character when I am in the costume. The Chicken has a style of his own. Mannerisms, gestures, reactions developed for performances averaging 70 hours per week. To me, the costume is skin which I bring alive when I enter."

We deal not with a stereotyped character such as The Lone Ranger or Yogi Bear, but with a clown in a chicken suit. His performances follow no set script. Only the costume itself has a fixed design, and we, by permitting subsections (a) and (b) of paragraph (1) of the injunction to stand, recognize KGB's probable rights in that particular design. KGB has not cited us a case, however, nor have we unearthed one, where it was regarded as unfair competition for a clown to change his employer.^{FN3} Only in a breach of contract situation may such conduct be enjoined, and then, probably only in a state where there is no statutory ban on restraints of trade as we have here.

^{FN3} The cases KGB relies on do not support its position. *Lone Ranger, Inc. v. Cox* (4th Cir. 1942) 124 F.2d 650, involved a defendant who untruthfully billed himself as the "original Lone Ranger," which misled the public and constituted unfair competition. That case is different from this because the Lone Ranger is a specific well-defined character, with a name, specific garb, and appearance, unlike the case of an antic chicken dependent on individual performances for its life. Similarly inapposite are *Boston Pro Hockey Ass'n. v. Dallas Cap. & E. Mfg. Inc.*

(5th Cir. 1975) 510 F.2d 1004 [copying servicemark emblems of hockey teams], and *Walt Disney Productions v. Air Pirates* (N.D.Cal. 1972) 345 F. Supp. 108, 116 [copyright infringement of character Mickey Mouse].

The employment contract between KGB and Giannoulas does not expressly give KGB the right to prevent Giannoulas from performing. The most pertinent part of the agreement provides: “For a period of five years after termination of this agreement, employee agrees not to act as a mascot of any radio station other than KGB, Inc., in the San Diego market.” This language does not give KGB a perpetual monopoly of all chicken ensembles and routines; it refers only to employment by another radio station, i.e., competition.

KGB relies specifically on two other contractual provisions. The 1978 contract provides: “Employee agrees and acknowledges that the costume, concept, and the KGB Chicken are the exclusive property of employer, and the KGB Chicken is a registered tradename and a valid copyright of employer. Employee agrees not to take any action inconsistent with said rights of employer in and to the concept of the KGB Chicken.”

KGB claims this language establishes its contractual monopoly of all rights in the KGB Chicken and of the “costume” or the “concept” of a chicken. The 1974 contract provides: “(a) I hereby acknowledge that the...characters and all other subject matters broadcast over the station as well as any name assigned to me by the station for broadcast purposes, are and shall remain, both while this contract shall be in effect and at all times thereafter, the station’s exclusive property in any and all fields, and that I shall not at any time obtain any right, title or interest whatsoever in or to such property or a part thereof.

“(b) Any ideas, including but not limited to, programs, themes, titles, characters, which are developed by me during the term of my employment, shall be the property of this station.” KGB claims these provisions indicate the parties’ intent to vest exclusive ownership of the KGB Chicken character in KGB.

These arguments tend to buttress KGB’s claim to an exclusive right to the specific character, the KGB Chicken, an antic chicken bearing the KGB insignia, colored in a definite manner, and appearing on behalf of the station. These contractual provisions do not, however, create a contractual monopoly of all appearances by Giannoulas in any chicken costume. In general, contractual language contained in employees’ negative covenants not to compete is strictly construed against the employer because of the policy against such bargains which we have described. (E.g., *W.R. Grace & Co. v. Hargadine* (6th Cir. 1968) 392 F.2d 9, 20; *Rest., Contracts*, § 236, subd. (f), p. 328; § 515, p. 988.) Here the specific chicken referred to is the KGB Chicken, and we have permitted the restriction on appearances as that character to stand. Further restriction is not warranted by the parties’ express bargain.

We have found no precedent defining the respective rights in fictional characters of the artist who plays the role, the employer who finances and assists him, and members of the general public who choose to imitate aspects of the character in question. The rights vary from case to case depending on such facts as the contracts in effect and the relief sought. There is precedent, which we shall discuss, establishing an actor has a strong claim to exclusive monopoly of a fictional role he has created. The employer may also have rights in such role, particularly when he seeks to assert them against infringing third parties rather than against the employee/actor.

However, because of the policies we have discussed, the employer has a weak case against his employee when he seeks to prevent future performances, unless he can point to a specific contract conferring such rights. His naked claim of having assisted the development of the role is not enough; presumably he has been compensated for that assistance by the revenues from performances while the employee still worked for him. Should he desire more, in the nature of continuing royalties or control of the character, then he must bargain for that control. Further, in California section 16600 limits his available remedies.

Misappropriation of rights in a stage character can of course occur, but it takes a strong showing to restrict the allegedly infringing performer. For example, in *West v. Lind* (1960) 186 Cal.App.2d 563 9 Cal.Rptr. 288], Mae West lost her suit to enjoin defendant's appearance in the role of "Diamond Lil," which West claimed to have developed. The trial court found the role was not exclusively associated with West nor impressed with her identity in the public mind, hence she had no exclusive claim to it, despite her undisputed contributions to the role. It does not appear KGB has staked a valid claim to another's comic routine, at the preliminary injunction stage, when West could not monopolize the role she herself had played, for which she claimed sole credit. West's claim was also stronger than KGB's because the Diamond Lil character is well defined and specific, whereas here we deal with the ever changing performance of an antic routine.

KGB asserts because Lugosi played the Dracula role without a mask, the concept of the "unique individual likeness of the actor" as property, developed in the Lugosi opinion, does not apply to Giannoulas' performances in a chicken suit which hides his features. Facial expressions are hardly a necessary attribute of a fantastic character.

Masked or not, both Lugosi and Giannoulas have made certain roles their own, by a combination of mannerisms, gestures, body language, and other behavior adding up in each case to a unique character. We see no reason why the concept of unique individual likeness should not apply to the role of antic chicken whose turns, kicks, tumbles and gyrations have become uniquely those of Giannoulas. What is more, we view with skepticism KGB's assertion it makes no difference who wears the costume. If that were so, why did KGB pay Giannoulas some \$50,000 a year to wear it? The identity of the performer clearly has some relevance here.

.....

A person appearing in a chicken costume cannot be a servicemark. A servicemark is an emblem or logo used in the sale or advertising of services to identify their source. (See 15 U.S.C. § 1127; Bus. & Prof. Code, § 14206.) Servicemarks may be registered and protected like trademarks. (15 U.S.C. § 1053; Bus. & Prof. Code, § 14230.) To be entitled to such protection the mark must be stationary and unchanging. For example, a fanciful king who eats hamburgers in a television commercial cannot be registered as a servicemark (In re Burger King Corp., (1974) 183 U.S.P.Q. 698). Further, a servicemark must not be the service itself, but rather, a designation of its source. (See Cebu Association of California, Inc. v. Santo Nino de Cebu USA, Inc. (1979) 95 Cal.App.3d 129, 137 [157 Cal.Rptr. 102].) Here the service is entertainment in a chicken suit, yet it is that activity which KGB seeks to monopolize.

In fact, the concept of parading as a mascot in an animal costume would seem to be in the public domain. Certainly it is commonplace and a number of similar fictional animal characters coexist in the media; for example, note Yogi Bear, Smokey the Bear, Winnie the Pooh, and the California Bear acting as mascot for the University of California. Can the creator of any of these bears be seriously contended to have a monopoly of all fictional bears? We think it possible for the present KGB Chicken and the Giannoulas chicken likewise to coexist.

KGB asserts it has now registered the figure of the KGB Chicken as a servicemark with the State of California and with the Federal Patent and Trademark Office. It further argues, without giving authority, the mark once registered in a two-dimensional form may not be “exploited” in a three-dimensional form without KGB’s permission. There is no “exploitation.” To exploit a servicemark means essentially to engage in some act of unfair competition; to use a confusingly similar mark, to palm off goods or services, to pirate the fruits of another’s industry. We have already discussed why the evidence does not show inequitable piracy of the fruits of KGB’s labor.

KGB also claims the service here involved is not entertainment, but is radio station broadcasting. The assertion is false. The service enjoined is entertainment in a chicken suit; Giannoulas is not in the radio broadcast business. His performances are too fluid and changing to be a servicemark of some other service, such as broadcasting, and they cannot be owned by anyone, other than pursuant to a valid contract.

Finally, KGB claims we have no jurisdiction to make factual findings contrary to those of the trial court. Specifically, it claims we have not honored the finding of secondary meaning, essentially a finding any costumed chicken at a sports or public event in the designated area is associated with KGB in the public mind. We accept that finding. It is insufficient to show irreparable harm, or indeed any harm, and it does not warrant a preliminary prohibitory injunction restricting constitutionally protected freedoms, and possibly violating a statute as well.

On the subject of irreparable injury, the record shows Giannoulas has become a nationally known figure. FN4 KGB is a station which can transmit, on a clear day, as far as Oceanside. This station claims a perpetual monopoly on chicken routines in local counties; if that claim were not preposterous enough, it further contends injury because its former employee has made it nationally famous. The claim of irreparable injury in this context is ridiculous.

FN4 Giannoulas has also become an internationally known figure. The Encyclopedia Britannica Book of the Year 1980 under Biographies, page 78, recognizes him in the following article in which KGB, no doubt to its delight, receives publicity:

Giannoulas, Ted

When baseball's "chicken man" emerged from a giant egg in the San Diego Padres' infield on June 29, 1979, it was just a rehatch. He had first arrived fully fledged in Dayglow fluff five years earlier to hand out Easter eggs at the local zoo as part of radio station KGB's "promotional experiment." But the bird's inner being, 5-ft 4-in Ted Giannoulas, had bigger ideas. A communications student at San Diego State University, he suggested that KGB send him to Padres games in the fine-feathered costume. He became a fixture on and around the diamond, and the station rose from fifth to first place in local media standings. Cavorting through the stands, lifting a web-footed leg at the umpires, smothering an occasional pretty fan's head in his yellow beak, the chicken man was soon responsible for attracting more than one out of ten spectators to the stadium. Ted Turner, the Atlanta Braves' flamboyant owner, offered Giannoulas \$100,000 to turkey trot down to Georgia. But the cackling celebrity decided to keep San Diego as his home base and turn free-lance-a decision that got his suit sued off. The trouble started when he took off the vest showing KGB's call letters for an away-from-home game. The station fired him, shooed him into court claiming \$250,000 in damages, and hired a substitute. But the fans threatened such mayhem that the substitute was fitted with a bulletproof vest, though nothing worse came his way than game-delaying boos. Enjoined from wearing KGB's outfit or calling himself a chicken, Giannoulas bought a new fowl suit to prance the foul lines and went to work as an attraction without a name. Offered a percentage of the gate receipts by the Padres, he was escorted by motorcycle policemen onto the field inside the styrofoam egg atop an armored truck and emerged to the tune of Thus Spake Zarathustra. KGB kept the legal heat on for a while but lost listeners and ended up eating crow.

Giannoulas was not alone in the world of professional sports clowns, nor was he the first “bleacher creature.” But he was the most celebrated. Now earning more than \$100,000 a year, he belly flopped around the bases on national television during one All-Star Game and received the legislature’s official commendation for “comedy contributions to the State of California.”

The injunction goes beyond authorizing law and is against public policy because it restricts Giannoulas’ right to earn his living and to express his talents. Although subsections (a) and (b) of paragraph (1) of the injunction, referring to appearances in the defined KGB Chicken costume may stand, the remainder of the injunction is stayed pending the appeal of this matter.

Cologne, J., and Staniforth, J., concurred.

Asheboro Paper and Packaging, Inc. v. Dickinson, 599 F.Supp.2d 664 (M.D. 2009)

MEMORANDUM OPINION AND ORDER
THOMAS D. SCHROEDER, District Judge.

Before the court is the motion of Plaintiff Asheboro Paper and Packaging, Inc. to preliminarily enjoin its former employee, Defendant Mark Allen Dickinson, Jr. from competing with it and using or disclosing alleged confidential and proprietary information. On January 15, 2009, the court heard argument on Dickinson’s motion for expedited discovery and granted the parties the right to conduct discovery limited to issues raised by Asheboro Paper’s request for injunctive relief. After post-discovery briefing, a preliminary injunction hearing was held on February 6, 2009. For the reasons set forth herein, Asheboro Paper’s motion is denied.

Asheboro Paper is a North Carolina corporation with its principal place of business in Asheboro, North Carolina, that sells and distributes packaging products, including tapes, boxes, bags, chipboard, and bubble and foam packaging. On December 19, 2006, it hired Dickinson, who lives in Powhatan County, Virginia, to serve as a sales representative. Just prior to his hiring, Dickinson was employed by Unisource Worldwide, Inc. (“Unisource”), as an equipment specialist. Unisource is also engaged primarily in the business of distributing paper and packaging supplies, though it conducts business throughout the United States.

Contemporaneously with his hiring by Asheboro Paper, Dickinson executed both an Employment Contract and Agreement and a No-Compete Agreement. The Employment Contract and Agreement provided, among other things, that Dickinson would receive “5% of the profits of the Richmond branch/office and 5% of the sale of the Richmond branch if and when that occurs.” The No-Compete Agreement provided, in part:

The Employee covenants and agrees that he/she will not during the term of said

Employment, and for a period of twelve (12) months thereafter, directly or indirectly enter into the employment of or render any service to any other person, firm, company, association, or corporation engaged in the business of selling or distributing any type or kind of packaging products, (tapes, stretch films, polyethylene bags and sheeting and any other products that ASHEBORO PAPER AND PACKAGING, INC. sells, including any type of packaging machinery or service thereof, or any business in any way competitive thereto, whether or not such products or services were ever purchased by customers of ASHEBORO PAPER AND PACKAGING, INC., and that he/she will not during the period of employment and for a time aforesaid thereafter engage in any such business on his/her own account, or become interested therein, directly or indirectly, as an individual, partner, stockholder, director, officer, clerk, agent, employee, trustee, or in any other relationship or capacity whatsoever, all of which prohibitions shall extend to cover an area described and limited as follows: Within a 150 mile radius of Asheboro Paper and Packaging, Inc. and any of its branch offices in North Carolina and Virginia including any existing business that he has serviced while in the employ of Asheboro Paper and Packaging, Inc.

The Employee further covenants and agrees that he/she will not during his/her employment by the employer, and for the period of time aforesaid thereafter, communicate, divulge or use for the benefit of any other person, firm, association or corporation, any of the trade secrets or secret processes used or employed by the Employer in its business, and that he/she will not divulge to any such person, firm, association or corporation, the identity of any customers, past, present or prospective of the Employer.

The No-Compete Agreement further provided:

Whereas, the Employer uses in the said business certain trade secrets and secret processes which are highly confidential and proprietary to ASHEBORO PAPER AND PACKAGING, INC., including but not limited to, price lists, methods of pricing, the special and unique needs and requirements of customers, catalogs and methods of operation. All of these things are deemed trade secrets of ASHEBORO PAPER AND PACKAGING AND PAPER, INC. which will necessarily be communicated to the Employee by virtue of his/her employment by the Employer, and which shall place the Employee in an unfair competitive position as to ASHEBORO PAPER AND PACKAGING, INC. should, for any reason, employment be terminated.

The parties intended that Dickinson, along with another employee, Richard Dewey, would assist Asheboro Paper in establishing and growing a Richmond, Virginia, branch office. Asheboro Paper concedes that at the time it hired Dickinson it did not have an office, distribution center, or

any physical location in Virginia. During the initial portion of Dickinson's employment, Asheboro Paper investigated options for opening an office in Richmond. As "a business decision to best serve the market," Asheboro Paper decided not to establish a formal office or warehouse of its own. Dickinson and Dewey, instead, worked from their homes for the entirety of Dickinson's employment.

In April 2007, Asheboro Paper contracted with Riverside Logistics Services ("Riverside"), a third-party warehouse provider, to store Asheboro Paper's inventory in Richmond. Riverside provides space for a number of other companies to store inventory. Asheboro Paper has no specific location dedicated to it within the Riverside facility. Nor does Dickinson have free access to the facility; rather, he must sign into a visitor's log and be escorted by a Riverside employee. Asheboro Paper thus requires Riverside's permission to enter the building, even if only to remove its own goods. Asheboro Paper also has no public record of an office in Richmond, no business license to conduct business at the Riverside address, no employees working there, no sign bearing its name at that address, and no telephone or fax number registered to it at that location (all calls being forwarded to its North Carolina office).

By November 24, 2008, Dickinson had decided to resign and to return to work for Unisource and, on that date, sent a letter to Asheboro Paper notifying it of his resignation effective November 28, 2008. Dickinson went back to work for Unisource in Richmond, Virginia, as a sales representative.

Shortly after he resigned, Dickinson met with Asheboro Paper co-worker Dewey to discuss wrapping up Dickinson's business. Dickinson offered to return all of the documents in his possession related to Asheboro Paper, but Dewey declined to take them all. Dickinson did provide Dewey with a list of his Asheboro Paper customers and all of the documents Dewey thought may be helpful in transitioning the business.

Asheboro Paper filed this action originally in North Carolina Superior Court, Randolph County, on December 16, 2008. Asheboro Paper moved for a temporary restraining order, but before it could be heard Dickinson removed the case to this court. The Complaint asserts claims for breach of the No-Compete Agreement and misappropriation of trade secrets, presumably under North Carolina law, although the Complaint is silent as to any statutory ground.

This court has jurisdiction pursuant to 28 U.S.C. § 1332.

...

No-Compete Agreement

The parties agree that North Carolina law applies to the contractual claim. To be enforceable, a

covenant must, among other things, be reasonable as to time, territory, and scope of activity. One of the primary purposes of such a covenant is to protect the relationship between an employer and its customers. Under North Carolina law, restrictions must be “no wider in scope than is necessary to protect the business of the employer.” Where the language of a covenant is overbroad, North Carolina law severely limits the court’s options to “blue pencil” offending terms. Unless the overbroad portion is “a distinctly separable part of a covenant,” North Carolina courts cannot rewrite the contract and will simply not enforce it. The burden of proof remains on the party seeking to enforce the covenant.

Territorial Reasonableness

A territorial restriction is reasonable “only to the extent it protects the legitimate interests of the employer in maintaining [its] customers.” Thus, where a primary purpose of the covenant is to protect the employer’s relationship with its customers, as here, the employer must demonstrate the actual location of its customers to permit a finding that the territorial restriction is reasonable. In assessing the reasonableness of the geographic restriction of a covenant, North Carolina courts look to six overlapping factors: “(1) the area, or scope, of the restriction; (2) the area assigned to the employee; (3) the area where the employee actually worked or was subject to work; (4) the area in which the employer operated; (5) the nature of the business involved; and (6) the nature of the employee’s duty and his knowledge of the employer’s business operation.” North Carolina courts have upheld multi-state restrictions, especially where, as here, the time period is not excessive, as long as the employer demonstrates their reasonableness.

The No-Compete Agreement here suffers from several problems related to its territorial restriction.

First, Asheboro Paper has failed to demonstrate the actual existence of a “branch office” in Virginia. All of the evidence strongly indicates that, while Asheboro Paper intended to establish a Virginia office, one never materialized. It would not be reasonable to interpret Dickinson’s home as the branch office, either, because Asheboro Paper’s other Virginia-based employee, Dewey, resided elsewhere. Thus, it is hard to calculate a radius from a non-existent point. Asheboro Paper argues that the “branch office” was understood by everyone to mean Dickinson and Dewey, its two employees working in the Commonwealth of Virginia.

While that may be true, such an interpretation would reduce the “branch office” reference in the No-Compete Agreement to a concept rather than a place and fail to establish any reasonable basis from which to calculate a territorial restriction of 150 miles.

Second, even assuming a Virginia “branch office” could be said to have existed, Asheboro Paper has failed to indicate the location of its customers within the restricted area to demonstrate that the geographic scope is necessary to maintain those customer relationships. The closest Asheboro

Paper gets is the statement of William Dawson, its Vice President, that it “does business throughout the states of North Carolina and Virginia,” and that “[t]he majority of [its] business in Virginia is conducted within a 150 mile radius of Asheboro Paper’s location in Richmond, Virginia.”

However, no customer lists or locations to justify the 150–mile radius were presented, and conclusory statements are not sufficient under North Carolina law to support the geographic scope of a covenant not to compete. In fact, at the hearing on preliminary injunction, Asheboro Paper had (but, despite the entry of a confidentiality order, did not file under seal or seek to admit) a list of customers that Dickinson allegedly serviced in Virginia. A 150–mile radius from the Richmond area clearly exceeds the borders of Virginia, however, and covers portions of Delaware, Maryland, the District of Columbia, and West Virginia, yet Asheboro Paper does not purport to do business there.

Asheboro Paper also conceded in its briefing and at the preliminary injunction hearing that Dickinson served no clients that were located within the 150–mile radius but outside the Commonwealth of Virginia. A restriction outside an employee’s operating area may be enforced only if the employer actually does business there.

Third, there has been no demonstration that Dickinson’s or Asheboro Paper’s customers covered the Commonwealth of Virginia to show that a state-wide restriction would be reasonable. Where the territory is too broad, “the entire covenant fails since equity will neither enforce nor reform an overreaching and unreasonable covenant.”

Asheboro Paper further argued at the hearing that the 150–mile radius represents the range from which Asheboro Paper can economically make deliveries from its Riverside warehouse in Richmond. This argument is unsupported in the record and, even if it were, would be an insufficient basis upon which to restrain competition in the absence of a demonstration Asheboro Paper actually does business there.

Fourth, Asheboro Paper argues that, even if no Virginia branch office existed, the No–Compete Agreement prohibits Dickinson from servicing “any existing business that he has serviced while in the employ of Asheboro Paper and Packaging, Inc.” Asheboro Paper contends that this establishes a separate, customer-based restriction that is reasonable. It is true that a prohibition against soliciting customers is deemed per se reasonable. However, here the clause is contained in the sentence that defines the 150–mile radius, thus rendering its meaning at best ambiguous. Such an ambiguity is to be construed against the drafter, Asheboro Paper, as covenants not to compete are in restraint of trade and are to be strictly construed against the drafting party. Even if the court were to adopt Asheboro Paper’s interpretation (and reject a reading that the phrase defines the 150–mile radius), the restriction would fail because the rest of the sentence, which has not been supported on this record, is not separable so as to be capable of being blue-pencilled

out. Thus, taking into account all the factors considered by North Carolina courts, the court concludes that Asheboro Paper has failed to support the territorial restriction.

Legitimate Business Interest

A non-competition covenant must be no wider in scope than is necessary to protect a legitimate business of an employer. Where a covenant is too broad to constitute a reasonable protection of the employer's business, it will not be enforced. Here, the No-Compete Agreement defines the scope of the employment to be prohibited as a function of the 150-mile radius, which the court has already found lacking on this record. In the absence of a demonstration that the territorial restriction is valid, therefore, the scope restriction fails.

The No-Compete Agreement also seeks to preclude Dickinson not only from competing with Asheboro Paper, but also from working for a competitor in any capacity. For example, it prohibits him from working "directly or indirectly" with, "or render[ing] any service to," any person or firm engaged in the business of selling or distributing packaging products within the defined territory. The covenant does not limit itself to performing only an identical service for a competitor.

The No-Compete Agreement further prohibits Dickinson from "engag[ing] in any such business on his/her own account, or becom[ing] interested therein, directly or indirectly, as an individual, partner, stockholder, director, officer, clerk, agent, employee, trustee, or in any other relationship or capacity whatsoever." Where a covenant requires an employee to have no association whatsoever with any business irrespective of whether he or she would be in a position to compete or divulge protected information, the covenant is overbroad.

A covenant must rise or fall integrally. These overbroad terms are not distinctly separable portions that the court could "blue pencil" without effectively rewriting the covenant. Accordingly, the court finds that the No-Compete Agreement is facially broader than necessary under North Carolina law to protect the legitimate business of the employer. Thus, as to the No-Compete Agreement, Asheboro Paper has failed to demonstrate questions going to the merits "so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation."

Trade Secret Protection Act Claim

Asheboro Paper contends that Dickinson was provided a host of allegedly confidential and proprietary information, including customer lists, pricing information, product and sales information, and information about customers and their relationships with it (including types and quantities of items purchased, margins, and dates of sales). It contends that Dickinson has either misappropriated such information or that there is a very real likelihood that he will do so.

Dickinson argues that Asheboro Paper has failed to sufficiently identify trade secret materials, contends that what it has identified was never provided to Dickinson during his employment, and denies that he has disclosed any such information.

The North Carolina Trade Secret Protection Act provides that “actual or threatened misappropriation of a trade secret may be preliminarily enjoined during the pendency of the action.” N.C. Gen.Stat. § 66–154(a). The alleged trade secret information must be identified “with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur.” An employer must demonstrate that it took reasonable measures to protect the trade secrets. N.C. Gen.Stat. § 66–152(3). Customer pricing lists, cost information, confidential customer lists, and pricing and bidding formulas can constitute trade secrets. Customer names and addresses may not be protected as a “trade secret” inasmuch as they can be readily ascertained through independent development. Misappropriation of trade secret information can constitute irreparable harm.

At the January 15, 2009, hearing, the court directed Asheboro Paper to identify exactly what it contends constitutes trade secrets that were made available to Dickinson. Asheboro Paper has provided a host of general categories of information it claims it provided to Dickinson, as noted above. Asheboro Paper’s Dawson testified that he has reviewed the “documents produced in discovery” and affirms that they are “exactly the types of confidential information and proprietary documents and information provided to Dickinson.”

Dickinson acknowledges that Asheboro Paper did identify certain price lists and customer lists in response to the court’s direction, but he claims that the ones so identified were never given to him. Dickinson admitted generally in his deposition that he was provided and still had in his possession documents containing names of customers and pricing and margin information (though he was never asked to further identify such information), which he denied having looked at since his resignation. So, there is some lack of clarity as to what was allegedly given to Dickinson, though the court will assume for its analysis that the trade secret information has been sufficiently identified. Moreover, Dickinson does not contest that Asheboro Paper took reasonable steps to attempt to protect the alleged trade secret information.

The primary difficulty is that there does not appear to be any misappropriation, either in fact or threatened, under either the Trade Secret Protection Act or under the No–Compete Agreement. The No–Compete Agreement acknowledges that use or disclosure of trade secret material shared with Dickinson is prohibited, but it never requires that the material be returned.

This is particularly important here because of Dickinson’s unique employment situation where he worked out of his home inasmuch as Asheboro Paper never established a physical facility in Richmond. Therefore, he kept his paperwork at home. His resignation alone did not violate any

term of the No–Compete Agreement or Trade Secret Protection Act in this regard, and Dickinson freely met with Dewey, Asheboro Paper’s only other representative in Virginia, in order to transition his business and to return the materials.

The record reflects that, for whatever reason, Dewey indicated that he did not need or want whatever materials Dickinson possessed, and there is no indication that Asheboro Paper ever thereafter requested their return. Thus, this is not a situation where an employee resigns, takes protected materials from his office, and is not forthright as to his intentions.

That presents the next problem. Though Dickinson was deposed, there is no record, other than in the most general terms, of what materials he possessed. Asheboro Paper represented at the preliminary injunction hearing that his returning whatever he retained in his files would “go a long way” toward resolving its concerns. Dickinson has not only not threatened to use any of the alleged trade secret information (assuming the price lists and margin information from November 2008 are current now), he now represents that he has returned all the documents alleged to constitute trade secrets.

Under North Carolina law, customer information maintained in the memory of a departing employee is not a trade secret. North Carolina courts also “are reluctant to prevent an employee from working for a competitor merely for the purpose of protecting confidential information.” They have done so in circumstances suggesting bad faith or underhanded dealing. *Id.* On this record, there is simply insufficient evidence of misappropriation or bad faith, actual or threatened, to support injunctive relief.

Public Interest

In this case there are competing public interests. Asheboro Paper has a legitimate interest in developing its customer relationships and being able to freely share confidential and proprietary information with its employees without fear it will end up in the hands of a competitor. The public interest is also served by ensuring that legitimate contracts are enforced.

Dickinson has a legitimate interest in remaining free to seek employment with “the highest and most congenial bidder,” and the North Carolina courts disfavor restrictions on that interest. An employee also cannot be prohibited from taking with him his general knowledge and expertise, and Dickinson is bound by the separable non-disclosure provisions of his No–Compete Agreement.

The question is where the equities lie. There is no evidence that Dickinson has failed to be forthright about his intentions, having given advance notice of his resignation and meeting with Asheboro Paper’s designee, Dewey, to transition business and to return all information Dickinson maintained at his home office. Given Dickinson’s employment as a salesman,

Asheboro Paper's legitimate interests are largely its customer relationships and the prevention of a former employee from competing with knowledge of its confidential information, which rises or falls on the validity of the No-Compete Agreement. The court also notes that in hiring Dickinson from Unisource just over two years ago, Asheboro Paper agreed to indemnify him for all attorneys' fees in what appears to have been a potential lawsuit on a no-compete agreement between Dickinson and Unisource.

On balance, the court concludes that the public interest does not favor enjoining Dickinson from working with Unisource or from disclosing or using any alleged trade secrets "merely to allay the fears and apprehensions or to soothe the anxieties of a party."

III. CONCLUSION

For the foregoing reasons, IT IS THEREFORE ORDERED that Asheboro Paper's motion for preliminary injunction (Doc. 9) is DENIED.

Not Reported in B.R., 2010 WL 2404346 (Bkrcty.S.D.Ind.)

United States Bankruptcy Court,
S.D. Indiana,
Indianapolis Division.

In re PAIN MANAGEMENT CENTER OF SOUTHERN INDIANA, P.C.
Pain Management & Surgery Center of Southern Indiana, Inc.
Comprehensive Spine Care, P.C., Debtors.

Nos. 08-10555-AJM-11, 08-10560-AJM-11, 08-10557-AJM-11, 08-10555-AJM-11.
June 10, 2010.

[ANTHONY J. METZ III](#), Bankruptcy Judge.

This matter came for hearing on April 2, 2010 before the Court regarding the Debtors' objection to the claim of Vera Foley. For the reasons stated below, the Court allows the claim as filed as a general unsecured claim, and grants Foley's attorney leave to file an affidavit for attorney fees.

Background

Vera Foley ("Foley") is a certified family nurse practitioner whom Pain Management Center of Southern Indiana ("Pain Management Center"), one of the jointly administered debtors, hired in November, 2005 to work in its Vincennes, Indiana facility. Foley's employment was to be for one year, starting on January 3, 2006. Section 4.4 of the November 10, 2005 Employment Agreement (the "Employment Agreement") between Foley and Pain Management Center provided:

Section 4.4 Vacation/ Meeting Time / Personal Days. [Foley] will be entitled to four (4) paid weeks for vacation,

professional activities, and continuing education, and four (4) paid personal days, during each calendar year. [Foley] shall take such paid absences at such times as shall be approved by the Directors of [Pain Management Center]. Such paid absences shall not be cumulative from year to year; any time not taken at the end of a year shall be forfeited.

Foley worked for Pain Management Center in 2006 and 2007. On January 7, 2008, Employment Agreement was amended by Addendum which modified Section 4.4 with respect to the paid vacation and personal days as follows:

Section 4.4 Vacation/ Meeting Time / Personal Days. [Foley] will be entitled to sixteen (16) paid days for vacation, professional activities, and continuing education, and three (3) paid personal days, during each calendar year. [Foley] shall take such paid absences at such times as shall be approved by the Directors of [Pain Management Center]. Such paid absences shall not be cumulative from year to year; any time not taken at the end of a year shall be forfeited.

On February 4, 2008, Manoj Kumar, Human Resource Manager for Pain Management Center, informed Foley by letter that her Employment Agreement had been terminated, effective February 4, 2008. Although the letter gave “three months’ notice,” Foley’s employment terminated on February 19th. **Pain Management Center closed its Vincennes facility on or about February 20, 2008.**

Pain Management Center filed a chapter 11 case on August 27, 2008 [notice that this filing date is more than 180 days after Foley’s last date of employment, Feb. 20, 2008] and its chapter 11 plan was confirmed on December 21, 2009. On December 30, 2009, Pain Management Center objected to Foley’s claim in the amount of \$27,653.73, in part because it was untimely filed. The Court did not disallow the claim based on its untimely filing. Pain Management Center also objects to the amount of Foley’s claim which consists of both a contract damages and an unpaid vacation component. The present dispute involves only the claim for unpaid vacation. [FN1](#)

[FN1](#). Under the Employment Agreement, Foley was entitled to three months’ notice prior to termination of her employment. After Foley received the February 4th letter, she was allowed to work only two additional weeks instead of the full remainder of three months. Foley had eleven (11) additional weeks of guaranteed employment which amounted to \$11,846.23 in salary. **This amount is the “contract damages” portion of Foley’s claim and is not disputed. Pain Management Center objected to Foley’s claim in part on the basis that it was not entitled to priority under 11 U.S.C. § 507(a)(4). The parties agree that Foley’s claim is not entitled to such priority and further agree that such claim for unpaid vacation, in whatever amount, is a general unsecured claim and shall be treated accordingly under the confirmed chapter 11 plan.**

The 2008 Addendum to the Employment Agreement provides that Foley is entitled to 16 paid vacation days, but does not provide how the vacation pay accrues or to what vacation pay Foley is entitled if her employment is terminated during 2008. Pain Management Center argues that since the Addendum does not provide for how vacation pay vests, accrues or is paid upon termination of employment, the vacation pay should be calculated to accrue on a pro rata basis, throughout 2008. And, Pain Management Center argues that, since Foley could not carry over unused vacation days from year to year, she is entitled only to the pro rata portion of her 16 vacation days she was to receive in 2008. Having worked a month and half in 2008, Pain Management Center argues that Foley is entitled only to 1.8 days of vacation.

Foley contends that, as part of her compensation package she negotiated for 2008, her vacation days accrued immediately when the January, 2008 Addendum was executed and that she is entitled to vacation pay for the full sixteen days, despite the fact that she worked only a month and half in 2008. Foley introduced into evidence Foley’s last pay stub dated February 4, 2008 which indicated *accrued* vacation of 128 hours and *accrued* personal time of 24

hours, which translates to 16 vacation days and 3 personal days. Pain Management Center's business coordinator, Manoj Kumar, testified that the accrual balances were what Foley would be able to use *if she were still employed at Pain Management Center*. However, Mr. Kumar likewise testified that nothing in the Employment Agreement provided that Foley forfeit her paid vacation days upon termination of her employment.

Neither the Employment Agreement nor the Addendum provide how vacation days vest; certainly neither provides that Foley had to work to a date certain in order to be entitled to them. There was no evidence presented that Pain Management Center had an employee handbook that addressed this issue. Pain Management Center contends that, in the absence of such provision, the vacation days accrue pro rata. [Die & Mold, Inc. v. Western](#), 448 N.E.2d 44 (Ind.Ct.App.1983); [Damon Corp. v. Estes](#), 750 N.E.2d 8981 (Ind.Ct.App.2001).

However, the Court finds that applying a pro rata approach to the vacation days presents a physical impossibility. If the 16 vacation days accrued incrementally throughout all of 2008 as Pain Management Center suggests, then certainly Foley would still be earning a portion of those 16 days on December 31st. If Foley, pursuant to the Employment Agreement and the Addendum, was not allowed to carry over unused vacation to the following year, how would Foley take the "full" 16 vacation days in 2008? Assuming the 16 days accrue evenly throughout the 12 months of 2008, Foley would accrue approximately a day and a third each month (1.33 days). She would not have accrued the full day and a third attributable to December until the completion of her shift on December 31st. However, she would not be able to use this time since this one and a third days would not carry over to the following day, January 1, 2009. Consequently, if Pain Management Center's position regarding the pro rata accrual of vacation days is correct, Foley, at best, would have been able to use only 14.67 days of vacation time during 2008.

Rather, the Court finds that the 16 vacation days were part of the compensation package for which Foley bargained and for which Pain Management Center gave her in exchange for her services rendered to Pain Management Center in 2008. Although not entirely clear from the record of the hearing on this matter, it appears that Foley had to have worked for Pain Management Center in 2007 as a condition precedent to receiving the vacation days in 2008. Regardless, Foley's last pay stub provided for an "accrual balance" of 16 days. "Accrue" means "to come into existence as an enforceable claim or right", "to arise." *Black's Law Dictionary* (8th ed., 2004), "to augment," and, in the past tense, "vested." *Black's Law Dictionary*, (6th ed.1990). The Court is convinced that Foley had the right, whether it be by having fulfilled a condition precedent or by negotiation of a new employment contract, to take all 16 vacation days as of the date her employment was terminated, with the only limitation being that she had to consult with Pain Management Center's directors as to when the vacation days would be scheduled. Accordingly, the Court finds that Foley is entitled to compensation for 16 vacation days.

Pain Management Center does not dispute that vacation days are deferred compensation and thus "wages." [Die & Mold](#), 448 N.E.2d at 46-47. Indiana's Wage Claim statute, [Ind.Code § 22-2-9-1, et seq.](#), governs wage disputes where the wage claimant's employment was terminated involuntarily.^{FN2} [St. Vincent Hospital and Health Care Center, Inc. v. Steele](#), 766 N.E.2d 699, 705 (Ind.2002). That statute provides that "the provisions of [IC 22-2-5-2](#) apply to civil actions initiated under this subsection by the attorney general or his designee". [Ind.Code § 22-2-9-4\(b\)](#), [Ind Code § 22-2-5-2](#), in turn, provides for payment of liquidated damages of 10% of the amount due for each day the wages remain unpaid, not to exceed double the amount of wages due. That provision also allows the claimant to recover as costs a reasonable attorney fee. Foley testified that her gross weekly salary was \$1076.93 and that she was owed 3.8 weeks of vacation time. Based on that testimony, Foley's vacation pay claim amounts to \$12,277.00.^{FN3} This amount, however does not include reasonable attorneys fees to which Foley is entitled under [Ind.Code § 22-2-5-2](#). The undisputed contract damages claim is \$11,846.23. Accordingly, **the Court finds that Foley holds an allowed general unsecured claim of \$24,123.23, before an award of reasonable attorney fees.** Counsel for Foley shall file an affidavit setting forth in detail the amount of attorney fees sought within 21 days of the date of this order. Counsel for Pain Management Center shall have 14 days from the date of filing said affidavit to file an objection. If an objection is filed, the Court will set the matter at its earliest convenience for hearing to

determine reasonable attorney fees.

[FN2](#). Actions under the Wage Claims statute must first be referred to the Commissioner of the Indiana Department of Labor who in turn may refer the prosecution of the claim to the Indiana Attorney General or any attorney admitted to the practice of law in Indiana. [Ind.Code § 22-2-9-4](#)(b). On April 8, 2008, Foley’s counsel obtained such referral and thus is authorized to prosecute Foley’s claim as the Attorney General’s designee. *Plaintiff’s Complaint for Damages and Injunctive Relief and Request for Trial by Jury, filed April 14, 2008 in the Knox Superior Court, attached as Part 6, to Claim 53-1, filed by Vera Foley.*

[FN3](#). This sum is calculated as follows: \$1076.93 times 3.8 = \$4092.33, which is the amount of Foley’s actual damages. [Ind Code § 22-2-5-2](#) caps liquidated damages at double the amount of actual damages, and thus, Foley’s liquidated damages are \$8184.66. The aggregate of Foley’s actual and liquidated damages is \$12,276.99, rounded to \$12,277.00.

Bkrtcy.S.D.Ind.,2010.

In re Pain Management Center of Southern Ind., P.C.

Not Reported in B.R., 2010 WL 2404346 (Bkrtcy.S.D.Ind.)

Walrond v. County of Somerset, 888 A.2d 491 (N.J. 2006)

Before Judges KESTIN, LEFELT and HOENS.

Opinion

The opinion of the court was delivered by
LEFELT, J.A.D.

The Chief of the South Brunswick Police Department (Department) assigned Officer Steven Walrond to serve one week as a “duty officer” at the Somerset County Police Academy. While serving at the Academy in this function, a lightning bolt struck Walrond causing severe personal injuries. Walrond was awarded workers’ compensation benefits by the Department, but he also brought a civil action against, among others, the Academy and several members of its staff. Walrond alleged in the civil action that defendants were negligent for conducting an outdoor physical training session under dangerous weather conditions. The Academy moved for summary judgment. A motion judge found that Walrond was a “special employee” of the Academy and dismissed Walrond’s civil suit on the ground that the Workers’ Compensation Act, N.J.S.A. 34:15-1 to -128, constituted Walrond’s sole remedy. Walrond appealed, and we now reverse.

I.

The facts are straightforward and largely uncontested. The Academy holds its recruit training program on the campus of Raritan Valley Community College in North Branch. Campus classrooms along with the gymnasium, pool, and outdoor track are used during the training program. The Academy commonly invites officers from local municipalities to serve as “recruit

duty officers” during the program. Many of these individuals had previously graduated from the Academy and have gone on to successful police officer careers. Walrond, for example, graduated from the Academy in 1996.

In June 2001, the Academy Director sent an “instructor request” letter to the Department’s Chief “request[ing] the services of [Walrond] to assist in training at the [Academy]” as a “duty officer” for police recruits. The letter indicated that Walrond would be needed from August 13 through August 17, 2001, during the hours of 7:00 a.m. to 3:30 p.m. The letter requested the Chief to “check off whether or not the[] requests [could] be accommodated,” photocopy the letter, and return it by July 13, 2001. The Chief checked “[a]pproved” and signed the letter.

Other than the letter, the record does not show that the Department and the Academy executed any formal agreement with regard to Walrond’s services as a duty officer. In addition, Walrond did not enter into any written agreement with the Academy regarding his service as a duty officer. During his week at the Academy, Walrond was to be paid his regular salary by the Department.

The Academy was not obligated to compensate Walrond or reimburse the Department for his services. Indeed, we were advised at oral argument that the Academy is funded by the several counties that participate in its program and that it collects tuition from the recruits.

The Academy’s “Policies and Procedures Manual” provides a detailed description of the role and responsibilities of a “Recruit Duty Officer.” These duties include ensuring the safety and security of vehicles and lockers used by the recruits during training; supervising the recruits while they eat lunch; monitoring recruit classes and breaks; engaging recruits “concerning their appearance, their behavior, their knowledge, etc.”; reviewing recruit notebooks; looking out for unsafe conditions; and generally setting a good example for recruits to follow. If duty officers are certified in physical training, the manual further provides that they “will be dressed in the day’s [physical training] uniform” at the designated time.

During the first day of Walrond’s assignment as “Recruit Duty Officer,” he performed various tasks upon behalf of the Academy. For example, he advised the recruits that he was there for them and that if they had any questions, they should feel free to ask him. He met with two recruits who had firearm issues, telephoned some instructors to remind them of their scheduled obligations, and graded some traffic tickets that had been prepared by the recruits.

Later that day, at around 2:00 p.m., the recruit class was scheduled to participate in an outdoor physical training session. These sessions generally involve running, calisthenics, and various other exercises.

Shortly before the session began, an Academy instructor informed Walrond that he could leave if he desired. However, Walrond told the instructor that he was scheduled by his chief to remain at the Academy until later that afternoon and he would therefore stay for the training session.

Because Walrond was not a certified physical trainer, he could not provide direct instruction to the recruits. However, he was permitted to encourage and assist the recruits during the session. At the time the session began, the weather was slightly overcast with a drizzle of rain falling; and thunder could be heard in the background. Academy instructors began the session by leading the recruits on a run around the track. As the run ended, a steady downpour of rain began to fall accompanied by thunder and lightning.

After completing the run, the recruits cooled down and then began calisthenics in the pouring rain. A lead instructor allegedly told Walrond that he enjoyed bad weather and that Walrond should look out for lightning. Nevertheless, the instructor subsequently decided to end the training session, and the recruits were ordered to march to a flag pole in the pouring rain and “bring down the colors.” Walrond “went with [two recruits] for the purpose of supervising them [while taking down the flag].” This was the last thing Walrond remembered before he was struck by lightning at 3:01 p.m. and knocked unconscious.

II.

The Workers’ Compensation Act provides an employee with an “exclusive remedy” against the employer for injuries “arising out of and in the course of the employment.” *Gore v. Hepworth*, 316 N.J.Super. 234, 240, 720 A.2d 350 (App.Div.1998); N.J.S.A. 34:15–1, –7, –8. In exchange for receiving workers’ compensation benefits, which are awarded without regard to fault, the employee surrenders common law tort remedies against his or her employer and co-employees, except for intentional wrongs. N.J.S.A. 34:15–8; *Ramos v. Browning Ferris Indus.*, 103 N.J. 177, 183, 510 A.2d 1152 (1986).

Over the years, we have developed a doctrine that recognizes that under workers’ compensation, an employee can “have two employers, both of whom may be liable in compensation. However, recovery against one bars the employee from maintaining a tort action against the other for the same injury.” *Antheunisse v. Tiffany & Co., Inc.*, 229 N.J.Super. 399, 402, 551 A.2d 1006 (App.Div.1988), certif. denied, 115 N.J. 59, 556 A.2d 1206 (1989) (citing *Blessing v. T. Shriver and Co.*, 94 N.J.Super. 426, 429–30, 228 A.2d 711 (App.Div.1967)); *Scott v. Public Serv. Interstate Transp. Co.*, 6 N.J.Super. 226, 229, 70 A.2d 882 (App.Div.1950).

The doctrine developed largely from lent employment situations. Typically, for example, when a temporary employment agency lends one of its trained employees to a client of the agency, the lent employee may be considered to have been temporarily employed by the borrowing employer for purposes of workers’ compensation coverage. “Whether [a] common law action is precluded [against the borrowing employer] is ... dependent upon a determination that the borrower ... is, in fact, a special employer.” *Blessing*, supra, 94 N.J.Super. at 430, 228 A.2d 711.

In our case, as a further example, Walrond filed a workers’ compensation claim against his

general employer, the South Brunswick Police Department. He subsequently brought a negligence action against the Academy and several of its employees. “If it is determined that plaintiff was a lent employee or special employee of [the Academy] then the [tort] action may not be maintained.” *Murin v. Frapaul Constr.*, 240 N.J.Super. 600, 607, 573 A.2d 989 (App.Div.1990).

Our Supreme Court has recognized that “New Jersey has developed its special-employee doctrine by adopting the three-prong test recommended by Professor Larson for establishing a special-employment relationship.” *Volb v. Gen. Elec. Capital Corp.*, 139 N.J. 110, 116, 651 A.2d 1002 (1995)³ (quoting *Blessing*, supra, 94 N.J.Super. at 430–31, 228 A.2d 711) (quoting 1A Arthur Larson, *Workmen’s Compensation* § 48.00, at 710 (1966), and *Jones v. George F. Getty Oil Co.*, 92 F.2d 255, 263 (10th Cir.1937), cert. denied sub nom. *Associated Indemnity Corp. v. George F. Getty Oil Co.*, 303 U.S. 644, 58 S.Ct. 644, 82 L.Ed. 1106 (1938)).

The three-prong test renders the special employer liable for workers’ compensation “only if: [1] The employee has made a contract of hire, express or implied, with the special employer; [2] The work being done is essentially that of the special employer; and [3] The special employer has the right to control the details of the work.” *Volb*, supra, 139 N.J. at 116, 651 A.2d 1002 (quoting *Blessing*, supra, 94 N.J.Super. at 430–31, 228 A.2d 711).

To decide whether special employment exists, we have also utilized two additional factors. These additional factors ask “whether the special employer [4] pays the lent employee’s wages; and [5] has the power to hire, discharge or recall the employee.” *Blessing*, supra, 94 N.J.Super. at 430, 228 A.2d 711; *Kelly v. Geriatric and Med. Servs., Inc.*, 287 N.J.Super. 567, 571–72, 671 A.2d 631 (App.Div.), aff’d o.b., 147 N.J. 42, 685 A.2d 943 (1996); see also *Antheunisse*, supra, 229 N.J.Super. at 402–03, 551 A.2d 1006.

Traditionally, the five factors are weighed to determine special employment. No single factor is “necessarily dispositive, and not all five must be satisfied in order for a special employment relationship to exist.” *Marino v. Ind. Crating Co.*, 358 F.3d 241, 244 (3rd Cir.2004) (citing *Blessing*, supra, 94 N.J.Super. at 433–34, 228 A.2d 711). Generally, however, it is believed that the most significant factor is the third: whether the special employer had the right to control the special employee. See, e.g., *Volb*, supra, 139 N.J. at 116, 651 A.2d 1002; *Mahoney v. Nitroform Co.*, 20 N.J. 499, 506, 120 A.2d 454 (1956) (noting that the right to control is “essential” to the employment relationship); *Gore*, supra, 316 N.J.Super. at 241, 720 A.2d 350; *Santos v. Std. Havens, Inc.*, 225 N.J.Super. 16, 22, 541 A.2d 708 (App.Div.1988) (stressing the importance of the employer’s “right to exercise a higher degree of authority” over any actual discretion exercised by the employee); *Blessing*, supra, 94 N.J.Super. at 430–31, 228 A.2d 711 (the “sheer weight of authority is undoubtedly on the side of ‘control.’”).

III.

In this case, the motion judge found that Walrond was a special employee of the Academy because a “contract of hire may be inferred from Plaintiff remaining in the employment of the [Academy] for what was intended to be a one-week term.” The judge also found that there was “little question that the work Plaintiff was doing at the time of the incident was the work of the Academy.” In addition, the judge noted that “[w]hile the Plaintiff was present on the Academy grounds the sole people who could control the activities or give the Plaintiff assignments was Academy staff and not his superiors at the South Brunswick Police Department.” Finally, the judge also determined “[i]t has not been demonstrated by the moving papers of either party that the Academy could not cut short the intended one week term if they were not happy with the performance of the Plaintiff or simply no longer required his services.”

We do not quarrel with these findings, but note that conspicuous by its absence was any discussion of the fourth factor: whether the special employer pays the employee’s wages? Though this factor is part of the usual five-part test to determine special employment, traditionally it has not been given great weight. In fact, we have previously stated that “this factor is not necessary for determination that a special employment relationship exists.” Kelly, *supra*, 287 N.J.Super. at 577, 671 A.2d 631; (citing Volb, *supra*, 139 N.J. at 116, 651 A.2d 1002; Antheunisse, *supra*, 229 N.J.Super. at 403, 551 A.2d 1006).

The wage factor was discredited in Kelly, however, because “[t]he money used to pay [plaintiff’s] wages came indirectly out of the fees paid by defendant for plaintiff’s services.” *Ibid*. Indeed, that is the nature of most special employment arrangements. As Professor Larson indicated, “the net result is almost invariably that the special employer ultimately pays for the services received and the employee ultimately gets his wages.” Santos, *supra*, 225 N.J.Super. at 24, 541 A.2d 708 (quoting 1C Larson, *Workmen’s Compensation Law* § 48.30, p. 8–503–504 (1986)).

Thus, indirect or direct financial consideration flows to the special employee from the special employer. In every case we have been able to identify, where our courts have found a special employment relationship, the special employer paid the special employee directly or indirectly through fees to the general employer. E.g., *Pacanti v. Hoffman–La Roche, Inc.*, 245 N.J.Super. 188, 192, 584 A.2d 843 (App.Div.1991) (indirect payment)⁴; *Gore*, *supra*, 316 N.J.Super. at 241, 720 A.2d 350 (direct payment); *Kelly*, *supra*, 287 N.J.Super. at 577, 671 A.2d 631 (indirect payment); *Santos*, *supra*, 225 N.J.Super. at 24, 541 A.2d 708 (indirect payment); *Antheunisse*, *supra*, 229 N.J.Super. at 405, 551 A.2d 1006 (indirect payment); *Chickachop v. Manpower, Inc.*, 84 N.J.Super. 129, 139, 201 A.2d 90 (Law Div.1964) (indirect payment). In this case, however, there is no compensation whatsoever flowing from the Academy either to Walrond or to the Department.

IV.

In most workers' compensation statutes, "employee" is defined "to include every person in the service of another under any contract of hire, express or implied." 3-60 Larson's Workers' Compensation Law § 60.syn. (2005). Compensation is not specifically mentioned. In New Jersey, however, N.J.S.A. 34:15-36, defines "employee" as "synonymous with servant, and includes all natural persons, including officers of corporations, who perform service for an employer for financial consideration [.]"⁵ (emphasis added). Service performed in exchange "'for financial consideration' is a cardinal legal requirement in [workers'] compensation for the creation of the status of employer and employee." *Goff v. County of Union*, 26 N.J. Misc. 135, 138, 57 A.2d 480 (Dept. Labor 1948). That services be rendered for "financial consideration" has been recognized as "the primary governing standard defining an employee[.]" *Kraivanger v. Radburn Assoc.*, 335 N.J.Super. 169, 172, 762 A.2d 222 (App.Div.2000); *Gross v. Pellicane*, 65 N.J.Super. 386, 395, 167 A.2d 838 (Cty.Ct.1961) ("a prerequisite to the existence of an employment status is that there be a financial consideration flowing between the employer and the employee.").

Financial consideration, under the statute, need not be in the traditional form of a wage. *Johnson v. The United States Life Ins. Co.*, 74 N.J.Super. 343, 349-50, 181 A.2d 380 (App.Div.1962). For instance, free board and lodging or a rent-free apartment have been held to constitute consideration given in return for services rendered. See *Britten v. Berger*, 18 N.J. Misc. 215, 12 A.2d 875 (Dept. Labor 1940); *Simpson v. Vertty*, 3 N.J. Misc. 9 (Dept. Labor 1925). In addition, benefits such as vocational instruction, training, and incidental equipment have also been deemed compensation. *Heget v. Christ Hosp.*, 26 N.J. Misc. 189, 192, 58 A.2d 615 (Cty.Ct.1948) (finding that student nurse was employee of hospital even though she did not receive wages for her work).

Reimbursement or payment of expenses "could also be seen as a form of compensation when others who might be classified as 'true volunteers' were not so compensated." *Kraivanger, supra*, 335 N.J.Super. at 172, 762 A.2d 222. In addition, "even where no specific salary or manner of payment is fixed, the law in a proper case may spell out an agreement implied in fact to pay for the reasonable value of the services rendered." *Johnson, supra*, 74 N.J.Super. at 350, 181 A.2d 380. Notably, "employee status for workers' compensation purposes exists if any financial consideration at all passes." *Kraivanger, supra*, 335 N.J.Super. at 172, 762 A.2d 222. In short, "financial consideration" includes anything of value to be received by the individual in return for his services, but not the hope of future favors. *Hawksford v. Steinbacher Packing Co.*, 73 N.J.Super. 175, 180, 179 A.2d 181 (Cty.Ct.1962), *aff'd*, 80 N.J.Super. 129, 193 A.2d 163 (App.Div.), *certif. denied*, 41 N.J. 195, 195 A.2d 466 (1963).

It is not necessary, to be considered an employee, to receive "financial consideration" directly from an employer. Rather, indirect compensation for services is sufficient to establish the employment relationship. *Pickett v. Tryon Trucking Co.*, 214 N.J.Super. 76, 81, 518 A.2d 500

(App.Div.1986), certif. denied, 107 N.J. 149, 526 A.2d 210 (1987). In Pickett, for example, consideration passed from Tryon Trucking to a third-party who, in turn, paid petitioner for his services rendered to Tryon, and therefore, Pickett was found to be an employee of Tryon. Ibid. 1314 In contrast, however, volunteers who act out of civic or charitable motives with no expectation of payment are not employees. *Cerniglia v. City of Passaic*, 50 N.J.Super. 201, 208, 141 A.2d 558 (App.Div.1958). “It is clear that one who volunteers his [or her] services and neither receives nor expects to receive payment is not an employee for workers’ compensation purposes.” *Veit v. Courier Post Newspaper*, 154 N.J.Super. 572, 574, 382 A.2d 62 (App.Div.1977) (citing *Cerniglia*, supra, 50 N.J.Super. 201, 141 A.2d 558; *Armitage v. Trs. of Mt. Fern M.E. Church*, 33 N.J.Super. 367, 110 A.2d 154 (Cty.Ct.1954); 1A *Larson, Workmen’s Compensation Law*, § 47.41 (1973)). The *Cerniglia* court noted that “[t]he [workers’] compensation decisions uniformly exclude from the definition of ‘employee’ those who neither receive nor expect to receive any kind of pay for their services.” *Cerniglia*, supra, 50 N.J.Super. at 208, 141 A.2d 558 (citing 1A *Larson*, supra, § 47.41 at 696).

V.

In this case, Walrond was to receive his salary from the South Brunswick Police Department during his scheduled week as duty officer for the Academy. He remained in South Brunswick’s general employment. However, the Academy provided Walrond no financial consideration whatsoever. He received neither wages nor non-monetary benefits for his work, such as additional training, equipment, or free room and board. Moreover, the Academy did not in any way compensate or reimburse the South Brunswick Police Department for Walrond’s services.

Unlike the petitioner in Pickett, it cannot be said that Walrond received even indirect consideration from the Academy for his services. In *Marino* where special employment was not found, Marino was paid by his general employer “for the duration of his work at the [borrowed employment]. [The borrowing employer] made no contributions to his wages or benefits, nor did it offer any payment to the [general employer] in exchange for Marino’s work.” *Marino*, supra, 358 F.3d at 253.

In our case, Walrond was a volunteer duty officer uncompensated by the Academy. Walrond cannot under the Workers’ Compensation Act be considered an employee of the Academy, special or otherwise, and he is, therefore, not subject to the exclusivity provision of the Act. Accordingly, we reinstate Walrond’s negligence suit and remand for further proceedings. Reversed and remanded.

All Citations

382 N.J.Super. 227, 888 A.2d 491, 23 IER Cases 1858

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<https://www1.gmnews.com/2001/08/16/lightning-bolt-injures-officer-south-brunswick-patrolman-alert-and-resting/> (News story).

817 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.

Firestone Tire and Rubber Co. v. Bruch (1989)

Justice O'CONNOR delivered the opinion of the U.S. Supreme Court.

This case presents two questions concerning the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, [29 U.S.C. § 1001](#) et seq. First, we address the appropriate standard of judicial review of benefit determinations by fiduciaries or plan administrators under ERISA. Second, we determine which persons are "participants" entitled to obtain information about benefit plans covered by ERISA.

I

Late in 1980, petitioner Firestone Tire and Rubber Company (Firestone) sold, as going concerns, the five plants composing its Plastics Division to Occidental Petroleum Company (Occidental). Most of the approximately 500 salaried employees at the five plants were rehired by Occidental and continued in their same positions without interruption and at the same rates of pay. At the time of the sale, Firestone maintained three pension and welfare benefit plans for its employees: a termination pay plan, a retirement plan, and a stock purchase plan. Firestone was the sole source of funding for the plans and had not established separate trust funds out of which to pay the benefits from the plans. All three of the plans were either "employee welfare benefit plans" or "employee pension benefit plans" governed (albeit in different ways) by ERISA. By operation of law, Firestone itself was the administrator, [29 U.S.C. § 1002\(16\)\(A\)\(ii\)](#), and fiduciary, [§ 1002\(21\)\(A\)](#), of each of these "unfunded" plans. At the time of the sale of its Plastics Division, Firestone was not aware that the termination pay plan was governed by ERISA, and therefore had not set up a claims procedure, § 1133, nor complied with ERISA's reporting and disclosure obligations, §§ 1021-1031, with respect to that plan.

Respondents, six Firestone employees who were rehired by Occidental, sought severance benefits from Firestone under the termination pay plan. In relevant part, that plan provides as follows:

“If your service is discontinued prior to the time you are eligible for pension benefits, you will be given termination pay if released because of a reduction in work force or if you become physically or mentally unable to perform your job.

“The amount of termination pay you will receive will depend on your period of credited company service.”

Several of the respondents also sought information from Firestone regarding their benefits under all three of the plans pursuant to certain ERISA disclosure provisions. See [§§ 1024\(b\)\(4\), 1025\(a\)](#). Firestone denied respondents severance benefits on the ground that the sale of the Plastics Division to Occidental did not constitute a “reduction in work force” within the meaning of the termination pay plan. In addition, Firestone denied the requests for information concerning benefits under the three plans. Firestone concluded that respondents were not entitled to the information because they were no longer “participants” in the plans.

Respondents then filed a class action on behalf of “former, salaried, non-union employees who worked in the five plants that comprised the Plastics Division of Firestone.” Complaint ¶ 9, App. 94. The action was based on [§ 1132\(a\)\(1\)](#), which provides that a “civil action may be brought ... by a participant or beneficiary [of a covered plan] ... (A) for the relief provided for in [[§ 1132\(c\)](#)], [and] (B) to recover benefits due to him under the terms of his plan.” In Count I of their complaint, respondents alleged that they were entitled to severance benefits because Firestone’s sale of the Plastics Division to Occidental constituted a “reduction in work force” within the meaning of the termination pay plan. Complaint ¶¶ 23-44, App. 98-104. In Count VII, respondents alleged that they were entitled to damages under [§ 1132\(c\)](#) because Firestone had breached its reporting obligations under [§ 1025\(a\)](#). Complaint ¶¶ 87-94, App. 104-106.

The District Court granted Firestone’s motion for summary judgment. [640 F.Supp. 519 \(ED Pa.1986\)](#). With respect to Count I, the District Court held that Firestone had satisfied its fiduciary duty under ERISA because its decision not to pay severance benefits to respondents under the termination pay plan was not arbitrary or capricious. [Id., at 521-526](#). With respect to Count VII, the District Court held that, although [§ 1024\(b\)\(4\)](#) imposes a duty on a plan administrator to respond to written requests for information about the plan, that duty extends only to requests by plan participants and beneficiaries. Under ERISA a plan participant is “any employee or former employee ... who is or may become eligible to receive a benefit of any type from an employee benefit plan.” [§ 1002\(7\)](#). A beneficiary is “a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.” [§ 1002\(8\)](#). The District Court concluded that respondents were not entitled to damages under [§ 1132\(c\)](#) because they were not plan “participants” or “beneficiaries” at the time they requested information from [Firestone. 640 F.Supp., at 534.](#)

The Court of Appeals reversed the District Court’s grant of summary judgment on Counts I and VII. [828 F.2d 134 \(CA3 1987\)](#). With respect to Count I, the Court of Appeals acknowledged that most federal courts have reviewed the denial of benefits by ERISA fiduciaries and administrators under the arbitrary and capricious standard. [Id., at 138](#) (citing cases). It noted, however, that the arbitrary and capricious standard had been softened in cases where fiduciaries and administrators had some bias or adverse interest. [Id., at 138-140](#). See, e.g., [Jung v. FMC Corp., 755 F.2d 708, 711-712 \(CA9 1985\)](#) (where “the employer’s denial of benefits to a class avoids a very considerable outlay [by the employer], the reviewing court should consider that fact in applying the arbitrary and capricious standard of review,” and “[l]ess deference should be given to the trustee’s decision”).

The Court of Appeals held that where an employer is itself the fiduciary and administrator of an unfunded benefit plan, its decision to deny benefits should be subject to de novo judicial review. It reasoned that in such situations deference is unwarranted given the lack of assurance of impartiality on the part of the employer. [828 F.2d, at 137-145](#). With respect to Count VII, the Court of Appeals held that the right to request and receive information about an employee benefit plan “most sensibly extend[s] both to people who are in fact entitled to a benefit under the plan and to those who claim to be but in fact are not.” [Id., at 153](#). Because the District Court had applied different legal standards in granting summary judgment in favor of Firestone on Counts I and VII, the Court of Appeals remanded the case for further proceedings consistent with its opinion.

We granted certiorari, [485 U.S. 986, 108 S.Ct. 1288, 99 L.Ed.2d 498 \(1988\)](#), to resolve the conflicts among the Courts of Appeals as to the appropriate standard of review in actions under [§ 1132\(a\)\(1\)\(B\)](#) and the interpretation of the term “participant” in [§ 1002\(7\)](#). We now affirm in part, reverse in part, and remand the case for further proceedings.

II

ERISA provides “a panoply of remedial devices” for participants and beneficiaries of benefit plans. [Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 146, 105 S.Ct. 3085, 3092, 87 L.Ed.2d 96 \(1985\)](#). Respondents’ action asserting that they were entitled to benefits because the sale of Firestone’s Plastics Division constituted a “reduction in work force” within the meaning of the termination pay plan was based on the authority of [§ 1132\(a\)\(1\)\(B\)](#). That provision allows a suit to recover benefits due under the plan, to enforce rights under the terms of the plan, and to obtain a declaratory judgment of future entitlement to benefits under the provisions of the plan contract. The discussion which follows is limited to the appropriate standard of review in [§ 1132\(a\)\(1\)\(B\)](#) actions challenging denials of benefits based on plan interpretations. We express no view as to the appropriate standard of review for actions under other remedial provisions of ERISA.

A

Although it is a “comprehensive and reticulated statute,” [Nachman Corp. v. Pension Benefit Guaranty Corp.](#), 446 U.S. 359, 361, 100 S.Ct. 1723, 1726, 64 L.Ed.2d 354 (1980), ERISA does not set out the appropriate standard of review for actions under [§ 1132\(a\)\(1\)\(B\)](#) challenging benefit eligibility determinations. To fill this gap, federal courts have adopted the arbitrary and capricious standard developed under 61 [Stat. 157, 29 U.S.C. § 186\(c\)](#), a provision of the Labor Management Relations Act, 1947 (LMRA). See, e.g., [Struble v. New Jersey Brewery Employees’ Welfare Trust Fund](#), 732 F.2d 325, 333 (CA3 1984); [Bayles v. Central States, Southeast and Southwest Areas Pension Fund](#), 602 F.2d 97, 99-100, and n. 3 (CA5 1979). In light of Congress’ general intent to incorporate much of LMRA fiduciary law into ERISA, see [NLRB v. Amax Coal Co.](#), 453 U.S. 322, 332, 101 S.Ct. 2789, 2795-2796, 69 L.Ed.2d 672 (1981), and because ERISA, like the LMRA, imposes a duty of loyalty on fiduciaries and plan administrators, Firestone argues that the LMRA arbitrary and capricious standard should apply to ERISA actions. See Brief for Petitioners 13-14. A comparison of the LMRA and ERISA, however, shows that the wholesale importation of the arbitrary and capricious standard into ERISA is unwarranted.

In relevant part, [29 U.S.C. § 186\(c\)](#) authorizes unions and employers to set up pension plans jointly and provides that contributions to such plans be made “for the sole and exclusive benefit of the employees ... and their families and dependents.” The LMRA does not provide for judicial review of the decisions of LMRA trustees. Federal courts adopted the arbitrary and capricious standard both as a standard of review and, more importantly, as a means of asserting jurisdiction over suits under [§ 186\(c\)](#) by beneficiaries of LMRA plans who were denied benefits by trustees. See [Van Boxel v. Journal Co. Employees’ Pension Trust](#), 836 F.2d 1048, 1052 (CA7 1987) (“[W]hen a plan provision as interpreted had the effect of denying an application for benefits unreasonably, or as it came to be said, arbitrarily and capriciously, courts would hold that the plan as ‘structured’ was not for the sole and exclusive benefit of the employees, so that the denial of benefits violated [[§ 186\(c\) 1](#)].” See also Comment, [The Arbitrary and Capricious Standard Under ERISA: Its Origins and Application](#), 23 *Duquesne L.Rev.* 1033, 1037-1039 (1985). Unlike the LMRA, ERISA explicitly authorizes suits against fiduciaries and plan administrators to remedy statutory violations, including breaches of fiduciary duty and lack of compliance with benefit plans. See [29 U.S.C. §§ 1132\(a\), 1132\(f\)](#). See generally [Pilot Life Ins. Co. v. Dedeaux](#), 481 U.S. 41, 52-57, 107 S.Ct. 1549, 1555-1558, 95 L.Ed.2d 39 (1987) (describing scope of [§ 1132\(a\)](#)). Thus, the *raison d’être* for the LMRA arbitrary and capricious standard—the need for a jurisdictional basis in suits against trustees—is not present in ERISA. See Note, [Judicial Review of Fiduciary Claim Denials Under ERISA: An Alternative to the Arbitrary and Capricious Test](#), 71 *Cornell L.Rev.* 986, 994, n. 40 (1986). Without this jurisdictional analogy, LMRA principles offer no support for the adoption of the arbitrary and capricious standard insofar as [§ 1132\(a\)\(1\)\(B\)](#) is concerned.

B

ERISA abounds with the language and terminology of trust law. See, e.g., [29 U.S.C. §§ 1002\(7\)](#) (“participant”), [1002\(8\)](#) (“beneficiary”), [1002\(21\)\(A\)](#) (“fiduciary”), [1103\(a\)](#) (“trustee”),

1104 (“fiduciary duties”). ERISA’s legislative history confirms that the Act’s fiduciary responsibility provisions, [29 U.S.C. §§ 1101-1114](#), “codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.” [H.R.Rep. No. 93-533, p. 11](#) (1973), U.S.Code Cong. & Admin.News 1974, pp. 4639, 4649. Given this language and history, we have held that courts are to develop a “federal common law of rights and obligations under ERISA-regulated plans.” [Pilot Life Ins. Co. v. Dedeaux, supra, at 56, 107 S.Ct., at 1558](#). See also [Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 24, n. 26, 103 S.Ct. 2841, 2854, n. 26, 77 L.Ed.2d 420 \(1983\)](#) (“[A] body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans’”) (quoting 129 Cong.Rec. 29942 (1974) (remarks of Sen. Javits)). In determining the appropriate standard of review for actions under [§ 1132\(a\)\(1\)\(B\)](#), we are guided by principles of trust law. [Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 570, 105 S.Ct. 2833, 2840, 86 L.Ed.2d 447 \(1985\)](#).

Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers. See [Restatement \(Second\) of Trusts § 187 \(1959\)](#) (“[w]here discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion”). See also G. Bogert & G. Bogert, *Law of Trusts and Trustees* § 560, pp. 193-208 (2d rev. ed. 1980). A trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee’s interpretation will not be disturbed if reasonable. *Id.*, § 559, at 169-171. Whether “the exercise of a power is permissive or mandatory depends upon the terms of the trust.” 3 W. Fratcher, *Scott on Trusts* § 187, p. 14 (4th ed. 1988). Hence, over a century ago we remarked that “[w]hen trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a discretion vested in them by the instrument under which they act.” [Nichols v. Eaton, 91 U.S. 716, 724-725, 23 L.Ed. 254 \(1875\)](#) (emphasis added). See also [Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., supra, 472 U.S., at 568, 105 S.Ct., at 2839](#) (“The trustees’ determination that the trust documents authorize their access to records here in dispute has significant weight, for the trust agreement explicitly provides that ‘any construction [of the agreement’s provisions] adopted by the Trustees in good faith shall be binding upon the Union, Employees, and Employers’”). Firestone can seek no shelter in these principles of trust law, however, for there is no evidence that under Firestone’s termination pay plan the administrator has the power to construe uncertain terms or that eligibility determinations are to be given deference. See Brief for Respondents 24-25; Reply Brief for Petitioners 7, n. 2; Brief for United States as Amicus Curiae 14-15, n. 11.

Finding no support in the language of its termination pay plan for the arbitrary and capricious standard, Firestone argues that as a matter of trust law the interpretation of the terms of a plan is an inherently discretionary function. But other settled principles of trust law, which point to de novo review of benefit eligibility determinations based on plan interpretations, belie this

contention. As they do with contractual provisions, courts construe terms in trust agreements without deferring to either party's interpretation. "The extent of the duties and powers of a trustee is determined by the rules of law that are applicable to the situation, and not the rules that the trustee or his attorney believes to be applicable, and by the terms of the trust as the court may interpret them, and not as they may be interpreted by the trustee himself or by his attorney." 3 W. Fratcher, *Scott on Trusts* § 201, at 221 (emphasis added). A trustee who is in doubt as to the interpretation of the instrument can protect himself by obtaining instructions from the court. Bogert & Bogert, *supra*, § 559, at 162-168; [Restatement \(Second\) of Trusts § 201](#), Comment b (1959). See also [United States v. Mason](#), 412 U.S. 391, 399, 93 S.Ct. 2202, 2208, 37 L.Ed.2d 22 (1973). The terms of trusts created by written instruments are "determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible." [Restatement \(Second\) of Trusts § 4](#), Comment d (1959).

The trust law *de novo* standard of review is consistent with the judicial interpretation of employee benefit plans prior to the enactment of ERISA. Actions challenging an employer's denial of benefits before the enactment of ERISA were governed by principles of contract law. If the plan did not give the employer or administrator discretionary or final authority to construe uncertain terms, the court reviewed the employee's claim as it would have any other contract claim— by looking to the terms of the plan and other manifestations of the parties' intent. See, e.g., [Conner v. Phoenix Steel Corp.](#), 249 A.2d 866 (Del.1969); [Atlantic Steel Co. v. Kitchens](#), 228 Ga. 708, 187 S.E.2d 824 (1972); [Sigman v. Rudolph Wurlitzer Co.](#), 57 Ohio App. 4, 11 N.E.2d 878 (1937).

Despite these principles of trust law pointing to a *de novo* standard of review for claims like respondents', Firestone would have us read ERISA to require the application of the arbitrary and capricious standard to such claims. ERISA defines a fiduciary as one who "exercises any discretionary authority or discretionary control respecting management of [a] plan or exercises any authority or control respecting management or disposition of its assets." [29 U.S.C. § 1002\(21\)\(A\)\(i\)](#). A fiduciary has "authority to control and manage the operation and administration of the plan," § 1102(a)(1), and must provide a "full and fair review" of claim denials, § 1133(2). From these provisions, Firestone concludes that an ERISA plan administrator, fiduciary, or trustee is empowered to exercise all his authority in a discretionary manner subject only to review for arbitrariness and capriciousness. But the provisions relied upon so heavily by Firestone do not characterize a fiduciary as one who exercises entirely discretionary authority or control. Rather, one is a fiduciary to the extent he exercises any discretionary authority or control. Cf. [United Mine Workers of America Health and Retirement Funds v. Robinson](#), 455 U.S. 562, 573-574, 102 S.Ct. 1226, 1232-1233, 71 L.Ed.2d 419 (1982) (common law of trusts did not alter nondiscretionary obligation of trustees to enforce eligibility requirements as required by LMRA trust agreement).

ERISA was enacted “to promote the interests of employees and their beneficiaries in employee benefit plans,” [Shaw v. Delta Airlines, Inc.](#), 463 U.S. 85, 90, 103 S.Ct. 2890, 2896, 77 L.Ed.2d 490 (1983), and “to protect contractually defined benefits,” [Massachusetts Mutual Life Ins. Co. v. Russell](#), 473 U.S., at 148, 105 S.Ct., at 3093. See generally [29 U.S.C. § 1001](#) (setting forth congressional findings and declarations of policy regarding ERISA). Adopting Firestone’s reading of ERISA would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted. Nevertheless, Firestone maintains that congressional action after the passage of ERISA indicates that Congress intended ERISA claims to be reviewed under the arbitrary and capricious standard. At a time when most federal courts had adopted the arbitrary and capricious standard of review, a bill was introduced in Congress to amend [§ 1132](#) by providing de novo review of decisions denying benefits. See H.R. 6226, 97th Cong., 2d Sess. (1982), reprinted in Pension Legislation: Hearings on H.R. 1614 et al. before the Sub-committee on Labor-Management Relations of the House Committee on Education and Labor, 97th Cong., 2d Sess., 60 (1983). Because the bill was never enacted, Firestone asserts that we should conclude that Congress was satisfied with the arbitrary and capricious standard. See Brief for Petitioners 19-20. We do not think that this bit of legislative inaction carries the day for Firestone. Though “instructive,” failure to act on the proposed bill is not conclusive of Congress’ views on the appropriate standard of review. [Bowsher v. Merck & Co.](#), 460 U.S. 824, 837, n. 12, 103 S.Ct. 1587, 1595, n. 12, 75 L.Ed.2d 580 (1983). The bill’s demise may have been the result of events that had nothing to do with Congress’ view on the propriety of de novo review. Without more, we cannot ascribe to Congress any acquiescence in the arbitrary and capricious standard. “[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.” [United States v. Price](#), 361 U.S. 304, 313, 80 S.Ct. 326, 332, 4 L.Ed.2d 334 (1960).

Firestone and its amici also assert that a de novo standard would contravene the spirit of ERISA because it would impose much higher administrative and litigation costs and therefore discourage employers from creating benefit plans. See, e.g., Brief for American Council of Life Insurance et al. as Amici Curiae 10-11. Because even under the arbitrary and capricious standard an employer’s denial of benefits could be subject to judicial review, the assumption seems to be that a de novo standard would encourage more litigation by employees, participants, and beneficiaries who wish to assert their right to benefits. Neither general principles of trust law nor a concern for impartial decisionmaking, however, forecloses parties from agreeing upon a narrower standard of review. Moreover, as to both funded and unfunded plans, the threat of increased litigation is not sufficient to outweigh the reasons for a de novo standard that we have already explained.

As this case aptly demonstrates, the validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue. Consistent with established principles of trust law, we hold that a denial of benefits challenged under [§ 1132\(a\)\(1\)\(B\)](#) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary

discretionary authority to determine eligibility for benefits or to construe the terms of the plan. Because we do not rest our decision on the concern for impartiality that guided the Court of Appeals, see [828 F.2d, at 143-146](#), we need not distinguish between types of plans or focus on the motivations of plan administrators and fiduciaries. Thus, for purposes of actions under [§ 1132\(a\)\(1\)\(B\)](#), the de novo standard of review applies regardless of whether the plan at issue is funded or unfunded and regardless of whether the administrator or fiduciary is operating under a possible or actual conflict of interest. Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a “facto[r] in determining whether there is an abuse of discretion.” [Restatement \(Second\) of Trusts § 187](#), Comment d (1959).

III

Respondents unsuccessfully sought plan information from Firestone pursuant to [29 U.S.C. § 1024\(b\)\(4\)](#), one of ERISA’s disclosure provisions. That provision reads as follows:

“The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary [of Labor] may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.”

When Firestone did not comply with their request for information, respondents sought damages under [29 U.S.C. § 1132\(c\)\(1\)\(B\) \(1982 ed., Supp. IV\)](#), which provides that “[a]ny administrator ... who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary ... may in the court’s discretion be personally liable to such participant or beneficiary in the amount of up to \$100 a day.”

Respondents have not alleged that they are “beneficiaries” as defined in [§ 1002\(8\)](#). See Complaint ¶¶ 87-95, App. 104-106. The dispute in this case therefore centers on the definition of the term “participant,” which is found in [§ 1002\(7\)](#):

“The term ‘participant’ means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.”

The Court of Appeals noted that [§ 1132\(a\)\(1\)](#) allows suits for benefits “by a participant or

beneficiary.” Finding that it would be illogical to say that a person could only bring a claim for benefits if he or she was entitled to benefits, the Court of Appeals reasoned that [§ 1132\(a\)\(1\)](#) should be read to mean that “ ‘a civil action may be brought by someone who claims to be a participant or beneficiary.’ ” [828 F.2d, at 152](#). It went on to conclude that the same interpretation should apply with respect to [§ 1024\(b\)\(4\)](#): “A provision such as that one, entitling people to information on the extent of their benefits, would most sensibly extend both to people who are in fact entitled to a benefit under the plan and to those who claim to be but in fact are not.” [Id., at 153](#).

The Court of Appeals “concede[d] that it is expensive and inefficient to provide people with information about benefits— and to permit them to obtain damages if information is withheld— if they are clearly not entitled to the benefits about which they are informed.” *Ibid.* It tried to solve this dilemma by suggesting that courts use discretion and not award damages if the employee’s claim for benefits was not colorable or if the employer did not act in bad faith. There is, however, a more fundamental problem with the Court of Appeals’ interpretation of the term “participant”: it strays far from the statutory language. Congress did not say that all “claimants” could receive information about benefit plans. To say that a “participant” is any person who claims to be one begs the question of who is a “participant” and renders the definition set forth in [§ 1002\(7\)](#) superfluous. Indeed, respondents admitted at oral argument that “the words point against [them].” *Tr. of Oral Arg.* 40.

In our view, the term “participant” is naturally read to mean either “employees in, or reasonably expected to be in, currently covered employment,” [Saladino v. I.L.G.W.U. National Retirement Fund, 754 F.2d 473, 476 \(CA2 1985\)](#), or former employees who “have ... a reasonable expectation of returning to covered employment” or who have “a colorable claim” to vested benefits, [Kuntz v. Reese, 785 F.2d 1410, 1411 \(CA9\)](#) (per curiam), cert. denied, [479 U.S. 916, 107 S.Ct. 318, 93 L.Ed.2d 291 \(1986\)](#). In order to establish that he or she “may become eligible” for benefits, a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future. “This view attributes conventional meanings to the statutory language since all employees in covered employment and former employees with a colorable claim to vested benefits ‘may become eligible.’ A former employee who has neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits, however, simply does not fit within the [phrase] ‘may become eligible.’ ” *Saladino v. I.L.G.W.U. National Retirement Fund, supra*, at 476.

We do not think Congress’ purpose in enacting the ERISA disclosure provisions—ensuring that “the individual participant knows exactly where he stands with respect to the plan,” [H.R.Rep. No. 93-533, p. 11](#) (1973), *U.S.Code Cong. & Admin.News* 1978, p. 4649—will be thwarted by a natural reading of the term “participant.” Faced with the possibility of \$100 a day in penalties under [§ 1132\(c\)\(1\)\(B\)](#), a rational plan administrator or fiduciary would likely opt to provide a

claimant with the information requested if there is any doubt as to whether the claimant is a “participant,” especially when the reasonable costs of producing the information can be recovered. See [29 CFR § 2520.104b-30\(b\) \(1987\)](#) (the “charge assessed by the plan administrator to cover the costs of furnishing documents is reasonable if it is equal to the actual cost per page to the plan for the least expensive means of acceptable reproduction, but in no event may such charge exceed 25 cents per page”).

The Court of Appeals did not attempt to determine whether respondents were “participants” under [§ 1002\(7\)](#). See [828 F.2d, at 152-153](#). We likewise express no views as to whether respondents were “participants” with respect to the benefit plans about which they sought information. Those questions are best left to the Court of Appeals on remand.

For the reasons set forth above, the decision of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded for proceedings consistent with this opinion.

So ordered.

Justice SCALIA, concurring in part and concurring in the judgment.

I join the judgment of the Court and Parts I and II of its opinion. I agree with its disposition but not all of its reasoning regarding Part III.

The Court holds that a person with a colorable claim is one who “‘may become eligible’ for benefits” within the meaning of the statutory definition of “participant,” because, it reasons, such a claim raises the possibility that “he or she will prevail in a suit for benefits.” Ante, at 958. The relevant portion of the definition, however, refers to an employee “who is or may become eligible to receive a benefit.” There is an obvious parallelism here: one “may become” eligible by acquiring, in the future, the same characteristic of eligibility that someone who “is” eligible now possesses. And I find it contrary to normal usage to think that the characteristic of “being” eligible consists of “having prevailed in a suit for benefits.” Eligibility exists not merely during the brief period between formal judgment of entitlement and payment of benefits. Rather, one is eligible whether or not he has yet been adjudicated to be—and, similarly, one can become eligible before he is adjudicated to be. It follows that the phrase “may become eligible” has nothing to do with the probabilities of winning a suit. I think that, properly read, the definition of “participant” embraces those whose benefits have vested, and those who (by reason of current or former employment) have some potential to receive the vesting of benefits in the future, but not those who have a good argument that benefits have vested even though they have not.

Applying the definition in this fashion would mean, of course, that if the employer guesses right that a person with a colorable claim is in fact not entitled to benefits, he can deny that person the information required to be provided under [29 U.S.C. § 1024\(b\)\(4\)](#) without paying the

\$100-a-day damages assessable for breach of that obligation, [29 U.S.C. § 1132\(c\)\(1\)\(B\) \(1982 ed., Supp. IV\)](#). Since, however, no employer sensible enough to consult the law would be senseless enough to take that risk, giving the term its defined meaning would produce precisely the same incentive for disclosure as the Court's opinion.

[Postscript: From the Supreme Court brief of the employees, we learn the following:

“Termination Pay ... If your service is discontinued prior to the time you are eligible for pension benefits, you will be given termination pay if released because of a reduction in work force or if you become physically or mentally unable to perform your jobs.

The amount of termination pay you will receive will depend on your period of credited company service. [Pet. App. A48]

The terms of Firestone's severance plan were set forth in Firestone's Salaried Personnel Manual, a confidential document distributed only to personnel managers and senior management executives, J.A. 121, and the existence of which was unknown to at least some of the plaintiffs.

The Manual defines the operative phrase “reduction in work force” as the “Termination of employment by the Company, without prejudice to the employee.” (§ 1.54) The Manual goes on to define the other types of termination of employment (“resignation,” “separation,” “discharge,” “retirement,” and “death”) (§ 1.54); to require that “[a]ll terminating employees must have an exit interview to establish the true cause of termination” (§ 1.51); and to state the amount of severance pay--two weeks' pay per year of service--for employees “terminated under the Reduction-in-Force policy.” (§ 2.11.3(C)).

At the time of the events in question, Firestone had not appointed any “board, committee or trustees to administer the severance pay plan”; instead, according to Thomas Robinson, Firestone's Director of Compensation and Management Development, the plan was administered by “personnel managers in our various locations, using policy as a general guideline” and where severance pay was awarded, the payment was made out of Firestone's general treasury, rather than out of a trust or other segregated fund.

Moreover, as Robinson also testified, as of the time of the sale Firestone was “unaware” that its “termination pay policy” was regulated by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 et seq (“ERISA”). J.A. 125.

Lacking any administrator or other structure for its severance pay plan, upon consummating the sale to Occidental Firestone decided, through its corporate officers, not to assume the substantial cost--in excess of six million dollars--of paying severance pay to its over 500 salaried employees. Instead, Firestone concluded that the termination of its employees did not constitute a “reduction in force” as that phrase is defined in the Manual, viz., a “termination without prejudice to the employee.”

Two of the named plaintiffs wrote to Firestone concerning the denial of termination pay. By letter dated March 7, 1981, plaintiff Leonard Smolinski “made application for my severance pay which is due me” and stat[ed] that if “my request is denied, I would like a written statement verifying this fact”; Smolinski did not receive any response to this request. Similarly, on May 4,

1981, plaintiff Albert Schade wrote to Firestone requesting “our outline and/or contract on company severance” and “the provision of severance from the company”; Firestone responded to Schade’s letter by stating its conclusion that because Schade was rehired by Occidental the “termination provisions do not apply,” but Firestone did not provide Schade with the documents he had requested.

**Alexandra Berzon and Mark Maremont,
The Perils of Workers’ Comp for Injured Cirque du Soleil Performers: Unlike Professional Athletes, Injured Cirque Stars Don’t Get to Keep Their Salaries, Wall Street Journal
(April 24, 2015)**

April 24, 2015 5:30 a.m. ET

Natasha Hallett was a longtime performer at Cirque du Soleil, playing a key role in the circus giant’s La Nouba show in Orlando, Fla. Then she made a mistake.

Ms. Hallett says she forgot to put a double loop through her harness for a flying trick, and a colleague didn’t notice the oversight during a safety check. She tumbled about 40 feet to the stage during a Cirque performance, shattering 19 bones from the waist down. “Like a horse that broke its leg, once you are injured you are pretty much no good for them anymore,” Ms. Hallett said.

Artists at [Cirque du Soleil put their unusually adept bodies at risk](#) to entertain audiences, just as many professional athletes do. But unlike many pro athletes, Cirque performers don’t get special treatment, such as continuing to receive regular pay, if they suffer severe injuries.

More on Cirque du Soleil

- [Injuries Put Safety in Spotlight at Cirque du Soleil](#)
- [Cirque du Soleil Nears Sales to TPG Group](#)
- [Photos: Backstage at Cirque du Soleil](#)

Cirque du Soleil reassessed its safety practices and revamped its show ‘Kà’ after a fatal accident in 2013. But questions remain about whether the show pushes the limits of daredevil stunts.

Photo: Eric Jamison

Instead, most of them are treated like ordinary workers, thrust into a complex workers’ compensation system that provides limited recompense for lost wages and permanent disabilities.

A small number of injured workers whose contracts provide for it do receive extra compensation after an injury, executives said. But relying primarily on workers’ compensation payments “is the best solution in terms of management,” Cirque spokeswoman Renée-Claude Ménard said. The company declined to comment on specific cases of injury.

Advertisement

For a Cirque worker injured in a major accident, the aftermath is a rarely publicized aspect of the stunning stunts that Cirque has turned into an \$850-million-a-year business.

“Pain is everything for your life,” Artur Dashkevich, a former Cirque performer from Belarus, said a doctor once told him. He became permanently disabled after injuring his neck in a 2007 training accident in Montreal. He returned to Belarus, but said he can’t work and lives on about \$21,000 a year from the Quebec workers’ compensation system. Others have taken jobs such as driving taxis or cutting hair while their bodies remain in pain.

Cirque executives said 80% to 90% of its performers’ injuries involve soft-tissue damage such as muscle or joint strains that accumulate over time and aren’t linked to a major accident or a single career-ending event.



ENLARGE

Natasha Hallett looks through old photos. She started at Cirque in 1992 just after competing in the Olympics. At the time of her injury in 2007, she was making about \$150,000 a year. Photo: JOSH ANDERSON FOR THE WALL STREET JOURNAL

But Cirque stands out for the number of injuries to its performers, many of which become workers' compensation claims. A Wall Street Journal analysis showed that in 2011, the most recent year for which data is available, [Cirque's Kà show in Las Vegas had a higher rate of injury](#) than all but 78 workplaces on a list of nearly 52,000 of the most dangerous compiled by the U.S. Occupational Safety and Health Administration.

Nicolas Panet-Raymond, Cirque's head of safety, said that some circuses classify their performers as contractors, which means they don't have to provide any injury insurance coverage for them. By contrast, Cirque considers its performers employees. That means, he said, that in most places where it operates, the state or country requires the company to pay for workers' compensation insurance so that workers can get money and health care if they are injured.

Workers' compensation laws vary widely, but they generally prevent workers from suing their employer for negligence.

'Pain is everything for your life'

—Artur Dashkevich, a former Cirque performer, said a doctor once told him

Meaghan Muller, a performer from the Atlanta area who was badly injured in a fall onto a concrete floor while training at Cirque's Montreal headquarters, said that Quebec authorities required her to seek medical treatment in Canada for the first year after her accident. She later needed four surgeries in the U.S. to correct what Canadian surgeons had done, she said.

Still, many employee attorneys and Cirque performers who have used the workers' compensation system through Cirque say that the medical coverage provided is generally good. Their bigger frustration stems from the financial compensation they get through workers' compensation for permanent disabilities.

Ms. Hallett started at Cirque soon after going to the Olympics for Canada in 1992. At the time of her injury in 2007, she was making about \$150,000 a year, performing on a year-to-year contract like most Cirque artists.

After her injury, her pay dropped about 85% to about \$2,000 a month due to a cap on compensation payouts for Florida workers. Her benefits ran out after she hit the maximum allowed for two years of such pay, and she lost her house to foreclosure.

When a doctor evaluated her to determine what she would be paid as compensation for a permanent ankle injury, he used a standard formula to determine how much use she had lost.

**ENLARGE**

Natasha Hallett and her boyfriend John Baskett with their children Jacob, 3, and Ryder, 1, at their home in Nashville, Tenn. Photo: JOSH ANDERSON FOR THE WALL STREET JOURNAL

What that formula didn't take into account was that Ms. Hallett needed far more than normal use of her ankle to do a job in her field. "What we're doing is a little bit more advanced than just trying to get back to walking," she said.

She was offered \$45,000, she said. After disputing the decision she settled for \$170,000, a large amount in Florida, according to workers' compensation attorneys there.

Mr. Panet-Raymond agreed the system is problematic. "Workers' comp has not been established for high performers," he said. "We cannot ask workers' comp to build scales to represent our specific nature."

Most top professional sports teams, including Major League Baseball, which are among the only workplaces to come close to Cirque in likelihood of injuries, give workers their full salary until their multiyear contracts expire. In the National Football League, injured players receive only a portion of their salary for a few years if they can't play, but they generally receive large upfront bonus payments to make up for the risk, according to sports agents and lawyers.

Ms. Muller criticized Cirque for not providing more generous financial settlements. "These are not flukes, these are accidents," she said. "You can't send people home broken and broke."

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**Alexandra Berzon and Mark Maremont, *Backstage at Cirque du Soleil*, Wall Street Journal
(April 22, 2015) 1:25 p.m. ET
[16 COMMENTS](#)**

LAS VEGAS—Sarah Guillot-Guyard lay dying on the floor of a basement inside a darkened Cirque du Soleil theater here, one leg broken and blood pooling under her head.

It was June 2013, and the 31-year-old mother of two had fallen 94 feet in front of hundreds of horrified spectators after the wire attached to her safety harness shredded while she performed in the dramatic aerial climax of the company's most technically challenging production, "Kà."

It was the first fatality during a Cirque show, and it capped an increase in injuries at Cirque with the "Kà" production. The show had one of the highest rates of serious injuries of any workplace in the country, according to safety records kept by Cirque that were compared with federal records by The Wall Street Journal.

Montreal-based Cirque, which said Monday that its founder had agreed to [sell a controlling stake to an investor group](#), has evolved from a fringe troupe of avant-garde stilt walkers and clowns into a nearly \$1-billion-a-year business. Its 18 shows around the world, including eight resident shows in Las Vegas, combine music, dance and dramatic spectacle with high-wire and acrobatic feats of daring, to dazzle audiences who typically pay \$100 or more for tickets.

Cirque is "always trying to push the envelope," driven in part by Cirque's own artistic drive, but also by the public "asking for bigger and flashier," said Bill Sapsis, a theatrical rigging expert in Philadelphia who has worked with it.

Advertisement

The death of Ms. Guillot-Guyard, along with hundreds of injuries among Cirque du Soleil performers, puts in stark relief the question of how much risk is acceptable for the modern,

corporate circus, and whether Ms. Guillot-Guyard's death or some injuries could have been prevented.

Cirque said the incident launched a broad re-evaluation of safety practices at the 30-year-old company, which marketed "Kà" as "extreme," "terrifying" and "dangerous."

"It forced us to review the way we work," said Cirque's safety director, Nicolas Panet-Raymond.

Multiple efforts to reach Ms. Guillot-Guyard's family for comment were unsuccessful.

Circuses have long marketed "death-defying" stunts to sell tickets, but experts said that in the modern era the risk-taking is largely an illusion to thrill spectators. Interviews with more than three dozen former and current Cirque employees, along with outside experts, reveal an organization that greatly emphasized safety but also embraced crowd-pleasing feats that stretched the limits of the human body and of theater-rigging technology.

To walk this line, the company provided employees with training and assigned technicians to repeatedly check equipment, trusting that under those conditions the elite acrobats could avoid major accidents, or at least avoid a death when an accident did occur.

Seemed Nervous

But state safety investigators and engineers hired by Cirque found that in the case of Ms. Guillot-Guyard's death, relying so much on the "human element" of keeping the performers safe—the part that depended on every person doing their job perfectly every single night—could be fatal.

Ms. Guillot-Guyard died during what was only her second live performance of one of the more challenging roles in "Kà," safety records show. She flubbed her part during the earlier performance that night and seemed nervous to fellow workers. Some questioned her readiness, Nevada state records show.

**ENLARGE**

Sarah Guillot-Guyard died during a performance of ‘Kà’ in June 2013 after the wire attached to her safety harness shredded. Photo: Associated Press

There had been earlier signs indicating that the safety equation might have gotten out of balance, especially at “Kà,” performed at the MGM Grand casino in Las Vegas since 2004.

The drama features a dizzying array of bodies suspended in the air, sometimes appearing to hurl themselves against a stage that moves between horizontal and vertical planes throughout the show.

That complexity played into the show’s high number of injuries. In 2012, the most recent year for which government data are available, “Kà” had an injury rate of 56.2 per 100 workers—four times that of professional sports teams. “Kà” had 101 full-time-equivalent workers that year. Because industry safety data for circuses are included with other amusement and recreation

companies and impossible to break out on their own, safety experts at Cirque said that sports-team records are the most apt comparison.

The show's workplace injury rates also were more than five times the 2012 rate of some other injury-prone professions—including police work, firefighting, construction and workers at steel foundries. The data come from federal records and internal Cirque documents that became part of a Nevada Occupational Safety and Health Administration report on Ms. Guillot-Guyard's death that the Journal reviewed in a public records request.

The statistics measure injuries diagnosed by a medical professional, including problems like strains, which make up the majority of Cirque injuries. Cirque records also indicate serious previous accidents at "Kà," including five falls by aerial performers in the three years leading up to Ms. Guillot-Guyard's death.

Cirque, which had previously experienced one other performer death in its history, during training in 2009, acknowledges the worrisome comparisons between injury rates on its shows and some other jobs. "We were looking at mining and other professions and saw, wow, our rates are quite high," said Boris Verkhovsky, director of acrobatics and coaching for Cirque.

But the company commissioned studies using different metrics that showed its performers' rates in line with some athletes. That gave Cirque more assurance, Mr. Verkhovsky said.

After Ms. Guillot-Guyard's death, Cirque officials said they realized they needed to do more to engineer safety into the shows. Now, for the first time, Cirque said its managers must incorporate a safety review into every step of designing or modifying any of its shows.

Executives also said they set up a process requiring shows to report accidents that nearly resulted in injuries or fatalities, which triggers an internal investigation into the cause. Previously, the root cause of a serious injury had been investigated but not close calls, executives said. Cirque said there have been no such reports at "Kà" since the change in policy.

Tension over the trade-off between spectacle and safety in circuses has been inherent since trapeze performers began flying 30 feet in the air about 150 years ago. "A circus tent is not an ancient Roman arena or a modern prize ring," wrote the journal *Circus Scrap Book* in 1931.

Experts said serious injuries and fatalities can, and should, be prevented with safety harnesses, nets and other protocols, so that, despite the stagecraft, the workplace is safe. "Most of the accidents that have happened in recent times have been preventable," said Jerry Gorrell, a theater safety consultant in Phoenix.

In the past 15 years, separate from the Cirque death, at least three circus performers—including one at major Cirque competitor Feld Entertainment Inc.'s Ringling Bros. and Barnum & Bailey—have fallen to their deaths during shows in the U.S., according to federal records and company reports.

Cirque, which had its first shows in the 1980s, initially didn't emphasize aerial acts. The circus's hits made its owner, Guy Laliberté, a billionaire, thanks in large part to a favorable deal beginning in the 1990s with Las Vegas casinos, which gave Cirque half the revenue of the shows there despite not having to incur costs for the theater, equipment and nonartistic personnel.

[The company last year had about \\$850 million in annual revenue and a staff of about 4,000—1,300 of whom are artists.](#)

On Monday, Mr. Laliberté said he would sell a controlling stake to a group led by U.S. private-equity firm TPG, which declined to comment for this article. Another investor, Fosun Capital Group, is expected to help drive the company's expansion in China. Terms weren't disclosed.

'We're a Family'

Mr. Laliberté said in an interview last year that he considered the company "pioneers" in the use of safety harnesses. Cirque requires multiple checks a day on rigging systems and has conservative weight limits for each harness.

"We're a family," said Mr. Laliberté. "We don't want to put our kids in danger. We don't sell tickets that way."

[Backstage at Cirque du Soleil](#)

See performers backstage at Cirque du Soleil's 'Kà' at the MGM Grand theater in Las Vegas.

Montreal-based Cirque has evolved from a fringe troupe of avant-garde stilt walkers and clowns into a near-\$1 billion a year business with 18 shows around the world. *Benjamin Lowy for The Wall Street Journal*

Cirque is 'always trying to push the envelope,' driven in part by Cirque's own artistic drive, but also by the public 'asking for bigger and flashier,' says Bill Sapsis, a theatrical rigging expert in Philadelphia who has worked with it. *Benjamin Lowy for The Wall Street Journal*

A diagram backstage showing the lighting plan for 'Kà,' with a prop. *Benjamin Lowy for The Wall Street Journal*

Cirque says the performer's death in 2013 launched a broad re-evaluation of safety practices at the 30-year-old company. 'It forced us to review the way we work,' says Cirque's safety director, Nicolas Panet-Raymond. *Benjamin Lowy for The Wall Street Journal*

Even with safety equipment, there are expected injury risks for Cirque artists, in part because of the punishing demands of a schedule that usually involves performing 10 shows a week.

"Who cannot make a mistake?" said Olena Shaparna, a onetime Ukrainian Olympic gymnast who left Cirque a decade ago after a severe neck injury sustained during a practice session. "If you do those tricks every day, all the time, one day something will happen."

Some performers said Cirque has failed to take opportunities to improve safety, saying revisions such as mats or nets could make acts safer.

When Cirque's touring show Kooza was making its debut in Montreal in 2007, safety regulators told the company it needed a net under the Wheel of Death, a long-popular act used in many circuses that involves performers jumping and flipping on top of a giant spinning apparatus. Cirque officials commissioned a net that would be invisible to the audience.

Yet for the same act in the Zarkana show in Las Vegas, Cirque continued to perform the Wheel of Death with no nets. When a performer fell from the wheel in 2013, he missed a mat underneath and slammed into the ground, suffering significant injuries. Cirque safety officials told Nevada OSHA that it didn't use a net in Zarkana because there isn't sufficient room due to the way the stage is configured.

Nevada safety regulators found it would be "infeasible" to require more safety systems in the act and cleared Cirque of any responsibility for the accident.

"It is evident that there is a hazardous condition for this line of work and the employee accepts that risk," a Nevada OSHA inspector wrote.

Cirque declined to comment on all questions about specific performers' injuries.

The company said this year it hasn't made significant changes to the Zarkana Wheel of Death and doesn't plan to. "It's an apparatus that by definition—even by its very name—is a high-risk apparatus," said Renée-Claude Ménard, Cirque's director of communications. The performers "have to be on the ball," Ms. Ménard said.

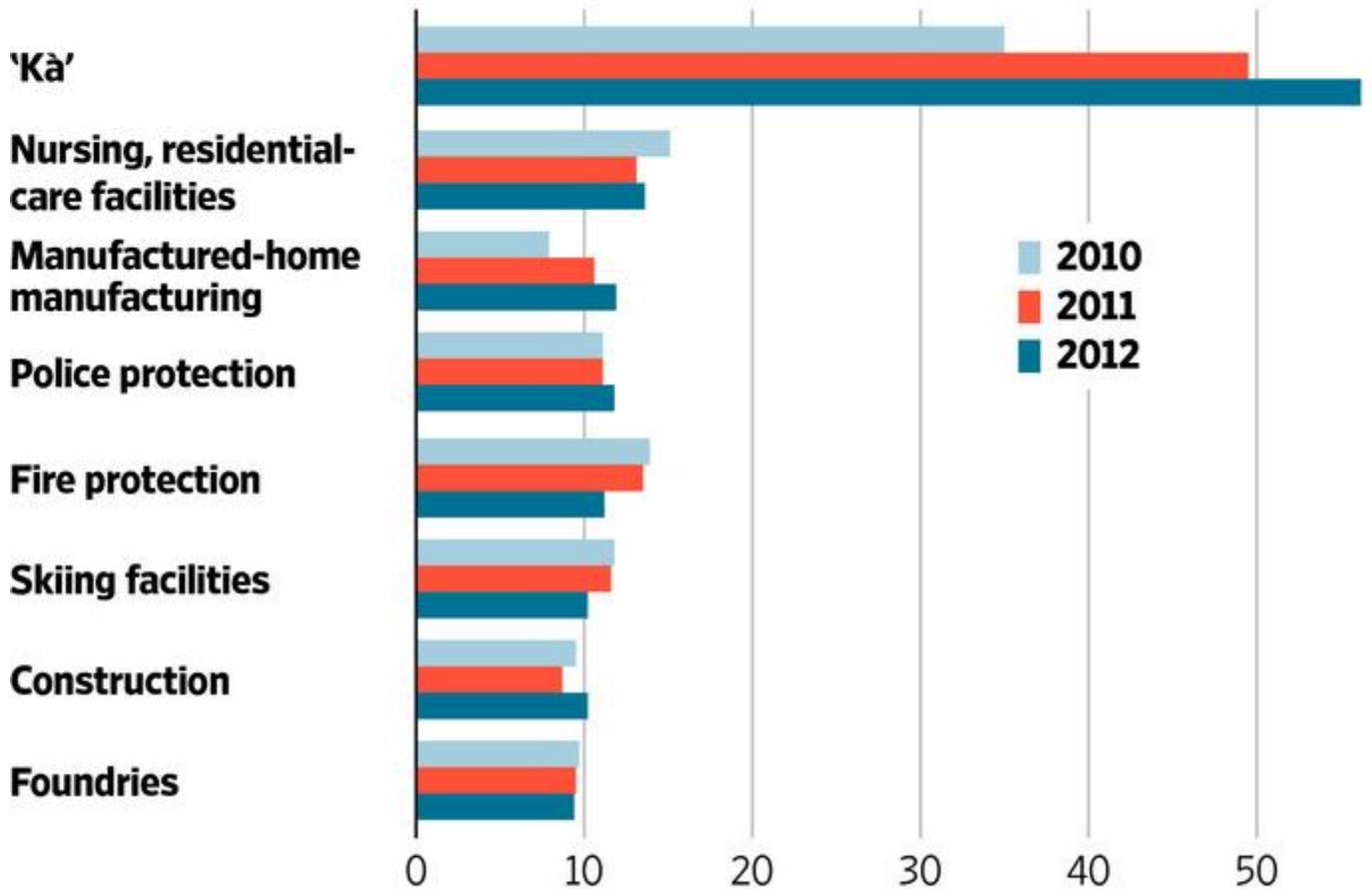
Meaghan Muller, a former Cirque performer, said she shattered both wrists, one hand and her jaw in a 2005 fall onto a concrete floor while training in Montreal. "It turned into quite a sour experience," she said. "I had 13 surgeries, and I walked away with no show and bankrupt."

Ms. Muller, who believes her injuries would have been less severe had Cirque provided a safety mat during her training, said she remains in pain and can't do some daily tasks such as cook.

Cirque performers, who aren't unionized, sign one-year contracts after an initial testing period, with starting salaries around \$50,000. Some doing particularly specialized stunts or who play key characters can negotiate higher salaries.

Workplace Danger

Cirque du Soleil's 'Kà' had a much higher injury rate than top injury-prone occupations. Injuries per 100 workers:



Sources: Nevada OSHA ('Kà'); Labor Department
ENLARGE

THE WALL STREET JOURNAL.

When performers are injured, they file for workers' compensation, which is standard for most American workers but can result in relatively small payments for injuries that sometimes leave performers with chronic pain or disabilities. Mr. Panet-Raymond, Cirque's safety director, said, in contrast, some other circus companies treat performers as freelance workers who are offered nothing if injured.

Full data about injuries at Cirque productions aren't available, but a snapshot of the toll on performers can be seen in Florida, which makes workers' compensation records public.

Of 61 Cirque acrobats listed in the cast for a 2004 video of La Nouba, a resident Cirque show in Orlando, Fla., 42 were injured seriously enough between 1999 and 2014 to require more than seven lost work days for a single injury, state records show. Of those, 15 performers had five or more such serious injuries, and nine later settled disputes with Cirque and its workers' compensation insurer, sometimes over career-ending injuries.

In total during those years, 170 Cirque workers in Florida suffered injuries involving more than seven days of lost work, and a few reported a dozen or more such injuries.

"The body is the tool [in the circus], and sometimes the tool gets broken," said Vladislav Dunaev, a former Cirque performer in Florida. Mr. Dunaev said Cirque had "very good safety measures," but even so, he suffered seven significant injuries over roughly a decade, state records show, the last a 2011 shoulder injury requiring surgery. In 2012 he reached a \$90,000 settlement with Cirque and its insurer after disputing his benefits through an administrative process.

In 2009, Cirque suffered its first fatality when Oleksandr Zhurov, a 24-year-old from Ukraine, died three months into his initial training in Montreal while learning an act on the Russian Swing, a giant two-person contraption that can catapult a performer up to 30 feet in the air.

Mr. Zhurov, who Cirque officials said had previously performed on the swing in other shows, fell backward off the apparatus while performing the less-risky role of the swing's pusher, hitting his head on the ground with enough force to be fatal, according to a report from Quebec safety regulators.

The Quebec investigators concluded he made a mistake with his foot placement and ruled it an accident. His mother, Larisa, said Cirque treated the family well. "It's a game of chance," she said. "One can start crossing a street and never make it."

Cirque's "Kà" show was to be an aerial spectacle on a scale never before attempted, and its marketing highlighted its daredevil stunts.

There would be no fixed stage, just a deep pit where the stage would be. A series of platforms would move back and forth and flip to become fully vertical. Performers would do much of their work as high as 75 feet in the air, with one jumping from 65 feet into an inflated air bag.

[On Stage at 'Kà'](#)

Scenes from the Cirque du Soleil production at the MGM Grand theater in Las Vegas.

1 of 5 *fullscreen*

Sarah Guillot-Guyard, left, performing the role of a Forest Person in 2008 in 'Kà.' *Leila Navidi/Las Vegas Sun/Associated Press*

A movable stage at the MGM Grand theater, which can become fully vertical. *Nils Becker/Cirque du Soleil*

Performers in the Wheel of Death in 'Kà.' *Denise Truscello/Cirque du Soleil*

The Twin Brother character. *Eric Jamison/Cirque du Soleil*

The Counselor's Son and Spearmen. *Eric Jamison/Cirque du Soleil*

"Stuntmen in Hollywood may do a fall like that eight or nine times a year, but our guy does it 465 times," said Calum Pearson, Cirque's vice president of resident shows, who was a technical director for "Kà."

"Kà" is the only Cirque show with a plot. Young twins are separated when one is captured by an evil group. The showdown between the good Forest People and evil Spearmen is the show's apex. In the battle scene, the two groups perform martial arts and flip against a vertical stage before the Spearmen, defeated, rise out of sight.

A Cirque production coordinator said in a 2005 Cirque marketing video called "Kà Extreme" that the company ordinarily would have backup safety systems, but not in some of the scenes in "Kà." "If the rigger makes a mistake or the ropes get ripped, there's no net," he said.

During preproduction in Montreal, technicians discussed using safety nets as a backup but decided it was unnecessary because the artists are wearing harnesses attached to ropes, a technician later told Nevada OSHA.

Mr. Panet-Raymond, Cirque's safety director, said safety experts were concerned that having nets underneath might encourage performers and technicians to be less vigilant in using the safety harnesses and could divert resources to staff the nets that would be better used watching the performers.

"The last thing we want to do is create a false sense of security," Mr. Panet-Raymond said.

Ms. Guillot-Guyard had been trained at a French circus school from a young age, focusing on aerial arts. She joined the show in 2006, and told others to call her "Sasoun" because there was already a Sarah in the cast.

"Sasoun was a tank," said Marc-Antoine Picard, a Cirque artist who was performing near Ms. Guillot-Guyard just before she died. "She was going somewhere and you better not get in her way."

Catwalk Danger

Ms. Guillot-Guyard played several roles in "Kà," but after her part in the battle scene was eliminated due to companywide budget cuts, she begged to learn the role of a Spearman, a

technically challenging role normally played by men, according to Mr. Pearson. She began training in April 2013.

Well before then, Cirque had experienced trouble with the role. As they flew up and out of the scene after being defeated, some of the Spearmen would hit the bottom of the catwalk they were supposed to exit from, sometimes getting injured. They controlled their own speeds with a joystick, going as fast as 11 feet a second.

Cirque officials added technicians watching the lines down below who were supposed to hit an emergency switch if they spotted trouble. Technicians called riggers stationed above were instructed to lean over a railing on the catwalk and push the performers' lines away as they rose to help them avoid colliding with the structure.

There were two shows scheduled on Ms. Guillot-Guyard's inaugural night in her new role. Riggers, coaches and other performers later told Nevada OSHA that she had said she was nervous and had expressed insecurity. During the first show of the night, she had trouble initially clipping her harness, which delayed the scene by a few seconds, and at the end of the scene rose slowly and jerkily, and needed help from her rigger to climb onto the catwalk, they said.

**ENLARGE**

Calum Pearson, Cirque's vice president of resident shows, backstage at the MGM Grand theater in Las Vegas, where 'Kà' is performed. Photo: Benjamin Lowy for The Wall Street Journal

In between shows, as staffers relaxed playing table tennis, her rigger told others she "needed more work on the fly-outs," according to his statement to OSHA investigators. "I didn't think she was ready," he said.

Disaster struck at the end of the second show. When the Spearman lined up to fly out backward, Ms. Guillot-Guyard was already 8 feet above the others when she should have been even with them, witnesses said. Using her joystick, she seemed to rise faster than normal, according to the OSHA report.

Her rigger was still working on clipping his own harness into his safety line, so he didn't push out her line as he was supposed to do, according to the OSHA report and Cirque officials.

Ms. Guillot-Guyard slammed against the catwalk, causing the safety wire to come out of its pulley and scrape against a sharp edge, ripping apart. The aerialist plummeted the equivalent of about nine stories to a lower basement and landed on her back.

“I wasn’t there,” her sobbing rigger later told a fellow employee, according to OSHA records. “I felt the rope go through my hand.”

The company, in its own investigation, concluded that its safety protocols had relied too much on performers’ and technicians’ actions rather than on engineering systems, officials said.

Cirque stopped performing the battle scene after the accident but recently restored it after revising choreography and installing new safety systems that it said cost \$500,000.

The company now uses technology to prevent performers from approaching the catwalk too quickly, has reduced the number of characters to give them more space and has performers face upward on the final exit. It replaced the pulley system that failed with one clamped to the ceiling and added a backup software system to monitor the winch’s primary software.

After investigating Ms. Guillot-Guyard’s death, OSHA issued three serious citations to Cirque, saying among other things that the performer wasn’t properly trained, and fined the company \$21,000. Cirque protested, and two of the citations were removed and the fine was reduced to \$7,000.

Nevada court records show Cirque settled a legal complaint by paying Ms. Guillot-Guyard’s children, now 7 and 10 years old, a total of \$1 million.

—Lisa Schwartz contributed to this article.

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K-Mart Corp. v. Herring

188 P.3d 140

Supreme Court of Oklahoma

Okla., 2008.

July 01, 2008 (Approx. 13 pages)

OPINION OF THE COURT OF CIVIL APPEALS VACATED; ORDER OF THE WORKERS' COMPENSATION COURT SUSTAINED.

[Donald A. Bullard](#), Bullard & Associates, Oklahoma City, OK, for petitioners.

[Phillip C. Hawkins](#), Hawkins Law Firm, Tulsa, OK, for respondents.

[TAYLOR, J.](#)

¶ 1 The question before this Court is whether the Workers' Compensation Court's finding that claimant's injuries occurred in the course of and arose out of his employment is supported by any competent evidence. We answer that there is competent evidence in the record to support this finding.

II. FACTS

¶ 3 The claimant, Mark Herring, was the only witness who testified at the hearing. Herring worked as a stocker during the daytime hours for his employer, K-Mart Corporation. When he arrived at work on May 12, 2006, he noticed a request for someone to work from 11:00 p.m. that night until 6:00 a.m. the next morning. The work involved watching merchandise that K-Mart was going to leave outside for a sale. K-Mart and Herring agreed that Herring would watch the merchandise, and he arrived at the store about 10:45 p.m. to begin work. Herring testified that when he arrived, the night manager instructed him to go to the nearest convenience store if he "had any issues with anything, or needed anything." Herring admitted that the night manager did not mention leaving his post to eat.

¶ 4 Herring clocked in at 11:00 p.m. and walked out of the store with the other employees. Herring sat in his vehicle in K-Mart's parking lot near the door. The store was then locked, and it is undisputed that Herring had no way to enter the store after 11:00 p.m.

¶ 5 About 3:15 a.m., Herring decided to go to the restroom. He went to the Fiesta Mart which was about a half of a block from the K-Mart store. When he arrived at the Fiesta Mart, he noticed that the lights on the gas pumps were off. Because he had a friend that worked at the Fiesta Mart, Herring believed that it would be closed for a short period of time while the clerk was on a restroom break or was restocking the cooler. Upon realizing that the Fiesta Mart was closed, Herring decided to get a burger. Herring drove to McDonald's about three blocks away.

¶ 6 When Herring pulled into McDonald's driveway, he noticed a man trying to open McDonald's door, but it was closed. Herring testified that he had planned to use the restroom and get food at McDonald's but because it was closed, he just went through the drive-through. When

Herring got to the menu board, he turned and saw a man by his car. The man demanded Herring's car. When Herring put the car into first gear, the man shot Herring. The bullet entered Herring's left upper jaw, went through his tongue, and exited his lower jaw. Herring drove to another convenience store for help.

III. PROCEDURAL HISTORY

¶ 7 On April 27, 2007, the trial judge entered an order denying compensation, finding Herring was on a special task and deviated from the task due to a personal mission. Herring sought review from a three-judge panel of the Workers' Compensation Court. By an order filed on July 24, 2007, the three-judge panel vacated the trial court's April 27th order and remanded "for a finding of a special task and a personal comfort mission thus a compensable injury occurring on May 13, 2006." On remand, the trial judge entered an order finding that Herring had suffered an accidental injury on May 13, 2006, arising out of and in the course of his employment. K-Mart and its insurer, American Home Assurance, filed a petition for review with this Court.

¶ 8 Vacating the Workers's Compensation Court's order, the Court of Civil Appeals found: (1) the "special task" exception to the going and coming rule did not apply to the facts here because "Claimant was not injured while 'going to perform' or while 'leaving after performing' the special task," (2) the personal comfort mission rule did not apply because Herring was not on the employer's premises when the injury occurred, (3) Herring did not assert any valid exception to the going and coming rule, and (4) there was no competent evidence to support the trial court's finding that the injury occurred in the course of employment. Herring filed a petition for writ of certiorari which we granted.

IV. GOVERNING LAW

¶ 9 A claimant seeking compensation has the burden of showing that the injuries for which benefits are sought both occurred "in the course" and "arose out of" the employment. [Corbett v. Express Pers., 1997 OK 40, ¶ 7, 936 P.2d 932, 934](#). Recovery is dependent on the claimant establishing these two distinct and separate requirements. [Id.](#) "In the course of" employment concerns the time or place of the injury's occurrence or the circumstances under which the injury occurred. [Fudge v. Univ. of Okla., 1983 OK 67, ¶ 4, 673 P.2d 149, 150](#). The "arising out of" component requires an evidentiary showing of a causal nexus between the injury and the risks of the employment. [Burns, 1995 OK 58 at ¶ 5, 903 P.2d at 291](#).

¶ 10 In [Burns](#), this Court addressed a 1986 amendment to section 3(7) of the Oklahoma Workers' Compensation Act (the Act), 85 O.S.Supp.1986, and the repeal of section 27 of the Act. Before the 1986 amendment, section 27 had provided in part: "In any proceeding for the enforcement of a claim for compensation under the Workers' Compensation Act, it shall be presumed in the absence of substantial evidence to the contrary: (1) That the claim comes within

the provisions of the Workers' Compensation Act....” The 1986 amendment to section 3(7), codified in 2001 at [section 3\(12\)\(a\) of title 85](#), added language making compensable “only accidental injuries arising out of and in the course of employment.... Provided, only injuries having as their source a risk not purely personal but one that is reasonably connected with the conditions of employment shall be deemed to arise out of the employment.”

¶ 11 In 2005, the Legislature enacted major changes in the Act which were in effect at the time of Herring’s injury. 2005 Okla. Sess. Laws ch. 1, § 9 (1st Extraordinary Sess.). In 2005, [section 3, subsection 12\(a\)](#) of the Act was deleted and [section 3, subsection 13\(a\)](#) was added. Subsection 13a provides in part:

“Compensable injury” means any injury or occupational illness, causing internal or external harm to the body, which arises out of and in the course of employment if such employment was the major cause of the specific injury or illness. An injury, other than cumulative trauma, is compensable only if it is caused by a specific incident and is identifiable by time....

“Major cause” is defined as “the predominate cause of the resulting injury or illness.” [85 O.S.Supp.2005, 3](#) (16). [Section 3](#), subsection 13(a) is currently in effect and was in effect at the time of Herring’s injury. [Whitehead v. Indep. Sch. Dist. No. 1 of Tulsa County, 2003 OK 26, n. 2, 68 P.3d 978, 981 n. 2](#) (parties’ rights determined by law in effect at the time of injury).

V. ARGUMENTS

¶ 12 K-Mart and its insurer argue on appeal that there was no casual nexus between Herring’s injuries and the risks of his employment, relying on [Burns, 1995 OK 58, 903 P.2d 288](#), and [Superior Stucco v. Daniels, 1995 OK 127, 912 P.2d 317](#). Relying on [Floyd v. Taco Mayo, 2002 OK 58, 58 P.3d 197](#), they also argue that Herring’s injury occurred while he was on a personal mission and, therefore, did not arise out of or in the course of his employment. Lastly, K-Mart and its insurer argue that the trial court erred in finding that Herring was on a special task, citing [Stroud Municipal Hospital v. Mooney, 1996 OK 127, 933 P.2d 872](#), and [PESP/TSI v. Weese, 2003 OK CIV APP 15, 64 P.3d 569](#), and on a personal comfort mission, citing [Ogg v. Bill White Chevrolet Co., 1986 OK 26, 720 P.2d 324](#).

¶ 13 In the brief before this Court, Herring asserts the trial court did not err in finding that his injuries were employment related and in finding that he was performing a special mission and was on a personal comfort mission at the time of his injury. Herring attempts to distinguish [Burns, 1995 OK 58, 903 P.2d 288](#), stating that unlike the claimant in [Burns](#), he, Herring, was on a special mission and but for his employment, he would not have been in the area of town where his injury occurred.

VI. IN THE COURSE OF EMPLOYMENT

¶ 14 An injury is received in the course of employment if it occurs “within the period of employment at a place where the workman reasonably may be and while he is reasonably fulfilling a duty of his employment or engaged in doing something incidental thereto.” [Barnhill, 1999 OK 82 at ¶ 11, 991 P.2d at 531](#). To be in the course of employment an injury must “arise within time and space limitations of employment, and also within the course of activity related to employment.” [Richey v. Commander Mills, Inc., 1974 OK 47, ¶ 6, 521 P.2d 805, 807](#). We discussed the personal comfort mission rule in obiter dictum in [Richey](#). An employee is in the course of employment if carrying out the employer’s purposes or advancing, either directly or indirectly, the employer’s interest. [Id.](#) An employee’s ministrations to personal comfort and needs is an incident to the employment because it provides an indirect benefit to the employer. [Id.](#) This rationale is the basis of the personal comfort mission rule, which allows recovery for injuries incurred while an employee is ministering to his personal needs during the hours of employment. [Id.](#)

¶ 15 This Court applied the personal comfort rule in [City Bus Co. v. Lockhart, 1951 OK 86, 229 P.2d 586](#) (1951). In [City Bus Co.](#), a bus driver who was assigned to a shift of seven and one-half hours without a scheduled break or lunch period, parked the bus and crossed the street to get something to drink. The driver was returning to his bus when he slipped and fell in the street, breaking his leg. The employer allowed a practice and custom of drivers taking no more than five minutes for personal comfort breaks. This Court found support in the record for the trial court’s finding that under the circumstances, the bus driver’s “procurement of water and food [were] reasonably necessary to the health and comfort of [the] employee [and did] not break the continuity of employment, the employee remaining under wage while doing so.” [Id. ¶¶ 5, 14, 229 P.2d at 588-589](#).

¶ 16 In [Richey, 1974 OK 47, 521 P.2d 805](#), the claimant was a machine operator in a garment factory. As her thirty-minute lunch period began, the claimant left her machine, slipped on garment clippings which were on the floor, and suffered an injury. This Court recognized that “acts as are necessary to the life, comfort, and convenience of the servant while at work’ will be done in the course of employment is necessarily contemplated.” [Id. ¶ 9, 521 P.2d at 807](#) (quoting [Archibald v. Ott, 77 W.Va. 448, 87 S.E. 791 \(1916\)](#)). Reliance on the personal comfort rule was not necessary in [Richey](#) because the employee was on the employer’s property and was leaving her immediate work area. [Id. ¶ 13, 521 P.2d at 808](#).

¶ 17 K-Mart and its insurer attempt to distinguish [Richey](#) arguing Herring was not on K-Mart’s premises when he was injured. Whether injury occurs on or off an employer’s premises is not a controlling factor even though it is a consideration in whether the claimant was in the course of employment at the time of the injury. [Id. ¶ 15, 521 P.2d at 808](#). Here, the fact that Herring was not on K-Mart’s premises at the time of his injury is not fatal to his claim. It is undisputed that the K-Mart store was locked, and, therefore, any restrooms or food vending machines inside would not be available to Herring. In [City Bus Co.](#), the bus driver was not on his employer’s

premises at the time of the injury but was in the street. Nonetheless, this Court affirmed the trial court's award of compensation.

¶ 18 K-Mart and its insurer also rely on [Ogg v. Bill White Chevrolet Co., 1986 OK 26, 720 P.2d 324](#). In [Ogg](#), the claimant had left his office to get cigarettes from an employer-provided truck which was parked on the employer's premises when he fell and injured himself. In denying compensation, the trial court found that the injury did not arise out of or occur in the course of the employment. This Court sustained the trial court's finding "[t]he use of tobacco is not necessarily incidental to the requirements of the claimant's employment" and there was competent evidence in the record to support the trial judge's finding. [Id. ¶ 6, 720 P.2d at 325-326](#).

¶ 19 We find that the facts here are most similar to those in [City Bus Co., 1951 OK 86, 229 P.2d 586](#). Herring was on a long shift without any scheduled restroom or lunch breaks. During a seven-hour shift, an employee can be expected to require a restroom and a food break. Herring had left his work station on a personal comfort mission. The conditions of Herring's employment necessitated him leaving the premises to minister to his personal needs. He was being paid at the time of his injury, and the trial court found he was in the course of his employment at the time of the injury.

[14] ¶ 20 K-Mart created the necessity of Herring having to leave the premises to use the restroom. It knew he would have to leave to attend his personal needs and instructed him to go to the nearest convenience store if he had any issues. Since the nearest convenience store was closed, it is not unreasonable that Herring went to another location to take care of his personal comfort needs. Under the unique conditions of his employment, there is evidence in the record that Herring was in the time and space limitations of his employment and was in the course of an activity incident to his employment, see [Richey, 1974 OK 47 at ¶ 6, 521 P.2d at 807](#), and we are bound by this finding under our standard of review. [Burns, 1995 OK 58 at ¶ 4, 903 P.2d at 290](#). Because there is evidence in the record that Herring was on a personal comfort mission at the time of his injury, and, thus, in the course of his employment, we did not address whether he was going or coming to work as part of a special mission.

V. ARISING OUT OF

¶ 21 An injury arises out of the employment when there is a causal connection between the condition under which the work is to be performed and the resulting injury. [Odyssey/Americare of Okla. v. Worden, 1997 OK 136, ¶ 5, 948 P.2d 309, 311](#). The three categories of risks which an employee may encounter during the course of employment are those that are solely employment related, those that are purely personal, and those that are neutral. [Id. ¶ 6, 948 P.2d at 311](#). Those that are solely employment related arise out of the employment and are compensable. [Id.](#) Those that are purely personal do not arise out of the employment and are not compensable. [Id.](#) Whether

a neutral risk, which is one that is neither distinctly employment related nor purely personal, is compensable presents a question of fact. Id. Herring’s risk of his injury here falls within the neutral-risk category.

¶ 22 Courts have used the positional risk test, the actual risk test, and the increased risk test to determine if a neutral risk-related injury arises out of the employment. Id., 1997 OK 136 at ¶ 7-11, 948 P.2d at 311-312. The positional risk test states “[a]n injury arises out of employment if it would not have occurred but for the fact that the conditions on the employment placed claimant in the position where he was injured.” Id. ¶ 10, 948 P.2d 311 (quoting 1 Larson’s Workers’ Compensation Law § 6.50 (2005)). The actual risk test allows recovery when the employer subjects the worker to the very risk that injures him. Id. ¶ 9, 948 P.2d at 311. The increased risk test examines whether the employment exposed the claimant to a risk greater than that to which the general public was exposed. Id. ¶ 8, 948 P.2d at 311.

¶ 23 After the 1986 changes in the Act, the positional risk test is no longer available to a claimant, and nothing in the 2005 amendments to the Act, as discussed above, implies a legislative intent to return the positional risk test to its pre-1986 status. Currently to establish the required employment-related nexus, a claimant has the onus of presenting evidence that the risk underlying the injury was either an actual risk of the employment, Odyssey/Americare, 1997 OK 136 at ¶ 13, 17, 948 P.2d at 312-313 (discussing Stroud Mun. Hosp., 1996 OK 127, 933 P.2d 872), or, if a risk common to the general public, that the employment exposed the claimant to a heightened risk of the injury. Burns, 1995 OK 58, ¶ 7, 903 P.2d at 291.

¶ 24 In Superior Stucco v. Daniels, 1995 OK 127, 912 P.2d 317, the work conditions required the claimant to be outdoors when he was shot in the arm by an unknown assailant in a drive-by shooting. The evidence was that the work site was located in a high crime area and that his continued presence outdoors in the area put him at a higher risk of injury than that of the general public. This Court found that there was competent evidence in the record to support the compensation award which required a finding that the injury arose out of the employment. Id. ¶¶ 8-9, 912 P.2d at 318-319.

¶ 25 As in Superior Stucco, there is evidence from which the trial court could have inferred that the conditions of Herring’s employment put him at a higher risk of injury than that faced by the general public. Herring was working as a night watchman. K-Mart expected Herring to be on its premises except for time and area limited excursions to address any issues he might have. The employment conditions forced Herring to go to a location such as a convenience store or fast food establishment during the night for his personal comfort needs. It would be unreasonable for an employer to expect an employee to go without food or drink and without a restroom break during a seven-hour shift. There is evidence in the record that the employment conditions exposed Herring to more risks of injury from an act of violence than that of the general public because of the time of the employment, the type of employment, and the necessity of going to

either a convenience store, fast food establishment, or a similar business to attend his personal needs.

¶ 26 K-Mart and its insurer rely on [Burns](#). In [Burns](#), Burns was killed when he was shot by an unknown assailant in a hotel while on a business trip. The trial judge found that, because Burns was on a work assignment as an employee, his death from the shot arose out of his employment. This Court applied the increased risk test and vacated the trial court's award. In [Burns](#), there was no evidence showing Burn's death "was occasioned by some employment-related risk" more than the risk of criminal activity shared generally by the traveling public. Unlike in the present case, the record in [Burns](#) turned on the lack of evidence in that the claimant failed to "show that Burn's death was causally related to the risks incident to his mission for the employer."

¶ 27 K-Mart and its insurer also rely on [Floyd, 2002 OK 58, 58 P.3d 197](#), to support their argument that Herring's injuries did not arise out of or in the course of his employment. In [Floyd](#), Floyd was working an unscheduled shift from 6:00 p.m. until 9:00 p.m. at which time she signed out on a time sheet. She could have left but decided to stay on the premises and eat a meal that was provided to her free of charge. About fifteen minutes after she signed out, she slipped, fell, and [injured her knee](#) while refilling her drink. We found that there was competent evidence in the record to support a finding that Floyd was on a purely personal mission at the time of her injury, and, thus, the finding was conclusive and binding on this Court. [Id. ¶ 16, 58 P.3d at 197](#). Unlike in [Floyd](#), the record here supports a finding that Herring's injuries arose out of his employment.

VI. CONCLUSION

¶ 28 There is competent evidence in the record to support the trial court's finding that the claimant's injuries occurred in the course of and arose out of his employment. There is nothing in the 2005 amendments which would preclude the trial court from finding that Herring's injuries were compensable. Thus the trial court's findings are conclusive and binding on this Court. [Id. ¶ 13, 58 P.3d at 198](#). The Court of Civil Appeals' opinion is vacated and the Workers' Compensation Court's order is sustained.

OPINION OF THE COURT OF CIVIL APPEALS VACATED; ORDER OF THE WORKERS' COMPENSATION COURT SUSTAINED.

ALL JUSTICES CONCUR.

Okla., 2008.

K-Mart Corp. v. Herring

188 P.3d 140, 2008 OK 75

Freeman v. Employment Department (Or.App. 2004)

BREWER, J.

Claimant seeks review of an order of the Employment Appeals Board (EAB) denying him unemployment compensation benefits. Claimant's driving privileges were suspended after he was arrested for driving under the influence of intoxicants (DUII). Employer then terminated his employment because he had failed to maintain the license, which was a requirement of his job. The Employment Department (the department) denied claimant unemployment benefits on the ground that he was discharged for misconduct connected with work. That decision was overturned by an administrative law judge (ALJ) but, on appeal, EAB concluded that claimant was not entitled to benefits. On review, claimant argues that EAB erred in finding that his failure to maintain a driver's license was wantonly negligent and concluding that his conduct was neither an isolated instance of poor judgment nor a good faith error. We reverse and remand.

We take the pertinent facts from EAB's order and the record. From October 2001 until August 2002, claimant worked for employer as a sales representative, selling beer and wine to retail stores. Employer required its employees to maintain a valid driver's license, and claimant was aware of that requirement. Claimant drove his own vehicle when performing his job duties. In February 2002, employer issued a memorandum to its employees who drove a company car or drove their own cars for company purposes. The memorandum stated that, because an unusually large number of employees had "made irresponsible decisions and been cited for driving under the influence of alcohol," employer had changed its policy with respect to employee DUIIs. Employer often previously had allowed employees to return to work under a last-chance agreement after a period of license suspension. However, employer announced in the memorandum the adoption of a zero-tolerance policy regarding any arrest, citation, diversion, or conviction involving alcohol-related driving. The policy provided that an employee could be terminated regardless whether the qualifying event occurred during work hours. The memorandum encouraged any employee "who has had too much to drink or is under the influence of alcohol to find a designated driver, call a friend or to CALL A CAB!" Claimant received the memorandum and understood that, under the new policy, if he drove while intoxicated he ran the risk of losing his driving privileges and his job. Claimant had never previously been arrested for DUII.

About once per month, claimant attended an employer-sponsored wine-tasting event. Claimant typically consumed about three glasses of wine at a wine tasting. On July 19, 2002, claimant attended a wine tasting that employer sponsored at a vineyard. Claimant arrived at about 3:00 p.m., and by 6:00 p.m. he had consumed the equivalent of four glasses of wine. Claimant stopped drinking at about 6:00 p.m. He was concerned that he had consumed too much wine to drive, so he waited until 7:00 p.m. before leaving. Claimant could have asked a coworker to drive him home, but he failed to do so because he believed that he was not under the influence of alcohol.

During claimant's drive home, a police officer stopped him because his car was swerving. The officer administered a field sobriety test and arrested claimant for DUII. Claimant's blood alcohol content was .09. Claimant entered a diversion program and, as a result, his driving privileges were suspended for 90 days. When claimant informed employer that his driving privileges were being suspended, employer discharged him.

Claimant applied for unemployment compensation, and the department denied him benefits, reasoning that “[c]laimant's failure to maintain [his] license, certificate or other similar authority necessary to the performance of the job, when it was within the claimant's reasonable control to do so, is misconduct.” Claimant appealed, and the ALJ determined that he was entitled to benefits because the DUII episode constituted an isolated instance of poor judgment. The department appealed that decision to EAB, which concluded that employer discharged claimant for misconduct because (1) claimant was wantonly negligent in failing to maintain his driver's license and the failure was reasonably attributable to claimant, (2) claimant's “failure to maintain his license was too severe to be an isolated instance of poor judgment,” and (3) claimant did not make a good faith error.

On review, claimant argues that EAB erred in finding that his failure to maintain driving privileges was wantonly negligent and in concluding that the loss of his driving privileges was not an isolated instance of poor judgment or a good faith error. See *MacKillop v. Employment Dept.*, 172 Or.App. 207, 212, 18 P.3d 461 (2001) (treating determination that claimant was wantonly negligent as a finding of fact); *Perez v. Employment Dept.*, 164 Or.App. 356, 365, 992 P.2d 460 (1999) (treating determination that claimant's conduct was not an isolated instance of poor judgment as a conclusion of law). We review the challenged finding for substantial evidence in the record and the legal conclusion for substantial reason and errors of law. ORS 183.482(8)(a), (b), (c).

A department rule, [OAR 471–030–0038](#), provides, in part:

“(3)(a) As used in [ORS 657.176\(2\)\(a\)](#) and (b) a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct.

“(b) Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or [mental disabilities](#), or mere inefficiency resulting from lack of job skills or experience are not misconduct.

“(c) The willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of the occupation involved is misconduct, so long as such failure is reasonably attributable to the individual.”

[OAR 471–030–0038\(1\)\(b\)](#), in turn, provides:

“As used in this rule, ‘wantonly negligent’ means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.”

Claimant first argues that his failure to maintain his driver's license was not “wantonly negligent” and, therefore, that he did not engage in misconduct under [OAR 471–030–0038\(3\)\(c\)](#). According to claimant, he “consumed alcohol responsibly and did not act with indifference and did not know, or should have known, that he would be only .01 above the [blood alcohol content] legal limit of .08.” Claimant asserts that EAB made an error of law because it mistakenly focused on what occurred after claimant drank and drove rather than what “he did and thought” before he drove. We disagree with claimant's characterization of EAB's reasoning. There is no indication in EAB's order that it failed to consider claimant's explanation for his conduct. It may well be, as claimant asserts, that he believed that he was drinking and behaving responsibly. However, that is not the issue at hand. The question, rather, is whether substantial evidence supports EAB's finding that claimant was wantonly negligent in failing to maintain his driving privileges. If so, EAB did not err in concluding that claimant engaged in misconduct under [OAR 471–030–](#)

0038(3)(c).2

In that regard, *Barnes v. Employment Dept.*, 171 Or.App. 342, 347, 15 P.3d 599 (2000), is instructive. In *Barnes*, the claimant argued that his failure to maintain driving privileges was not wantonly negligent because his employer never specifically told him that failure to maintain such privileges could result in his termination.

We disagreed:

“In this case, claimant created a situation that made it impossible for him to comply with his employer's requirement that he maintain a valid driver's license; he drove under the influence of intoxicants—an activity that he knew from past experience could result in the loss of his license.”

Id. at 348, 15 P.3d 599. Here, unlike in *Barnes*, claimant previously had not been disciplined for alcohol-related conduct. However, as in *Barnes*, claimant created a situation that made it impossible for him to comply with his employer's requirement that he maintain driving privileges. Claimant knew of that requirement. Claimant also knew that his conduct in driving under the influence of intoxicants could result in the loss of his driving privileges. Furthermore, claimant understood employer's zero-tolerance policy. Despite that knowledge, he chose to drive after consuming a substantial quantity of alcohol, even though another employee was available to drive him home. He was stopped for swerving, and he failed the field sobriety tests that were administered to him.

Taken together, the foregoing facts support reasonable inferences that claimant was indifferent to the consequences of his decision to drink and drive, that he was conscious of his conduct, and that he should have known that his “conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.” Therefore, EAB did not err in finding that claimant was wantonly negligent within the meaning of OAR 471–030–0038(3)(c). It follows that EAB also did not err in concluding that claimant engaged in misconduct under that section.

2 Claimant next argues that, even if he engaged in misconduct under OAR 471–030–0038, “it was not disqualifying misconduct because it was an isolated instance of poor judgment and/or good faith error” under OAR 471–030–0038(3)(b). EAB summarily rejected those arguments:

“Claimant's failure to maintain his license was too severe to be an isolated instance of poor judgment. By losing his driving privileges, claimant could not

perform an essential function of his job with the employer.

“Nor did claimant commit a good faith error when he failed to maintain his license. Considering that the employer considered holding a valid driver's license to be necessary for the performance of a sales representative's duties, and in light of the employer's memorandum of February 11, 2002, claimant could not have held a good faith belief that the employer would condone the conduct that led to the loss of claimant's driving privileges.”

In reaching the first conclusion, EAB failed to explain adequately why the “severity” of conduct or of its consequence—in this case, the loss of claimant's driver's license—could determine whether the conduct itself constituted an isolated instance of poor judgment within the meaning of [OAR 471–030–0038\(3\)\(b\)](#). Instead, EAB appeared to assume that, merely because claimant lost his driving privileges, claimant's conduct could not constitute an instance of poor judgment under [OAR 471–030–0038\(3\)\(b\)](#). That, however, is not a correct understanding of the rules. We do not suggest that the severity of conduct or its consequences is immaterial to the issue whether a claimant made a decision involving poor judgment. However, the determination whether an instance of poor judgment has occurred logically involves an examination of the claimant's decision-making process that led to the conduct or consequences, as well as the nature or gravity of the conduct or consequence itself. *Cf. Webster's Third New Int'l Dictionary* 1223 (unabridged ed 1993) (defining “judgment,” in part, as “the mental or intellectual process of forming an opinion or evaluation by discerning and comparing”). It follows that EAB's conclusion that claimant's conduct was not an instance of poor judgment lacks substantial reason. *See Drew v. PSRB*, 322 Or. 491, 500, 909 P.2d 1211 (1996) (in reviewing for substantial reason, we examine the reasoning that leads the agency from the facts that it has found to the conclusions that it draws from those facts).

A somewhat different problem inheres in EAB's reasoning in support of its conclusion that claimant did not make a good-faith error. Claimant asserts that he believed in good faith that he was not intoxicated when he drove. EAB rejected that argument on the ground that the necessity of a driver's license to perform claimant's job precluded his having a good-faith belief that employer would condone “the conduct that led to the loss of claimant's driving privileges.” That analysis is problematic because it does not explain why claimant's argument is wrong. The issue, as claimant frames it, is not whether it would have constituted a good-faith error for him mistakenly to believe that

he could keep his job if he engaged in conduct that would cause him to lose his driver's license. Instead, the issue is whether it constituted a good-faith error for him to believe that he was not under the influence of intoxicants when he drove home. Because EAB failed to adequately address that issue, its conclusion is not supported by substantial reason.

Accordingly, we must remand to EAB for reconsideration of both of its conclusions concerning [OAR 471–030–0038\(3\)\(b\)](#). In doing so, we note that claimant's arguments raise an issue of rule construction on which neither the department, EAB, nor the parties have expressly focused: Whether a claimant who has engaged in conduct ordinarily constituting misconduct under [OAR 471–030–0038\(3\)\(c\)](#) nonetheless has not engaged in misconduct if the conduct constituted an isolated instance of poor judgment or a good faith error under [OAR 471–030–0038\(3\)\(b\)](#).³ Generally speaking, the initial task of interpreting the department's rules is not ours or EAB's, but the department's. *Johnson v. Employment Dept.*, 189 Or.App. 243, 249, 74 P.3d 1159, *adhered to as modified on recons.*, 191 Or.App. 222, 81 P.3d 730 (2003); *see also Double K Kleaning Service v. Employment Dept.*, 191 Or.App. 374, 379, 82 P.3d 642 (affirming department's interpretation and application of the term “isolated instances of poor judgment” in [OAR 471–030–0038\(3\)\(b\)](#) on ground that interpretation was consistent with text and context of the rule, as well as relevant case law); *Levu v. Employment Dept.*, 149 Or.App.29, 34, 941 P.2d 1056 (1997) (department plausibly construed and applied “poor judgment” standard under [OAR 471–030–0038\(3\)\(b\)](#) as excluding crime of dishonesty for off-the-job conduct). Here, the department has not had the opportunity to decide that issue. EAB therefore may choose to ascertain the department's interpretation of the rule as pertinent to the issue using any lawful means to do so. *Johnson*, 191 Or.App. at 224, 81 P.3d 730.

Reversed and remanded.

All Citations

195 Or.App. 417, 98 P.3d 402

**N.Y.A.D. 3 Dept., 2009.
Williams v. City of New York
66 A.D.3d 1203, 887 N.Y.S.2d 286, 2009 N.Y. Slip Op. 07556**

[LAHTINEN, J.](#)

Appeal from a decision of the Workers' Compensation Board, filed August 7, 2008, as amended by decision filed June 5, 2009, which ruled, among other things, that claimant was not a participant in the World Trade Center rescue, recovery or cleanup operations and denied her claim for workers' compensation benefits.

Claimant was employed as an auditor with the New York City Department of Social Services and worked in lower Manhattan at 180 Water Street. Within a week of the terrorists' attacks on September 11, 2001, she returned to work at that location, but her job duties were temporarily changed. She had previously conducted internal audits of City vendors and agencies. However, she was reassigned to write checks that provided disaster funds to various individuals who had suffered immediate financial impact from the attack. This involved face-to-face contact with individuals coming to her location to receive funds. She initially carried out this new assignment at the 180 Water Street location, but soon moved to another lower Manhattan building on Centre Street because it was larger. Her hours were extended to include six to seven days a week and 10 to 12 hours per day. She remained in this special assignment until February 2002, and then returned to her normal duties. She continued working until September 2002, when she took a regular retirement with over 30 years of credited service.

Claimant allegedly began experiencing an exacerbation of her respiratory condition while working on the special assignment. She subsequently filed four claims for workers' compensation benefits between December 2005 and June 2007. In October 2006 and May 2007, she submitted forms registering as a participant in the World Trade Center rescue, recovery and cleanup so as to be entitled to the provisions of the recently enacted Workers' Compensation Law article 8-A.

A Workers' Compensation Law Judge found that claimant had been involved in rescue, recovery and cleanup and, thus, her claim was protected by Workers' Compensation Law article 8-A from dismissal for being untimely (see [Workers' Compensation Law § 28](#)). Upon review, the Workers' Compensation Board determined that claimant's activity did not constitute rescue, recovery and cleanup within the meaning of [Workers' Compensation Law § 161](#)(1) and, accordingly, disallowed her claim as untimely.^{FN2} Claimant appeals.

Workers' Compensation Law article 8-A was enacted "to remove statutory obstacles to timely claims filing and notice for latent conditions resulting from hazardous exposure for those who worked in rescue, recovery or cleanup operations following the World Trade Center September 11th, 2001 attack" (Senate Mem. in Support, 2006 McKinney's Session Laws of N.Y., at 1915; see Minkowitz, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 64, Workers' Compensation Law, Article 8-A, at 488). It is undisputed that this legislation was intended to be liberally construed to provide a potential avenue of relief for workers and volunteers suffering ill health as a result of their efforts in the aftermath of the terrorists attacks.

The liberal intent of the statute is reflected by the fact that the Legislature has amended the law twice to extend the deadline for claimants to file for coverage (see L. 2008, ch. 489, § 18; L. 2007, ch. 199, § 1; see generally [Matter of Smith v. Tompkins County Courthouse, 60 N.Y.2d](#)

[939, 941, 471 N.Y.S.2d 46, 459 N.E.2d 155 \[1983\]](#) [stating the general rule that the Workers' Compensation Law is to be liberally construed]).

To qualify for the coverage afforded by the statute, a claimant must essentially establish three elements, which relate to time, location and activity. The first two elements are clearly defined by the statute. The time element is limited to relevant activity occurring between September 11, 2001 and September 12, 2002 (see [Workers' Compensation Law § 161\[1\]\[i\]-\[iv\]](#)). The locations are specifically spelled out in the statute and include, as pertinent here, the "World Trade Center site" (see [Workers' Compensation Law § 161\[1\]\[i\]](#)), which "means anywhere below a line starting from the Hudson River and Canal Street; east on Canal Street to Pike Street; south on Pike Street to the East River; and extending to the lower tip of Manhattan" ([Workers' Compensation Law § 161\[2\]](#)). The qualifying activity that a person must show if his or her location was the World Trade Center site is that he or she "participated in the rescue, recovery, or cleanup operations" ([Workers' Compensation Law § 161\[1\]\[i\]](#)).^{FN3} This language, which is susceptible to varying interpretation and application, is the focus of the current appeal.

Claimant contends that the Board construed the qualifying activity in the statute too narrowly and focused unduly in her case on the word "rescue" rather than "recovery." Under well-established rules of statutory construction, each word of a statute is to be given effect (see [McKinney's Cons. Laws of N.Y., Book 1, Statutes § 231](#); see also [Matter of SIN, Inc. v. Department of Fin. of City of N.Y.](#), 71 N.Y.2d 616, 621-622, 528 N.Y.S.2d 524, 523 N.E.2d 811 [1988]).

While the three terms (rescue, recovery, cleanup) will often overlap in the context of post-attack activity at the World Trade Center site, nevertheless, in a situation where a participant's activity falls within only one of the terms, he or she would still be covered by the statute. Since the word recovery is not separately defined in the statute and had not been construed prior to enactment of the statute to have a "technical or peculiar significance," the word should "be interpreted according to the meaning ... generally accepted at the time of enactment" ([McKinney's Cons. Laws of N.Y., Book 1, Statutes § 232](#)).

The term recovery in the context of the aftermath of the terrorist attacks certainly could have different meanings to different people. Each individual who returned to lower Manhattan in the days and months after the attacks-to work at a job not associated with rescue and cleanup, to live, to purchase a product, to buy lunch, to visit, to mourn, to encourage-contributed, in an expansive sense of the term, to the "recovery." Although the legislation is construed liberally, such an expansive interpretation of recovery was not intended. It is apparent that the Legislature realized this element of the statute would, in many circumstances, be fact-driven and a difficult determination.^{FN4} The Board is often accorded broad discretion when addressing similar factual determinations that have legal import under the Workers' Compensation Law (see e.g. [Matter of Early v. New York Tel. Co.](#), 57 A.D.3d 1341, 1343, 870 N.Y.S.2d 573 [2008] [whether case truly closed]; [Matter of Victor v. Steel Style, Inc.](#), 56 A.D.3d 1099, 1099, 867 N.Y.S.2d 790 [2008] [status as special employee]; [Matter of Jara v. SMJ Env'tl., Inc.](#), 55 A.D.3d 1157, 1158, 866 N.Y.S.2d 404 [2008] [existence of employment relationship]; [Matter of Grant v. Niagara Mohawk Power Co.](#), 53 A.D.3d 972, 973, 862 N.Y.S.2d 180 [2008] [voluntary withdrawal from labor market]).

It has decided cases favorably to claimants that can be characterized as basically recovery cases including, among others, a technician who worked installing and repairing telephone lines in the relevant area of lower Manhattan (see [Verizon N.Y., Inc.](#), 2008 WL 2878810, 2008 N.Y. Wrk. Comp. LEXIS 7135 [July 15, 2008]), a bus driver assigned to transport police and

firefighters from the staging area to ground zero (see [NYC Transit Auth., 2009 WL 525476, 2009 N.Y. Wrk. Comp. LEXIS 5438 \[Feb. 20, 2009\]](#)), and a mechanic assigned to help restore gas lines in the vicinity (see [Con Edison, 2008 WL 593651, 2008 N.Y. Wrk. Comp. LEXIS 1247 \[Feb. 12, 2008\]](#)). So long as the Board's construction and application of the statutory words (rescue, recovery, cleanup) is consistent with the general accepted meaning of such terms, and the underlying factual basis for making its determination is supported by substantial evidence, its determination will be upheld.

FN4. All the elements of the statute necessarily entail difficult line-drawing that leaves some without a potential recovery. A person working one block north of Canal Street who developed respiratory problems would not qualify and undoubtedly would consider the use of Canal Street as the boundary to be unjust and arbitrary. Similarly, the time element draws an outside line on a particular date and a person working one day thereafter would not qualify while a person working a mere day earlier would.

Here, the Board's original decision and amended decision repeatedly referred to claimant as not participating in "rescue" activity. In both decisions the Board cited, discussed and relied on two of its prior decisions that dealt with rescue from the World Trade Center buildings on the date of the attacks. In its original decision, the Board expressly relied upon its conclusion that claimant's "work was not a rescue-type activity" in finding the statute inapplicable. Although this comment was omitted from the amended decision (which was not filed until 10 months later and after all briefs in this appeal had been filed), neither decision discussed recovery, despite the fact that this was the relevant activity in this case.

FN6. We further note that the Board's original decision incorrectly stated a material fact by concluding that claimant's duties before her special assignment "were the very same duties she performed subsequent to the terrorist attack." While this finding was omitted from the amended decision, no pertinent analysis of claimant's actual duties was substituted.

This is not to suggest that the Board must always address each activity (rescue, recovery, cleanup) separately or that it cannot group the terms in its decision. However, repeatedly referring to and ostensibly premising a decision on an activity that is not germane, with no analysis of the pertinent activity, does not permit meaningful judicial review (see [Matter of Cucci v. Rexer's Tang Soo Do Karate Academy, 34 A.D.3d 887, 889, 823 N.Y.S.2d 292 \[2006\]](#); [Matter of Caldas v. 86 Alda Rest., 167 A.D.2d 594, 595, 563 N.Y.S.2d 543 \[1990\]](#)). Under the circumstances, we reverse and remit to the Board so that the relevant issue can be addressed (see [Matter of Cucci v. Rexer's Tang Soo Do Karate Academy, 34 A.D.3d at 889, 823 N.Y.S.2d 292](#)).

ORDERED that the decision is reversed, with costs, and matter remitted to the Workers' Compensation Board for further proceedings not inconsistent with this Court's decision.

[CARDONA](#), P.J., [PETERS](#), MALONE JR. and [STEIN](#), JJ., concur.

66 A.D.3d 1203, 887 N.Y.S.2d 286, 2009 N.Y. Slip Op. 07556

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Abel Verdon Const. v. Rivera
348 S.W.3d 749 (Ky. 2011)
August 25, 2011 (Approx. 12 pages)

OPINION OF THE COURT

The Workers' Compensation Board affirmed findings that supported the claimant's partial disability award against his employer, Abel Verdon Construction, but remanded the claim with directions for the Administrative Law Judge (ALJ) to admit the testimony from the claimant's safety expert and to determine whether Verdon's intentional violation of a workplace safety regulation in any degree caused the claimant's accident.^{FN1} A divided Court of Appeals reinstated the ALJ's refusal to admit the safety expert's testimony but affirmed otherwise. The court also rejected Verdon's argument that Chapter 342 violates federal immigration law by authorizing workers' compensation benefits without regard to the legality of the recipient's immigration status. Verdon appeals.

[FN1.](#) A finding that such a violation occurred would warrant a 30% increase in compensation under [KRS 342.165\(1\)](#).

Verdon argues that the Court of Appeals erred because the Immigration Reform and Control Act of 1986 (IRCA)^{FN2} preempts the application of Chapter 342 to this claim based on the claimant's status as an "unauthorized alien."^{FN3} Verdon also argues that the Court of Appeals erred by affirming with respect to the existence of an employment relationship, the adequacy of proof concerning the claimant's average weekly wage, and the duration of TTD as well as the decision to remand for additional findings concerning a safety violation. We affirm for the reasons stated herein.

[FN2.](#) [8 U.S.C. § 1324a et seq.](#)

[FN3.](#) [8 U.S.C. § 1324a\(h\)\(3\)](#) defines an "unauthorized alien" as an alien not lawfully admitted for permanent residence or authorized to be employed in the United States. In order to be "authorized," an alien must possess a valid social security card or other acceptable documentation of authorization for employment. 8 U.S.C. § 1234a(b)(C). The claimant acknowledged that he moved to the United States "illegally;" that he did not have a social security card; and that he had not applied for an alien registration card or an employment authorization document.

The claimant, a fifteen-year-old unauthorized alien, sought workers' compensation benefits from Verdon for injuries sustained on July 8, 2005, when he fell through a hole in the second floor of a home that Verdon was constructing. He landed in the basement, resulting in a severe [head injury](#) and other serious injuries. The claimant lapsed into a coma and was hospitalized for two months, after which he underwent physical, occupational, and speech therapy. He had returned to high school and was taking special education classes when his claim was heard, but he retained significant physical and [mental impairments](#) that were permanent. The Cabinet for Health and Family Services became a party because it paid the claimant's medical expenses after Verdon denied liability.

Having declined to address the constitutional issue,^{[FN4](#)} the ALJ found the claimant to be Verdon's employee; found his average weekly wage to be \$150.00; awarded TTD benefits from July 9, 2005 through December 20, 2006; and awarded triple permanent partial disability benefits based on a permanent impairment rating of 44%. The ALJ refused to certify Ralph Wirth as an expert concerning Verdon's alleged safety violation; rejected his testimony; and concluded that no violation was applicable. Although the Court of Appeals determined subsequently that the Board erred by reversing the finding that Wirth was not an expert, the court determined that [KRS 342.165\(1\)](#) did not require expert testimony; found that the Board did not err by remanding for additional consideration under the statute; and affirmed in all other respects.

[FN4](#). See [Blue Diamond Coal Co. v. Cornett](#), 300 Ky. 647, 189 S.W.2d 963 (1945).

[I. KRS 342.640.](#)

[KRS 342.640](#) provides workers' compensation coverage to "employees," without regard to the legality of the employment relationship. It states, in pertinent part as follows:

The following shall constitute employees subject to the provisions of this chapter, except as exempted under [KRS 342.650](#):

(1) Every person, including a minor, whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, express or implied, and all helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer;

...

(4) Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury; and....

No exemption listed in [KRS 342.650](#) applies to this claim. The parties do not dispute that the

claimant is an unauthorized alien and that Chapter 342 covers him without regard to the legality of his status as an employee. Mindful that courts avoid a constitutional question unless the merits of an appeal require an answer,^{FN5} we turn first to the finding that he was an employee.

[FN5. *Baker v. Fletcher*, 204 S.W.3d 589 \(Ky.2006\); *Dawson v. Birenbaum*, 968 S.W.2d 663, 666 \(Ky.1998\), citing *Preston v. Clements*, 313 Ky. 479, 232 S.W.2d 85, 88 \(1950\).](#)

A. EMPLOYMENT RELATIONSHIP.

Verdon continues to assert that the claimant failed to meet his burden of proving that they had an employment relationship. We disagree.

Testifying through an interpreter, the claimant admitted that he never spoke to Abel Verdon. He testified that a distant cousin, Margarito Villa Martinez, hired him as a part-time helper to pick up trash at Verdon's construction site for \$50.00 per day during the summer break from school. An individual named Abelardo picked him up for work and told him what to do. The claimant stated that Martinez paid him and the other workers in cash and that he earned \$250.00 during the two-week period before his accident occurred.

Martinez, the foreman of Verdon's framing crew, testified through the use of an interpreter in November 2006. When asked whether the claimant was an employee of Verdon Construction, he responded, "Not really." He explained that the claimant worked part time during vacation and that there no intention for him to work full time because he was a teenager. The claimant was paid around \$7.00 to \$8.00 per hour and worked about eight hours per day for two or three days per week. Martinez stated that he did not tell Verdon that he hired the claimant because his duties included hiring workers and paying them. He stated that he told Verdon how much money he needed to pay the workers, then Verdon gave him cash and he distributed it to them.

When deposed again in March 2008, Martinez testified that the claimant picked up garbage and scrap materials at the construction site and sometimes carried supplies and tools to the carpenters. The work was necessary and would have been performed by Martinez or the carpenters had the claimant not been hired. His hourly rate was lower than the carpenters' and made it more economical to use him for the work.

Verdon's brief to the ALJ denied the existence of an employment relationship with the claimant. Noting that they had never met or spoken, Verdon claimed to have had no knowledge of the claimant's presence at the worksite. Verdon denied paying him for any services performed, pointing to the absence of any documentation to that effect as well as to the evidence that Martinez was the claimant's cousin, paid him in cash, and stated that he was not really an employee.

The ALJ analyzed the evidence of an employment relationship emphasizing the four primary [Ratliff v. Redmon](#)^{FN6} factors as set forth in [Chambers v. Wooten's IGA Foodliner](#).^{FN7} The ALJ determined that an employment relationship existed based on findings that the claimant's work as a site maintenance person was within the scope of Verdon's business constructing homes; that Verdon controlled the work being performed; and that the work did not require any particular skill. Noting that the three objective factors favored an employment relationship and that objective factors should prevail when the intent of the parties could not be ascertained, the ALJ determined that the claimant was Verdon's employee.

[FN6. 396 S.W.2d 320 \(Ky.1965\)](#). The nine [Ratliff](#) factors include: 1.) the extent of control that the alleged employer may exercise over the details of the work; 2.) whether the worker is engaged in a distinct occupation or business; 3.) whether the type of work is usually done in that locality under the supervision of an employer or by a specialist, without supervision; 4.) the degree of skill required by the work; 5.) whether the worker or alleged employer supplies the instrumentalities, tools, and place of work; 6.) length of the employment; 7.) the method of payment, whether by the time or the job; 8.) whether the work is a part of the regular business of the employer; and 9.) the intent of the parties. [Ratliff](#) emphasized that the workers' compensation approach to analyzing the parties' relationship was broader and more liberal than the approach found in the law of master and servant or principal and agent.

[FN7. 436 S.W.2d 265, 266 \(Ky.1969\)](#). The primary factors included: 1.) the nature of the work as related to the business generally carried on by the alleged employer; 2.) the extent of control exercised by the alleged employer; 3.) the professional skill of the alleged employee; and 4.) the true intentions of the parties.

[KRS 342.285](#) designates the ALJ as the finder of fact in workers' compensation cases. It permits an appeal to the Board but provides that the ALJ's decision is "conclusive and binding as to all questions of fact" and, together with [KRS 342.290](#), prohibits the Board or a reviewing court from substituting its judgment for the ALJ's "as to the weight of evidence on questions of fact."

[KRS 342.285](#) gives the ALJ the sole discretion to determine the quality, character, and substance of evidence.^{FN8} As fact-finder, an ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof.^{FN9} [KRS 342.285\(2\)](#) and [KRS 342.290](#) limit administrative and judicial review of an ALJ's decision to determining whether the ALJ "acted without or in excess of his powers;"^{FN10} whether the decision "was procured by fraud;"^{FN11} or whether the decision was erroneous as a matter of law.^{FN12} Legal errors would include whether the ALJ misapplied Chapter 342 to the facts; made a clearly erroneous finding of fact; rendered an arbitrary or capricious decision; or committed an abuse of discretion.

[FN8. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 \(Ky.1985\).](#)

[FN9. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 \(Ky.1977\).](#)

[FN10. KRS 342.285\(2\)\(a\).](#)

[FN11. KRS 342.285\(2\)\(b\).](#)

[FN12. KRS 342.285\(2\)\(c\), \(d\), and \(e\). See also *American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Commission*, 379 S.W.2d 450, 457 \(Ky.1964\).](#)

A party who appeals a finding that favors the party with the burden of proof must show that no substantial evidence supported the finding, *i.e.*, that the finding was unreasonable under the evidence.^{FN13} Evidence that would have supported but not compelled a different decision is an inadequate basis for reversal on appeal.^{FN14}

[FN13. *Special Fund v. Francis*, 708 S.W.2d 641, 643 \(Ky.1986\); *Mosely v. Ford Motor Co.*, 968 S.W.2d 675 \(Ky.App.1998\); *REO Mechanical v. Barnes*, 691 S.W.2d 224 \(Ky.App.1985\).](#)

[FN14. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46 \(Ky.1974\).](#)

The finding that an employment relationship existed between the claimant and Verdon was properly affirmed. It was reasonable and supported by substantial evidence.

B. PREEMPTION.

Having affirmed the existence of an employment relationship, we turn to the constitutional issue. Federal legislation preempts a state law if it contains an explicit preemption clause; if it implies Congressional intent to occupy the field; or if it conflicts with a state law.^{FN15} The IRCA expressly preempts states from imposing civil or criminal sanctions on those who employ unauthorized aliens other than through licensing or similar laws.^{FN16} Verdon concedes that the IRCA's preemption clause does not refer to state workers' compensation benefits. He asserts that it preempts the application of Chapter 342 to the claim of an unauthorized alien implicitly. We disagree.

[FN15. *English v. General Electric Co.*, 496 U.S. 72, 110 S.Ct. 2270, 110 L.Ed.2d 65 \(1990\). See also *Chamber of Commerce of the United States of America v. Whiting*, — U.S. —, 131 S.Ct. 1968, 179 L.Ed.2d 1031 \(2011\) \(citing *C.S.X. Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 123 L.Ed.2d 387 \(1993\).](#)

[FN16. 8 U.S.C. § 1324a\(h\)\(2\).](#)

Verdon relies on [*Hoffman Plastic Compounds, Inc. v. N.L.R.B.*](#),^{FN17} which concerned an employer's liability for back pay to an employee who was terminated in violation of the NLRA from an employment that was obtained illegally, by violating the IRCA. Noting that the employee was never lawfully entitled to be employed in the United States, the Supreme Court determined that the IRCA's policy of combating the employment of unauthorized aliens by criminalizing the use of fraudulent documents to subvert the Act's employer verification system preempted the NLRB's authority to award backpay based on a wrongful termination of employment.^{FN18} The court determined that to allow backpay to an unauthorized alien would "unduly trench upon explicit statutory prohibitions critical to federal immigration policy encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations."^{FN19}

[FN17. 535 U.S. 137, 122 S.Ct. 1275, 152 L.Ed.2d 271 \(2002\).](#)

[FN18.](#) Nothing indicated that the employer knew the documents verifying employability were false.

[FN19. 535 U.S. at 151, 122 S.Ct. 1275.](#)

[*Hoffman*](#) does not support the conclusion that Verdon seeks. A federal law preempts a state law implicitly when it is impossible to comply with both of them or when the state law creates an obstacle to accomplishing federal objectives.^{FN20} Unlike the statute at issue in [*Hoffman*](#), Chapter 342 does not conflict with the objectives of the IRCA, which are to deter employers from hiring unauthorized aliens and to deter aliens from entering the United States illegally in order to obtain employment.^{FN21} Nor does Chapter 342 permit an unauthorized alien to be compensated due to the termination of an employment that itself is illegal.

[FN20. See *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372, 120 S.Ct. 2288, 147 L.Ed.2d 352 \(2000\).](#)

[FN21. See H.R.Rep. No. 99-682 \[I\], 99th Cong.2d Sess. at 46, reprinted in 1986 U.S.S.C.A.N. at 5650. See also H.R.Rep. No. 99-682 \[I\], 99th Cong.2d Sess. at 58, reprinted in 1986 U.S.S.C.A.N. at 5662 \("not the intention of \[the IRCA\] to undermine or diminish in any way labor protections in existing law"\).](#)

The General Assembly enacted Chapter 342 under the state's police power, based on the community interest in regulating workplace safety and in requiring employers rather than the community to provide financial support for employees injured in work-related accidents as well as for their dependents.^{FN22} Employers bear liability under Chapter 342 as a cost of production, without regard to fault or the legality of the employment.

[FN22. *Workmen's Compensation Board of Kentucky v. Abbott*, 212 Ky. 123, 278 S.W. 533 \(1925\).](#)

Federal and state courts that have considered the matter have concluded that the IRCA does not preempt a workers' compensation law that covers unauthorized aliens.^{FN23} We do not view eligibility for workers' compensation benefits as being a realistic incentive for an individual to enter the United States unlawfully.^{FN24} Moreover, we view a decision to exclude unauthorized aliens from the application of Chapter 342 as contravening the purpose of the IRCA by providing a financial incentive for unscrupulous employers to hire unauthorized workers and engage in unsafe practices, leaving the burden of caring for injured workers and their dependents to the residents of the Commonwealth.^{FN25}

[FN23. See *Bollinger Shipyards, Inc. v. Director, Office of Worker's Compensation Programs*, 604 F.3d 864 \(5th Cir.2010\)](#) (benefits to unauthorized alien under Longshore and Harbor Workers' Compensation Act do not undermine the IRCA's policies). *See also* [*Asylum Co. v. District of Columbia Department of Employment Services*, 10 A.3d 619 \(D.C.2010\)](#); [*Amoah v. Mallah Management, LLC*, 57 A.D.3d 29, 866 N.Y.S.2d 797, 800 \(N.Y.App.Div.2008\)](#); [*Coma Corporation v. Kansas Dept. of Labor*, 283 Kan. 625, 154 P.3d 1080 \(2007\)](#); [*Economy Packing Company v. Illinois Workers' Compensation Commission*, 387 Ill.App.3d 283, 327 Ill.Dec. 182, 901 N.E.2d 915 \(2008\)](#); [*Design Kitchen and Baths v. Lagos*, 388 Md. 718, 882 A.2d 817 \(2005\)](#); [*Farmers Brothers Coffee v. Workers' Compensation Appeals Board*, 133 Cal.App.4th 533, 35 Cal.Rptr.3d 23 \(Cal.App. 2 Dist.2005\)](#); [*Dowling v. Slotnik*, 244 Conn. 781, 712 A.2d 396 \(1998\)](#); [*Continental PET Technologies, Inc. v. Palacias*, 269 Ga.App. 561, 604 S.E.2d 627 \(2004\)](#); [*Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324 \(Minn.2003\)](#); [*Safeharbor Employer Services I, Inc. v. Cinto Velazquez*, 860 So.2d 984 \(Fla.Dist.Ct.App.2003\)](#); [*Ruiz v. Belk Masonry Co., Inc.*, 148 N.C.App. 675, 559 S.E.2d 249 \(2002\).](#)

[FN24. See *Economy Packing*, 327 Ill.Dec. 182, 901 N.E.2d at 923.](#)

[FN25. *Id.*](#) (preemption would relieve employers from providing coverage, creating an incentive to hire unauthorized aliens); [*Design Kitchen*, 882 A.2d at 826](#) (preemption would enable unscrupulous employers to engage in unsafe practices, leaving the cost of caring for injured workers to society). The Court of Appeals noted in the present case that the IRCA contemplates a fine as low as \$250.00 for hiring an unauthorized alien, which to some employers might seem to be a reasonable price to pay for avoiding safety requirements and liability for a serious injury such as the claimant's.

**Economy Packing Company v. Illinois Workers' Compensation Commission,
901 N.E.2d 915 (2008)**

Justice ROBERT E. GORDON delivered the opinion of the court:

Economy Packing Company (Economy) appeals from an order of the circuit court of Cook County, confirming a decision of the Illinois Workers' Compensation Commission (Commission), which awarded the claimant, Ramona Navarro, temporary total disability (TTD) and permanent total disability (PTD) benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 et seq. (West 2002)). Economy contends that the Commission failed to apply the correct standard in determining that the claimant, as an undocumented alien, was entitled to PTD benefits. It further contends that the evidence does not support the Commission's finding that the claimant was permanently and totally disabled. For the reasons stated below, we affirm.

BACKGROUND

The claimant filed an application for adjustment of claim under the Act, seeking benefits for injuries that she allegedly received while in the employ of Economy on May 7, 2002. The following facts relevant to our resolution of this appeal are taken from the evidence presented at the arbitration hearing.

In 1992, the claimant was hired by Economy to work on an assembly line manually deboning chickens. The claimant, who was born in Mexico, admitted that she does not have the necessary paperwork to legally obtain employment in the United States and that, when she applied for her position at Economy, she presented documents that she received from a source other than the government.

On May 7, 2002, the claimant slipped while at work, hit the wall, and fell onto the floor, causing her to strike her head, right shoulder, hip, and buttocks. She reported the accident to her supervisor and was driven by a company employee to Concentra Medical Center.

According to the records from Concentra Medical Center, the claimant was diagnosed with a contusion of her shoulder and chest wall, prescribed ibuprofen, and restricted from performing any work with her right upper extremities. Over the next couple of weeks, the claimant continued to receive treatment from Concentra Medical Center and her family physician, Dr. Alvarado Jarava. Dr. Jarava subsequently referred her to an orthopedic surgeon, Dr. Daniel Newman.

On May 30, 2002, the claimant first met with Dr. Newman. Dr. Newman diagnosed the claimant with a grade 3–4 sprain of the acromioclavicular joint with significant displacement of the distal clavicle and recommended that she undergo physical therapy.

When the physical therapy proved ineffective, Dr. Newman suggested surgery. On November 1, 2002, the claimant underwent a resection of the distal clavicle and reconstruction of the

coracoclavicular ligament.

The claimant continued to treat with Dr. Newman postoperatively. In January of 2003, Dr. Newman returned the claimant to work with the restrictions of no lifting over 10 pounds and no work above the shoulder. The claimant, however, testified that her shoulder prevented her from returning to her job at Economy.

On April 15, 2003, Dr. Newman found the claimant to be at maximum medical improvement and recommended that she return to work with a permanent restriction of lifting 10 pounds or less and no work above her shoulder level. After the claimant was again unable to return to her position at Economy, Dr. Newman believed that she could no longer work at an assembly-line job which required the use of her right upper extremity. On May 13, 2003, Dr. Newman found that the claimant was permanently disabled and noted that he was not “planning on having her return to any type of gainful employment in the future.” However, in a subsequent report dated July 29, 2003, Dr. Newman noted that the claimant was still unable to perform any work above her shoulder level and could not perform any significant lifting on her right side, but that “vocational rehab” was seeking a position for her that would not require these activities. In the July 29, 2003, report, Dr. Newman believed that the claimant could still be gainfully employed.

At the hearing, the claimant testified that she was 60 years old. Prior to coming to the United States in 1982, she attended school for three years in Mexico and then worked on a farm. The claimant stated that she did not receive any additional education beyond those three years. She further testified that she speaks Spanish and cannot speak, read, or write in English. She also does not drive an automobile.

The claimant stated that she continues to experience pain in her right shoulder. She testified that she cannot lift her right arm much above her shoulder and that she has no strength in her right arm. According to the claimant, her condition has caused her not to seek employment since the summer of 2003.

The claimant sought a vocational evaluation from Julie Bose, a vocational rehabilitation counselor. Bose met with the claimant on November 24, 2003, and reviewed her medical records. Based on the claimant’s age, her limited education and communication skills, and her work restrictions that limited her to less than sedentary work, Bose opined that no stable labor market existed in which the claimant was employable. Bose further testified that, given the claimant’s current circumstances, she would not be employable, even if she were a citizen of the United States.

James Breen, a vocational rehabilitation case manager engaged by Economy, also conducted a vocational assessment of the claimant. He met with the claimant on July 23, 2003, and performed a labor market survey. Breen believed that, not taking into account the claimant’s inability to

legally obtain employment, she would be able to perform a wide range of unskilled sedentary work occupations, such as a fast-food worker, laundry worker, or sandwich maker. He further opined that, if the claimant could legally work in the United States, she could be gainfully employed in the current labor market. Breen, however, agreed that claimant was not a candidate for vocational rehabilitation.

At the conclusion of the hearing, an arbitrator found that the claimant suffered an accidental injury on May 7, 2002, arising out of and in the scope of her employment with Economy. The arbitrator awarded the claimant TTD benefits in the sum of \$146.67 per week for a period of 60 weeks and PTD benefits in the amount of \$371.12 per week for life. In determining that the claimant was entitled to PTD benefits, the arbitrator found that she was permanently and totally disabled under the “odd-lot” doctrine. Specifically, the arbitrator noted:

“[The claimant] is not obviously unemployable and the medical evidence indicates that [the claimant] is limited to less than sedentary work. Mr. Breen admitted that [the claimant] is not a candidate for vocational rehabilitation. The Commission has previously held that a [claimant] is entitled to rehabilitation services that are needed to provide [the claimant] with the physical and occupational skills necessary to enable her to resume working in any country where she would be legally entitled to work (*Tomayo vs. American Excelsior and Labor World, Inc.*, (99 IIC 521)). The Arbitrator places greater weight on the opinions of Julie Bose and finds that [the claimant’s] age, lack of education, lack of transferable skills, inability to speak English and physical restrictions render her unfit to perform any but the most menial task for which no stable labor market exists. (*A.M.T.C. of Illinois, Inc. v. Industrial Commission*, 77 Ill.2d 482, 397 N.E.2d 804, 34 Ill.Dec. 132 (1979), *Courier v. Industrial Commission*, 282 Ill.App.3d 1, 668 N.E.2d 28, 217 Ill.Dec. 843 (5th Dist.1996).”

Economy filed a petition for review of the arbitrator’s decision before the Commission. The Commission subsequently affirmed and adopted the arbitrator’s decision.FN1

Thereafter, Economy sought judicial review of the Commission’s decision in the circuit court of Cook County. The circuit court confirmed the Commission’s decision, and this appeal followed.

ANALYSIS

Economy argues that the Commission applied the incorrect standard in awarding PTD benefits to the claimant. It asserts that a different standard should apply when determining whether suitable employment is available to an undocumented alien, as potential employers are barred by the Immigration Reform and Control Act of 1986 (IRCA) (8 U.S.C. § 1324a et seq. (2000)) from hiring undocumented aliens regardless of their physical capabilities, and, therefore, an undocumented alien is always unemployable. Accordingly, Economy maintains that before an undocumented alien, such as the claimant, can receive PTD benefits under the “odd-lot” category

she must establish that she is not employable, due to her age, training, education, and experience, in a country where she is legally entitled to work.

The Act imposes liability on employers for injuries to employees arising out of and in the course of employment. 820 ILCS 305/2 (West 2002). “Employee” is defined as “[e]very person in the service of another under any contract of hire * * * including aliens.” 820 ILCS 305/1(b)(2) (West 2002). The Act, however, does not define “aliens.”

In interpreting a statute, undefined words are given their plain and ordinary meaning. *Price v. Philip Morris, Inc.*, 219 Ill.2d 182, 243, 302 Ill.Dec. 1, 848 N.E.2d 1 (2005). When unmodified, the term “alien” is broad enough in scope to encompass any “person who resides within the borders of a country but is not a citizen or subject of that country.” *Black’s Law Dictionary* 72 (7th ed.1999). The plain meaning of “aliens,” therefore, includes not only foreign-born citizens that can legally work in the United States, but also those that cannot. Had the legislature intended otherwise, it could have defined the term or modified it with more specific language.

Consequently, we conclude that all aliens in the service of another pursuant to a contract for hire, regardless of their immigration status, are considered “employees” within the meaning of the Act and, under Illinois law, are entitled to receive workers’ compensation benefits, including PTD benefits.

Pursuant to the IRCA, however, it is unlawful for an employer to knowingly hire an undocumented alien. 8 U.S.C. § 1324a(a)(1)(A) (2000). To enforce this policy, the IRCA mandates that employers verify that a newly hired individual is authorized to work in the United States by examining specified documents. 8 U.S.C. § 1324a(a)(1)(B) (2000). Similarly, if an employer later discovers that it unknowingly hired an undocumented alien, or if an alien becomes unauthorized to work while employed, the employer must discharge the worker. 8 U.S.C. § 1324a(a)(2) (2000). The IRCA also makes it unlawful for an alien to use or attempt to use “any forged, counterfeit, altered, or falsely made document” or “any document lawfully issued to or with respect to a person other than the possessor” for the purpose of obtaining employment in the United States. 8 U.S.C. §§ 1324c(a)(2),(a)(3) (2000).

In this case, it is undisputed that the claimant violated the provisions of the IRCA by using false documents to obtain employment with Economy. The initial question before this court, therefore, is whether the Commission’s award of PTD benefits to the claimant is preempted by the IRCA.

The doctrine of federal preemption arises from the supremacy clause of the United States Constitution, which states, *inter alia*, that “the Laws of the United States * * * shall be the supreme Law of the Land.” U.S. Const., art. VI, cl. 2. Preemption may be either explicitly stated in the federal statute’s language or implicitly contained in its structure or purpose. *Fidelity Federal Savings & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 152–53, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664, 675 (1982). Where, as in this case, the law at issue involves the state’s historic

police powers to regulate public safety, there is a presumption that the state law is not preempted “ ‘unless that was the clear and manifest purpose of Congress.’ [Citation.]” *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604, 614 (1977).

The IRCA does not expressly preempt state laws allowing undocumented aliens, who sustain workplace injuries, to recover workers’ compensation benefits, including PTD benefits. Rather, the IRCA contains an express preemption clause, which provides that “[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions * * * upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.” 8 U.S.C. § 1324a(h)(2) (2000). A sanction is generally defined as “[a] penalty or coercive measure that results from failure to comply with a law, rule, or order.” *Black’s Law Dictionary* 1341 (7th ed.1999).

By contrast, workers’ compensation benefits are designed to compensate an employee for injuries arising out of and in the scope of employment regardless of fault (*Schrock v. Shoemaker*, 159 Ill.2d 533, 542, 203 Ill.Dec. 787, 640 N.E.2d 937 (1994)) and, therefore, cannot reasonably be considered a “sanction.” However, the mere fact that a state law does not fall within an express provision regarding preemption does not necessarily foreclose the possibility that the state law may be preempted by implication. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287–88, 115 S.Ct. 1483, 1487–88, 131 L.Ed.2d 385, 393 (1995). Consequently, we will consider the applicability of both forms of implicit preemption, field preemption and conflict preemption.

Field preemption occurs where “federal law so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States to supplement it.’ [Citation.]” *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407, 423 (1992). Although the IRCA thoroughly addresses the hiring of undocumented aliens, nothing in the IRCA or its accompanying regulations indicates that Congress sought to supersede state laws providing workers’ compensation benefits to injured employees, whether undocumented or otherwise. To the contrary, the IRCA’s legislative history suggests that the statute was not intended “to undermine or diminish in any way labor protections in existing law.” H.R.Rep. No. 99–682(I), at 58 (1986), as reprinted in 1986 U.S.C.C.A.N. 5649, 5662. Accordingly, we conclude that field preemption does not bar an award of PTD benefits to undocumented aliens under the Act.

We, likewise, believe that the award of PTD benefits to an undocumented alien is not precluded by conflict preemption. Conflict preemption exists “ ‘where compliance with both federal and state regulations is a physical impossibility ...’ [citation], or where the ‘state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’ [Citations.]” *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158, 98 S.Ct. 988, 994, 55 L.Ed.2d 179, 188–89 (1978).

In Hoffman Plastic Compounds, Inc. v. National Labor Relations Board, 535 U.S. 137, 122 S.Ct.

1275, 152 L.Ed.2d 271 (2002), the United States Supreme Court considered whether the National Labor Relations Board had the authority to award back pay to an undocumented worker who was unlawfully terminated for supporting efforts to unionize. The worker, who was a citizen of Mexico, had gained employment by presenting false work-authorization documents in violation of the IRCA. The Court concluded that allowing the National Labor Relations Board to award back pay to an undocumented alien would conflict with federal immigration policy, as expressed in the IRCA. *Hoffman*, 535 U.S. at 151, 122 S.Ct. at 1284, 152 L.Ed.2d at 283–84. In reaching this conclusion, the Court found that the National Labor Relations Board had no authority to award back pay to an undocumented alien “for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud.” *Hoffman*, 535 U.S. at 149, 122 S.Ct. at 1283, 152 L.Ed.2d at 282. The Court further observed that “[t]here is no reason to think that Congress nonetheless intended to permit backpay where, but for an employer’s unfair labor practices, an alien-employee would have remained in the United States illegally, and continued to work illegally, all the while successfully evading apprehension by immigration authorities.” *Hoffman*, 535 U.S. at 149, 122 S.Ct. at 1283, 152 L.Ed.2d at 282.

The PTD benefits awarded in this case are fundamentally distinct from the back pay at issue in *Hoffman*. Had the employer in *Hoffman* not terminated the undocumented worker for attempting to unionize, the IRCA effectively required that the worker be discharged. Accordingly, the undocumented worker in *Hoffman* was not legally entitled to wages during the period for which back pay was awarded. See *Hoffman*, 535 U.S. at 149, 122 S.Ct. at 1283, 152 L.Ed.2d at 282. Unlike the undocumented alien in *Hoffman*, the claimant in this case has suffered a loss of earning unrelated to her violation of the IRCA. Although the IRCA prevents the claimant from legally working in the United States, she would still be able to work elsewhere had she not sustained a work-related injury. As a consequence, the award of PTD benefits to the claimant is separate and distinct from any continuing violation of the IRCA and, therefore, does not conflict with federal immigration policy.

Based on the foregoing analysis, we find that the IRCA does not preempt, either expressly or implicitly, an award of PTD benefits to an undocumented alien. In so concluding, we note that courts in other jurisdictions have almost uniformly held that the IRCA does not preclude undocumented aliens from receiving workers’ compensation benefits. See *Farmers Brothers Coffee v. Workers’ Compensation Appeals Board*, 133 Cal.App.4th 533, 542, 35 Cal.Rptr.3d 23, 29 (2005); *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671, 673 (Colo.App.1997); *Dowling*, 244 Conn. at 797, 712 A.2d at 405; *Safeharbor Employer Services I, Inc. v. Velazquez*, 860 So.2d 984, 986 (Fla.App.2003); *Continental Pet Technologies, Inc. v. Palacias*, 269 Ga.App. 561, 564, 604 S.E.2d 627, 631 (2004); *Design Kitchen & Baths v. Lagos*, 388 Md. 718, 739–40, 882 A.2d 817, 829–30 (2005); *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 331 (Minn.2003); *Ruiz v. Belk Masonry Co.*, 148 N.C.App. 675, 679, 559 S.E.2d 249, 252 (2002); *Mendoza v. Monmouth Recycling Corp.*, 288 N.J.Super. 240, 248, 672 A.2d

221, 225 (1996); *Cherokee Industries, Inc. v. Alvarez*, 84 P.3d 798, 799–801 (Okla.Civ.App.2003); *Reinforced Earth Co. v. Workers' Compensation Appeal Board*, 749 A.2d 1036, 1038–39 (Pa.Comm.w.Ct.2000).

Having found that the IRCA does not preempt the Commission's authority to award PTD benefits to an undocumented alien, we next consider whether an undocumented alien can prove she is totally and permanently disabled pursuant to the test traditionally applied to injured employees who fall within the "odd-lot" category. In this case, the Commission, in adopting the decision of the arbitrator, found the claimant to be permanently and totally disabled under the "odd-lot" category based on the claimant's age, lack of education, lack of transferable skills, inability to speak English, and physical restrictions.

An employee is totally and permanently disabled when she is unable to make some contribution to the work force sufficient to justify the payment of wages. *Ceco Corp. v. Industrial Comm'n*, 95 Ill.2d 278, 286, 69 Ill.Dec. 407, 447 N.E.2d 842 (1983). An employee, however, need not be reduced to total physical incapacity before a permanent total disability award may be granted. *Ceco Corp.*, 95 Ill.2d at 286, 69 Ill.Dec. 407, 447 N.E.2d 842. Instead, the employee must show that she is unable to perform services except those that are so limited in quantity, dependability, or quality that there is no reasonable stable market for them. *A.M.T.C. of Illinois, Inc., Aero Mayflower Transit Co. v. Industrial Comm'n*, 77 Ill.2d 482, 487, 34 Ill.Dec. 132, 397 N.E.2d 804 (1979).

Where an employee's disability is of a limited nature such that she is not obviously unemployable, or where there is no medical evidence to support a claim of total disability, the employee has the burden of establishing that she falls into the "odd-lot" category—one who, though not altogether incapacitated from work, is so handicapped that she will not be employed regularly in any well-known branch of the labor market. *Ceco Corp.*, 95 Ill.2d at 287, 69 Ill.Dec. 407, 447 N.E.2d 842.

There are two ways an employee can ordinarily satisfy her burden of proving that she fits into the "odd-lot" category: (1) by showing a diligent but unsuccessful job search, or (2) by demonstrating that because of her age, training, education, experience, and condition, she is unable to engage in stable and continuous employment. *Westin Hotel v. Industrial Comm'n*, 372 Ill.App.3d 527, 544, 310 Ill.Dec. 18, 865 N.E.2d 342 (2007). Once the employee has initially established the unavailability of employment to a person in her circumstances, the burden then shifts to the employer to show that suitable work is regularly and continuously available to the employee. *Valley Mould & Iron Co. v. Industrial Comm'n*, 84 Ill.2d 538, 547, 50 Ill.Dec. 710, 419 N.E.2d 1159 (1981).

As Economy correctly contends, the traditional test to determine whether an employee falls into

the “odd-lot” category cannot be applied to undocumented aliens. Because an undocumented alien’s immigration status renders her unemployable as a matter of law (see 8 U.S.C. § 1324a(a) (2000)), such an alien would always be able to demonstrate, and an employer would be unable to refute, that no jobs are available regardless of the alien’s condition. Nevertheless, we believe that an undocumented alien may establish that she is permanently and totally disabled under the “odd-lot” doctrine, so long as her unemployability is not based upon her immigration status.

Although this issue appears to be one of first impression in Illinois, other jurisdictions have considered what must be proven in order to establish an undocumented alien’s entitlement to workers’ compensation benefits. In *Gayton v. Gage Carolina Metals Inc.*, 149 N.C.App. 346, 560 S.E.2d 870 (2002), the North Carolina Court of Appeals rejected an employer’s argument that, due to an undocumented alien’s immigration status, it was theoretically impossible to prove that the alien would be employable. *Gayton*, 149 N.C.App. at 349–50, 560 S.E.2d at 872–73. The *Gayton* court observed that, although federal immigration law prevented an undocumented alien from returning to the same pre-injury job or any other job in the United States, federal law does not prohibit conducting a labor market survey to determine what suitable jobs, if any, are available that an undocumented alien might be able to obtain but for her immigration status. *Gayton*, 149 N.C.App. at 350, 560 S.E.2d at 873. The court further noted that an employer was not required to prove that a specific job had already been offered to the injured employee. *Gayton*, 149 N.C.App. at 350, 560 S.E.2d at 873. As North Carolina law provides that workers’ compensation benefits are not terminated until the employer proves that the employee can return to work at wages equal to those she was receiving at the time the injury occurred, the *Gayton* court held that the employer has the burden of proving that suitable jobs are available to the undocumented alien “but for” her immigration status. *Gayton*, 149 N.C.App. at 350, 560 S.E.2d at 873.

While the Illinois Workers’ Compensation Act and the North Carolina law differ, we believe that the reasoning employed by the *Gayton* court is sound. Furthermore, like North Carolina, Illinois does not require that an employer establish that an actual job is available to an injured employee, only that suitable work is regularly and continuously available. See *Valley Mould & Iron Co.*, 84 Ill.2d at 547, 50 Ill.Dec. 710, 419 N.E.2d 1159. Applying this reasoning to the “odd-lot” doctrine, we conclude that an undocumented alien has the initial burden of proving that she cannot sustain regular employment in a well-known branch of the labor market without regard to her undocumented status. The burden then shifts to the employer to produce sufficient evidence that suitable jobs would be regularly and continuously available to the undocumented alien but for her legal inability to obtain employment.

In this case, neither of the vocational experts considered the claimant’s immigration status when proffering their opinions. Bose, the claimant’s vocational expert, believed that, based on the claimant’s age, her limited education and communication skills, and her work restrictions, no stable labor market existed in which the claimant was employable. She further testified that,

given the claimant's current circumstances, she would not be employable, even if she were a citizen of the United States. Breen, Economy's rehabilitation expert, opined that, not taking into account the claimant's inability to legally obtain employment, she could be gainfully employed in the current labor market.

In concluding that the claimant was permanently and totally disabled, the arbitrator, whose decision was adopted by the Commission, relied upon Bose's opinion. As Bose believed that the claimant's condition prevented her from engaging in stable employment without regard to her legal right to work in the United States, the Commission's finding that the claimant is permanently and totally disabled is supported by competent evidence. We, therefore, conclude that the Commission's decision to award the claimant PTD benefits is not against the manifest weight of the evidence.

CONCLUSION

In sum, we conclude that the Act allows workers' compensation benefits, including PTD benefits, to be awarded to undocumented aliens and that an award of such benefits is not preempted by federal immigration law. Additionally, we hold that, for an undocumented alien to establish that she is permanently and totally disabled under the "odd-lot" doctrine, she must first prove that she cannot sustain regular employment in a well-known branch of the labor market without regard to her undocumented status. The burden then shifts to the employer to prove that, but for the undocumented alien's legal inability to obtain employment, suitable work would be regularly and continuously available. Applying this test to the record before us, we cannot say that the Commission's award of PTD benefits to the claimant is against the manifest weight of the evidence. For these reasons, we affirm the judgment of the circuit court which confirmed the decision of the Commission.

Affirmed.

SeaWorld of Florida, LLC v. Perez, 748 F.3d 1202 (D.C. Cir. 2014)

Before: GARLAND, Chief Judge, and ROGERS and KAVANAUGH, Circuit Judges.

Opinion

Opinion for the Court by Circuit Judge ROGERS.

Dissenting Opinion by Circuit Judge KAVANAUGH.

ROGERS, Circuit Judge:

SeaWorld of Florida, LLC, operates a theme park in Orlando, Florida, that is designed to entertain and educate paying customers by displaying and studying marine animals. Following the death of one of SeaWorld's trainers while working in close contact with a killer whale during a performance, the Occupational Safety and Health Review Commission found that SeaWorld

had violated the general duty clause, § 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 654(a)(1), by exposing the trainers to recognized hazards when working in close contact with killer whales during performances, and that the abatement procedures recommended by the Secretary of Labor were feasible. SeaWorld challenges the order with respect to one citation. Concluding its challenges are unpersuasive, we deny the petition for review.

I.

On February 24, 2010, SeaWorld trainer Dawn Brancheau was interacting with Tilikum, a killer whale, during a performance before a live audience in a pool at Shamu Stadium in Orlando. Ms. Brancheau was reclined on her back on a platform a few inches below the water surface. Tilikum was supposed to mimic her behavior by rolling over. Instead, the killer whale grabbed her and pulled her off the platform into the pool, refusing to release her. She suffered traumatic injuries and drowned as a result of Tilikum's actions.

The Secretary of Labor issued three citations to SeaWorld after an investigation by an Occupational Safety and Health Administration ("OSHA") compliance officer. Only the second citation is at issue. It alleged two instances of a "willful" violation of the general duty clause for exposing animal trainers to the recognized hazards of drowning or injury when working with killer whales during performances.

The first instance related to animal trainers working with Tilikum being exposed to "struck-by and drowning hazards" by being "allowed unprotected contact with Tilikum" while conducting "'drywork' performances on pool ledges, slideouts and platforms." In SeaWorld's terms, when trainers are out of the pool or on submerged ledges called "slideouts" in water no deeper than their knees, their interactions with killer whales are called "drywork." Any interaction in deeper water is "waterwork." According to the Secretary, "[a]mong other methods, one feasible and acceptable means of abatement would be to not allow animal trainers to have any contact with Tilikum unless they are protected by a physical barrier."

The second instance concerned animal trainers working with killer whales other than Tilikum who were exposed to struck-by and drowning hazards when they were "allowed to engage in 'waterwork' and 'drywork' performances with the killer whales without adequate protection."

The Secretary listed as possible abatement methods "prohibit [ing] animal trainers from working with killer whales, including 'waterwork' or 'dry work,' unless the trainers are protected through the use of physical barriers or through the use of decking systems, oxygen supply systems or other engineering or administrative controls that provide the same or greater level of protection for the trainers." The Secretary proposed a penalty of \$70,000.

Following an evidentiary hearing, the Administrative Law Judge (“ALJ”) found that on February 24, 2010, a “performance” was still in progress when Tilikum seized Ms. Brancheau and pulled her into the pool water. The ALJ found that the first and third elements of a violation of the general duty clause—existence of a workplace condition presenting a hazard that likely caused death or serious physical harm—were established by the events on February 24, 2010: Ms. Brancheau’s death demonstrated that close contact with killer whales was a hazard likely to cause death or serious injury. Based on evidence regarding three previous deaths involving killer whales (beginning in 1991 with Tilikum), SeaWorld’s written training manuals and safety lectures as implemented specifically to Tilikum, and SeaWorld’s incident reports, the ALJ found that the Secretary had established by “abundant” record evidence that “SeaWorld recognized the hazard created when its trainers worked in close contact with Tilikum during drywork performances,” satisfying the second element of a violation.

Further, the ALJ found that evidence, including SeaWorld’s incident reports, established that SeaWorld recognized the hazard when trainers worked in close contact with other killer whales; SeaWorld’s statistics regarding the predictability of killer whale behavior, on the other hand, were unpersuasive because not based on rigorous, scientific data. The ALJ concluded that SeaWorld’s claim that “it was unaware working with killer whales presents a recognized hazard is difficult to reconcile with numerous comments made over the years by SeaWorld management personnel, including [two] corporate curators of animal training ... [whose] comments were documented and circulated among all of the SeaWorld parks.”

The ALJ also found that the Secretary had established the fourth element of a violation: feasible abatement of the hazard for trainers working with Tilikum and other killer whales. SeaWorld had not argued, the ALJ noted, that it is infeasible to install barriers or implement a minimum distance between trainers and whales, but rather “considers the extensive safety training of its trainers and the operant conditioning of its killer whales to be an adequate means of abatement that materially reduces the hazard the killer whales present to the trainers.”

The ALJ found the Secretary had met her burden to show SeaWorld’s safety program is inadequate. Despite SeaWorld’s contention that its operant conditioning “materially reduces the recognized hazard,” *id.*, the ALJ concluded that “SeaWorld’s reliance on its trainers to recognize precursors and prevent unpredictable behavior by the killer whales runs counter to the requirements of the Act. ‘The duty to comply with section 5(a)(1) ... rests with the employer.’ ”

The ALJ further concluded that “SeaWorld holds trainers to a near—impossible standard set by upper management, who engage in a form of Monday morning quarterbacking.” Additionally, the ALJ noted that SeaWorld had already implemented the means of abatement recommended by the Secretary for trainers working with Tilikum—namely, maintaining a minimum distance from the killer whale, or imposing a physical barrier between the killer whale and trainers—and concluded the same or similar abatement involving other killer whales was no less feasible.

Although crediting the testimony of a SeaWorld curator of animal training regarding the educational and inspirational justification for continuing “waterwork” with killer whales, the ALJ concluded that justification “must be measured against the risk incurred by allowing trainers to interact closely with killer whales.”

Observing that OSHA has “no specific standard” regulating employees working in close contact with killer whales, and that the Secretary had presented no evidence SeaWorld had a “heightened awareness of the illegality of its conduct” or manifested “plain indifference to employee safety,” the ALJ found that violations were “serious,” not “willful,” and imposed a fine of \$7,000 for the general duty clause violation in Citation, emphasizing that his order was limited to show performances. SeaWorld unsuccessfully sought discretionary review by the Commission, whereupon the ALJ’s decision and order became final. See 29 C.F.R. § 2200.90(d). SeaWorld petitions for review of the general duty violation.

The general duty clause, § 5(a)(1) of the Occupational Safety and Health Act, provides: “Each employer [] shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. § 654(a)(1).

As explained by the House Committee on Education and Labor, “[b]earing in mind the fact that there is no automatic penalty for violation of the general duty, this clause enables the Federal Government to provide for the protection of employees who are working under such unique circumstances that no standard has yet been enacted to cover this situation.” H.R. REP. NO. 91–1291, at 21–22 (1970) (emphasis in original).

In a seminal case this court, in turn, observed that “[t]hrough novel in approach and sweeping in coverage, the legislation is no more drastic than the problem it aims to meet.” Nat’l Realty & Constr. Co. v. OSHRC, 489 F.2d 1257, 1260–61 (D.C.Cir.1973) (footnote omitted).

Notwithstanding the “unqualified and absolute” textual imperative that the workplace be “free” of the recognized hazard, *id.* at 1265, the court further observed that “Congress quite clearly did not intend the general duty clause to impose strict liability: The duty was to be an achievable one.” So understood, the court held that “[a]ll preventable forms and instances of hazardous conduct must ... be entirely excluded from the workplace.” *Id.* at 1266–67.

“To establish a violation of the General Duty Clause, the Secretary must establish that: (1) an activity or condition in the employer’s workplace presented a hazard to an employee, (2) either the employer or the industry recognized the condition or activity as a hazard, (3) the hazard was likely to or actually caused death or serious physical harm, and (4) a feasible

means to eliminate or materially reduce the hazard existed.”

Tempering the range of potential remedies that might be imposed upon finding a violation of the clause, the court explained: “In other words, ‘the Secretary must prove that a reasonably prudent employer familiar with the circumstances of the industry would have protected against the hazard in the manner specified by the Secretary’s citation.’”

SeaWorld contests only the second and fourth elements regarding recognized hazard and feasibility. In challenging the general duty citation, SeaWorld does not perforce contend that the Secretary of Labor or the Occupational Safety and Health Review Commission lack legal authority to require employers to provide a reasonably safe working environment for employees.

Rather, SeaWorld takes issue with the interpretation by these officials of what constitutes a recognized hazard that would subject an employer to citation under the Occupational Safety and Health Act.

First, SeaWorld contends that the finding that it exposed its employees to a “recognized hazard” is unsupported by substantial evidence. Second, it contends that “when some risk is inherent in a business activity, that risk cannot constitute a ‘recognized hazard.’” Third, it contends that the ALJ’s decision was based on unreliable expert testimony about the extent of killer whale predictability after SeaWorld’s training and precautions. As regards the feasibility of physical barriers and minimum distances SeaWorld contends that the Secretary failed to prove feasible abatement methods (or that SeaWorld had already implemented these measures), and that the ALJ failed to consider evidence these abatement measures present additional hazards and erred because eliminating close contact changes the nature of a trainer’s job. Finally, SeaWorld contends the general duty clause is unconstitutionally vague as applied because SeaWorld lacked fair notice of the Secretary’s abatement measures.

The court must uphold the Commission’s decision unless it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

Whether a work condition poses a recognized hazard is a question of fact. Substantial evidence supports the finding that “drywork” and “waterwork” with killer whales were recognized hazards. Tilikum is a 32-year-old male killer whale with known aggressive tendencies who in 1991 killed a whale trainer at a marine park in Vancouver, British Columbia. SeaWorld had established special protocols for Tilikum, which prohibited “waterwork” and, among other things, required non-killer whale personnel and guests to stay five feet behind pool walls or three feet from Tilikum’s head, indicating that SeaWorld recognized the possibility of harm to people standing outside of the pool on land.

Although “drywork” with Tilikum continued, SeaWorld limited it to a team of experienced

trainers who used extra caution. The caution with which SeaWorld treated Tilikum even when trainers were poolside or on “slideouts” in the pool indicates that it recognized the hazard the killer whale posed, not that it considered its protocols rendered Tilikum safe.

As to other killer whales, SeaWorld suggests that close contact with these whales was not a recognized hazard because all whales behave differently and its incident reports help SeaWorld improve training. But SeaWorld’s incident reports demonstrate that it recognized the danger its killer whales posed to trainers notwithstanding its protocols. At the time of Ms. Brancheau’s death, seven killer whales were at the Orlando park. Even though SeaWorld had not recorded incident reports on all of its killer whales, a substantial portion of SeaWorld’s killer whale population had at least one reported incident.

The ALJ also relied on the many comments by SeaWorld management personnel, including corporate curators of animal training, who described the need for caution around killer whales generally, not only around certain killer whales. Killer whales bit trainers’ body parts on several occasions (although not generally puncturing skin) and in 2006 a killer whale pulled a trainer underwater by the foot and submerged him repeatedly for approximately 10 minutes.

Although this incident occurred during “waterwork,” substantial evidence supports the finding with regard to “drywork” as well. On numerous occasions, trainers fell or were pulled into the water, as later happened with Tilikum and Ms. Brancheau, or killer whales lunged out of the water toward trainers. These incidents constitute substantial evidence to support the ALJ’s finding that “drywork” was also a recognized hazard.

SeaWorld’s position is that working with killer whales was not a recognized hazard because its training and safety program adequately controlled the risk. To train its killer whales, SeaWorld uses “operant conditioning” to reinforce desired behaviors with food or other rewards. It also trains its employees who work with killer whales to recognize particular behaviors that it calls “precursors,” which indicate that the killer whales may act aggressively, and keeps detailed incident reports of when its killer whales had behaved aggressively or otherwise undesirably toward trainers, including pulling trainers into the pool.

The Secretary presented evidence that the killer whales posed a hazard in spite of SeaWorld’s safety measures. On multiple occasions, including the death of Ms. Brancheau, SeaWorld’s incident reports indicated that the killer whales showed no immediate precursors of aggressive behavior or ignored SeaWorld’s emergency procedures designed to make them cease aggressive behavior. Statements by SeaWorld managers do not indicate that SeaWorld’s safety protocols and training made the killer whales safe; rather, they demonstrate SeaWorld’s recognition that the killer whales interacting with trainers are dangerous and unpredictable and that even senior trainers can make mistakes during performances, and the managers repeatedly urged caution in working with the killer whales.

The evidence thus supports the ALJ's finding that a recognized hazard existed, even beyond the impact of SeaWorld's safety protocols.

In relying on SeaWorld's safety program to establish a recognized hazard, the ALJ did not, as SeaWorld suggests, "invert[] the requirement of the General Duty Clause that the Secretary, 'as a threshold matter,' 'submit evidence proving ... that the methods undertaken by the employer to address the alleged hazard were inadequate.' "

The remedy imposed for SeaWorld's violations does not change the essential nature of its business. There will still be human interactions and performances with killer whales; the remedy will simply require that they continue with increased safety measures. SeaWorld itself has limited human interactions. After Ms. Brancheau's death in 2010, SeaWorld ceased "waterwork" with all of its killer whales. It also imposed distance between trainers and Tilikum during drywork and, to a lesser degree, between other killer whales and trainers during drywork.

These self-imposed limitations are relevant to the assessment of which aspects of SeaWorld's business are essential and indicate that the Secretary's remedy will not eliminate any essential element. SeaWorld does not assert (and at oral argument disavowed) that a public perception of danger to its trainers is essential to its business. See Oral Argument Recording at 15:05–16:05. Nor has SeaWorld ever argued that limiting interactions in the way that the remedy requires would have a detrimental economic impact on its profits. And SeaWorld is, after all, a for-profit entity owned, at times relevant to the Commission proceedings, by the Blackstone Group, an investment firm.

Substantial evidence supports the ALJ's findings that it was feasible for SeaWorld to abate the hazard to its employees by using barriers or minimum distance between trainers and killer whales, most notably because SeaWorld has implemented many of these measures on its own.

The record evidence showed that SeaWorld's training and protocols did not prevent continued incidents, including the submerging and biting of one trainer in 2006, the killing of a trainer by a SeaWorld-trained and—owned killer whale in 2009 at an amusement park in Spain, and Ms. Brancheau's death in 2010. SeaWorld employees repeatedly acknowledged the unpredictability of its killer whales. This record evidence supports the ALJ's finding that existing protocols were inadequate to eliminate or materially reduce the hazard to SeaWorld's trainer employees performing with killer whales.

Abatement is "feasible" when it is "economically and technologically capable of being done." After Ms. Brancheau's death, SeaWorld required that all trainers work with Tilikum from a minimum distance or behind a barrier, and "waterwork" ceased with all of its killer whales. As the ALJ noted, SeaWorld had not argued the Secretary's proposed abatement was not

economically or technologically feasible and had already implemented abatement for at least one of its killer whales and needed only to apply the same or similar protective contact measures it used with Tilikum to other killer whales. Consequently, the Secretary was not required to specify the precise manner in which abatement should be implemented. That the ALJ subsequently granted SeaWorld's request for a six-month extension of the abatement deadline, in view of SeaWorld's difficulty in scheduling two consulting experts, does not undermine the substantial evidence that SeaWorld could feasibly abate the hazard. SeaWorld does not dispute that the Secretary's abatement measures would materially reduce, if not eliminate, the hazard killer whales pose to its employees during performances. SeaWorld's use of protective contact with Tilikum, the three-year moratorium on "waterwork" after Ms. Brancheau's death, and repeated temporary cessation of "waterwork" with all killer whales or particular killer whales after other incidents support the finding that these changes were feasible and would not fundamentally alter the nature of the trainers' employment or SeaWorld's business.

Given evidence of continued incidents of aggressive behavior by killer whales toward trainers notwithstanding SeaWorld's training, operant conditioning practices, and emergency measures, SeaWorld could have anticipated that abatement measures it had applied after other incidents would be required.

Accordingly, we deny the petition for review.

KAVANAUGH, Circuit Judge, dissenting:

Many sports events and entertainment shows can be extremely dangerous for the participants. Football. Ice hockey. Downhill skiing. Air shows. The circus. Horse racing. Tiger taming. Standing in the batter's box against a 95 mile per hour fastball. Bull riding at the rodeo. Skydiving into the stadium before a football game. Daredevil motorcycle jumps. Stock car racing. Cheerleading vaults. Boxing. The balance beam. The ironman triathlon. Animal trainer shows. Movie stunts. The list goes on.

But the participants in those activities want to take part, sometimes even to make a career of it, despite and occasionally because of the known risk of serious injury. To be fearless, courageous, tough—to perform a sport or activity at the highest levels of human capacity, even in the face of known physical risk—is among the greatest forms of personal achievement for many who take part in these activities. American spectators enjoy watching these amazing feats of competition and daring, and they pay a lot to do so. Americans like to witness the thrill of victory, to cheer the linebacker who hammers the running back at the goal line, to yell with admiration as Derek Jeter flies into the stands down the left-field line to make a catch, to applaud the gymnast who nails the back flip off the balance beam, to hold their collective breath as Jack Hanna plays with pythons, to root on the marathoner who is near collapse at the finish line, to scream "Foreman" when the announcer says "Down goes Frazier." And American spectators also commiserate during the "agony of defeat," as immortalized in the Wide World of Sports video of a ski jumper flying

horribly off course.

The broad question implicated by this case is this: When should we as a society paternalistically decide that the participants in these sports and entertainment activities must be protected from themselves—that the risk of significant physical injury is simply too great even for eager and willing participants? And most importantly for this case, who decides that the risk to participants is too high?

In the first instance, the sports and entertainment industries regulate themselves, often through collaboration between management and participants, to ensure that the risks are at least known to all. Often, the sports and entertainment industries take affirmative steps to make the sports or activities safer for participants. Major League Baseball has required batters to wear increasingly protective helmets; just this offseason, it issued a new rule about home-plate collisions. The NFL has prohibited certain hits to the head. NASCAR has mandated roll cages, fire retardant uniforms, and window netting. And so on.

Sometimes Congress, state legislatures, or state regulators jump into the fray by prohibiting or otherwise regulating certain sports or entertainment activities. See, e.g., Professional Boxing Safety Act of 1996, Pub.L. No. 104–272, 110 Stat. 3309. State tort law also looms as a significant constraint in most jurisdictions, particularly for allegedly known but unwarned-of risks to the participants, as the NFL has recently experienced. See *In re National Football League Players' Concussion Injury Litigation*, 961 F.Supp.2d 708 (E.D.Pa.2014).

On the other hand, the bureaucracy at the U.S. Department of Labor has not traditionally been thought of as the proper body to decide whether to ban fighting in hockey, to prohibit the punt return in football, to regulate the distance between the mound and home plate in baseball, to separate the lions from the tamers at the circus, or the like.

In this case, however, the Department departed from tradition and stormed headlong into a new regulatory arena. The Department issued a citation to SeaWorld that effectively bans SeaWorld from continuing a longstanding and popular (albeit by definition somewhat dangerous) show in which SeaWorld trainers play with and interact with whales. The Department's SeaWorld decision was upheld administratively by the independent Occupational Safety and Health Review Commission, and the majority opinion today affirms.

Whether SeaWorld's show is unreasonably dangerous to participants and should be banned or changed is not the question before us. The question before us is whether the Department of Labor has authority under current law to make that decision—in addition to the authority already possessed by Congress, state legislatures, state regulators, and courts applying state tort law.