PART I

BACKGROUND

CHAPTER 1

WORK AND LAW

Page 11. Please add the following note.

1A. One way of quantifying the American Dream is to calculate the percentage of children age 30 who earned more than their parents at the same age. Using deidentified tax records, researchers made the following calculation. For children born in 1940, 92% earned more than their parents. That figure has declined steadily for children born after 1950 (79%), 1960 (72%), 1970 (71%), and 1980 (50%). David Leonhardt, The American Dream Quantified at Last, N.Y. Times, Dec. 11, 2016, at SR2.
CHAPTER 2

THE DEVELOPMENT OF EMPLOYMENT LAW

A. THE FOUNDATIONS OF EMPLOYMENT LAW

2. EMPLOYER–EMPLOYEE

Page 26. Please insert before 3. EMPLOYMENT AT WILL


Since the end of the Great Recession, U.S. businesses have aggressively engaged in a series of organizational changes—from classifying workers as independent contractors to hiring subcontractors, to utilizing staffing agencies—to delegate employment-related responsibilities to outsiders. Although the strategic use of contactors existed long before the most recent economic downturn, the Great Recession dramatically increased this trend. Regrettably for workers caught in these settings, employment law violations represent a common practice. In addition to avoiding employment liabilities, firms that hire contractors fail to contribute to essential components of America’s social safety net such as Social Security and unemployment benefits. And the scope of the problem is growing. By 2020, up to forty percent of workers are projected to become contingent “pseudo-employees,” many of whom will lack the ability to enforce basic workplace protections.

Given the potential cost-savings they offer, these organizational changes represent the “future of work” for which the law must account. Unfortunately, current judicial pronouncements on these issues often embrace a cabined vision of employment that shields firms from liability. This constrained understanding of employer-employee configurations ultimately limits the reach of protective statutes, thereby resulting in a misalignment between modern workplace structures and employment rights.

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I. THE RISE OF THE CONTRACTOR DEFENSE

A. Working but not employed

The uniforms that many workers wear today do not necessarily reflect the identities of their actual employers. For example, the satellite television installer who drives a DirecTV-branded truck may not actually report to DirecTV. Likewise, the Westin housekeeper who cleans hotel rooms may not receive a paycheck from the hotel chain where she works. The process of “vertical integration,” wherein firms generate goods and services internally, has drastically declined over the last several decades. Given the choice between producing a service in-house or
buying it from outside sources, companies increasingly turn to third parties for essential services. This growing commodification of work-related tasks has birthed an entire industry of labor intermediaries who sell discrete services in individualized packages to business.

Given the low price and availability of vendor-supplied labor, many formerly self-contained companies now rely on vast networks of contractors to maintain operations. For example, some hospitals and hotels assign nearly all of their operations—housekeeping, maintenance, recordkeeping, etc.—to third parties. Similarly, when Amazon recently opened a distribution center in Tennessee, it announced that 3500 of the 4500 new employees would actually work for an outside agency that contracted with Amazon. But even though Amazon may not share an official employment relationship with workers in situations like this, the company can still exert significant influence over workers’ pay and working conditions by controlling the firms that formally employ them.

Unsurprisingly, these movements have caused the number of people employed by labor-only agencies to explode in recent years. Since 2010, the staffing industry has added more jobs to the U.S. economy than any other sector. While total employment in the labor market has grown by six percent since 2009, the staffing industry has grown by forty-one percent. Many of the workers involved in these arrangements are not temporary laborers at all, but rather assume the identity of “permatemps” who receive their paychecks from supplying firms while providing labor to companies that never formally employ them. Once a niche field in the 1970s that offered only short-term work in areas such as secretarial assistance, nursing help, and day labor, the temporary staffing sector now supplies labor to numerous industries. Given this expansion, many end-user companies today see “temporary” staffing agencies as permanent extensions of their human resources departments.

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B. The Gig Economy and Independent Contractors

No industry better exemplifies the vast expansion of independent contracting than the on-demand or “gig” economy. Rooted in an economic model in which individuals sell services to one another, online platforms help facilitate varied forms of peer-to-peer work. Although on-demand workers represent a relatively small segment of the labor force, the number of jobs in this area is increasing rapidly. Take Uber: Valued at $50 billion, Uber is the fastest-growing startup in the world. In fact, the ride-broker’s growth has been so explosive that its private market value now equals that of mainstay public companies like Target and Kraft Foods. Uber claims that it “owns no vehicles” and “employs no drivers.” But even as the rideshare firm denies its employer status, it adds hundreds of thousands of driver-partners to its platform each month.

Uber’s ascension has devastated taxi companies in many regions. In New York City, for example, the number of rides provided by Uber jumped in two years from 300,000 to 3.5 million, while traditional cabs lost 2.1 million rides during the same period. In 2015, San Francisco’s largest taxi company, Yellow Cab, filed for bankruptcy. And Uber’s long-term business plan extends well beyond ridesharing. The company now delivers, or plans to deliver food
(UberEats), retail goods (UberRush), and flu shots (UberHealth), offering all of these services with nonemployee labor.

Because it categorizes its “partners” as independent contractors, Uber does not extend any employment rights—including unemployment benefits, workers’ compensation, or overtime—to its drivers. The rideshare firm gains immediate economic advantages from this strategy. Uber can save up to thirty percent in payroll taxes simply by classifying its drivers as nonemployees. And Uber is not the only platform taking advantage of this exempt category of workers. Indeed, the gig economy is chock-full of firms that hire independent contractors to gain similar bottom-line benefits. From Lyft drivers to TaskRabbit gardeners, many peer marketplaces categorize their workers as nonemployees.

As first glance, the classification of on-demand workers as independent contractors might seem perfectly appropriate given that workers in the industry can accept gigs whenever they choose. But the significant influence that on-demand firms have over working conditions—from setting non-negotiable wage rates, to implementing behavior codes, to “deactivating” (i.e. firing) individuals who perform poorly—reflects a more traditional employer-employee dynamic.

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

EDWARD M. CHEN, District Judge.

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

* * *

I. BACKGROUND

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

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

Once a prospective driver successfully completes the application and interview stages, the driver must sign contracts with Uber or one of Uber's subsidiaries (Raiser LLC). Those contracts explicitly provide that the relationship between the transportation providers and Uber/Raiser “is solely that of independent contracting parties.” The parties “expressly agree that this Agreement is not an employment agreement or employment relationship.” The relevant contracts further provide that drivers will be paid a “fee” (i.e., fare) upon the successful completion of each ride. According to an Uber 30(b)(6) deponent, Uber sets fares based principally on the miles traveled by the rider and the duration of the ride. Because Uber receives the rider's payment of the entire fare, the relevant contracts provide that Uber will automatically deduct its own “fee per ride” from the fare before it remits the remainder to the driver. Plaintiffs presented evidence that Uber typically takes roughly 20 percent of the total fare billed to a rider as its “fee per ride.”

In this litigation, Uber bills itself as a “technology company,” not a “transportation company,” and describes the software it provides as a “lead generation platform” that can be used to connect “businesses that provide transportation” with passengers who desire rides. Uber notes that it owns no vehicles, and contends that it employs no drivers. Rather, Uber partners with alleged independent contractors that it frequently refers to as “transportation providers.”

Plaintiffs characterize Uber's business (and their relationship with Uber) differently. They note that while Uber now disclaims that it is a “transportation company,” Uber has previously referred to itself as an “On-Demand Car Service,” and goes by the tagline “Everyone's Private Driver.” Indeed, in commenting on Uber's planned expansion into overseas markets, its CEO wrote on Uber's official blog: “We are ‘Everyone's Private Driver.’ We are Uber and we're rolling out a transportation system in a city near you.” Other Uber documents state that “Uber provides the best transportation service in San Francisco....”

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

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

2. California's Test of Employment

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

For the purpose of determining whether an employer can rebut a prima facie showing of employment, the Supreme Court's seminal opinion in Borello “enumerated a number of indicia of an employment relationship.” The “most significant consideration” is the putative employer's “right to control work details.” S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations (Borello), 769 P.2d 399 (Cal. 1989). This right of control need not extend to every possible detail of the work. Rather, the relevant question is whether the entity retains “all necessary control” over the worker's performance.

The Supreme Court has further emphasized that the pertinent question is “not how much control a hirer exercises, but how much control the hirer retains the right to exercise.” When evaluating the extent of that control, the Supreme Court has stressed that an employer's “right to discharge at will, without cause” is “strong evidence in support of an employment relationship.” This is because the “power of the principal to terminate the services of the agent [without cause] gives him the means of controlling the agent's activities.”

The putative employer's right to control work details is not the only relevant factor, however, and the control test cannot be “applied rigidly and in isolation.” Thus, the Supreme Court has also embraced a number of “secondary indicia” that are relevant to the employee/independent contractor determination.

While the Supreme Court explained that all thirteen of the above “secondary indicia” are helpful in determining a hiree's employment status, it noted that “the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends on particular combinations.” Moreover, the Court made it “clear that the label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.”
B. The Plaintiffs Are Uber's Presumptive Employees Because They Provide a Service to Uber

If Plaintiffs can establish that they provide a service to Uber, then a rebuttable presumption arises that they are Uber's employees. Uber argues that the presumption of employment does not apply here because Plaintiffs provide it no service. The central premise of this argument is Uber's contention that it is not a “transportation company,” but instead is a pure “technology company” that merely generates “leads” for its transportation providers through its software. Using this semantic framing, Uber argues that Plaintiffs are simply its customers who buy dispatches that may or may not result in actual rides. In fact, Uber notes that its terms of service with riders specifically state that Uber is under no obligation to actually provide riders with rides at all. Thus, Uber passes itself off as merely a technological intermediary between potential riders and potential drivers. This argument is fatally flawed in numerous respects.

First, Uber's self-definition as a mere “technology company” focuses exclusively on the mechanics of its platform (i.e., the use of internet enabled smartphones and software applications) rather than on the substance of what Uber actually does (i.e., enable customers to book and receive rides). This is an unduly narrow frame. Uber engineered a software method to connect drivers with passengers, but this is merely one instrumentality used in the context of its larger business. Uber does not simply sell software; it sells rides. Uber is no more a “technology company” than Yellow Cab is a “technology company” because it uses CB radios to dispatch taxi cabs, John Deere is a “technology company” because it uses computers and robots to manufacture lawn mowers, or Domino Sugar is a “technology company” because it uses modern irrigation techniques to grow its sugar cane. Indeed, very few (if any) firms are not technology companies if one focuses solely on how they create or distribute their products. If, however, the focus is on the substance of what the firm actually does (e.g., sells cab rides, lawn mowers, or sugar), it is clear that Uber is most certainly a transportation company, albeit a technologically sophisticated one. In fact, as noted above, Uber's own marketing bears this out, referring to Uber as “Everyone's Private Driver,” and describing Uber as a “transportation system” and the “best transportation service in San Francisco.”

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

Furthermore, Uber not only depends on drivers' provision of transportation services to obtain revenue, it exercises significant control over the amount of any revenue it earns: Uber sets the fares it charges riders unilaterally. The record also shows that Uber claims a “proprietary interest” in its riders, which further demonstrates that Uber acts as more than a mere passive intermediary between riders and drivers. For instance, Uber prohibits its drivers from answering
rider queries about booking future rides outside the Uber app, or otherwise “soliciting” rides from Uber riders.

* * *

This Court holds, as a matter of law, that Uber's drivers render service to Uber, and thus are Uber's presumptive employees.

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

Because the Court has determined that the Plaintiffs are Uber’s presumptive employees, the burden now shifts to Uber to disprove an employment relationship. As noted above, when determining under California law whether a putative employer can rebut a hiree’s prima facie case of employment, the Court applies the multi-factor test laid out in the Supreme Court’s decision in *Borello*.

* * *

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

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

Because the ultimate determination of the Plaintiffs' employment status presents a mixed question of law and fact, Uber may only obtain summary judgment if all facts and evidentiary inferences material to the employee/independent contractor determination are undisputed, and a reasonable jury viewing those undisputed facts and inferences could reach but one conclusion—that Uber's drivers are independent contractors as a matter of law. The Court explained at the hearing on this matter that this is a “pretty tough standard to meet,” and it is one that Uber has failed to meet here.

NOTES AND QUESTIONS

1. In another case involving Uber in San Francisco, Mohamed v. Uber Technologies, Inc., 848 F.3d 1201 (9th Cir. 2016), the Ninth Circuit reversed Judge Chen and upheld a provision in Uber's software license agreement with its drivers that all disputes are subject to arbitration.

2. In McGillis v. Department of Economic Opportunity, 210 So.3d 220 (Fla. Dist. Ct. App. 2017), an Uber driver was "deactivated" based on alleged violations of Uber's privacy policy. When the driver filed for "reemployment assistance" under Florida law his claim was rejected on the ground that he was not an employee. In affirming the denial of his claim, the Florida appellate court stated: "Due in large part to the transformative nature of the internet and
smartphones, Uber drivers like McGillis decide whether, when, where, with whom, and how to provide rides using Uber's computer programs. This level of free agency is incompatible with the control to which a traditional employee is subject."

3. Assuming that the court in *McGillis* is correct, that Uber drivers are not employees under traditional common law criteria, should they be excluded from unemployment insurance, workers' compensation, minimum wage and maximum hour provisions, and all of the other laws designed to protect the interests of workers? Do we need a new conceptualization of employment laws to replace the New Deal era foundations of many labor and employment laws?

4. On June 7, 2017, Secretary of Labor Alexander Acosta announced the immediate withdrawal of Labor Department interpretations from 2015 and 2016 involving independent contractors and joint employment. Of particular relevance is the guidance dealing with misclassification of employees as independent contractors, which contains a presumption that "most workers are employees." The Obama Administration had aggressively enforced the FLSA to obtain wages for workers, mostly low income, who were deemed independent contractors and therefore not subject to overtime provisions and other protections.

5. For a further discussion of these issues, see Invisible Labor: Hidden Work in the Contemporary World (Marion G. Crain, Winifred R. Poster, & Miriam A. Cherry eds., 2016).

**B. SOURCES OF MODERN EMPLOYMENT LAW**

2. COLLECTIVE BARGAINING

Page 47. After the second paragraph, please add the following.

NOTE

The conservative shift in state legislatures has resulted in the enactment of more state right to work laws. As of 2017, there were right to work laws in 28 states, including the midwestern states of Indiana, Iowa, Michigan, Missouri, Nebraska, and Wisconsin. For a further discussion, see Raymond L. Hogler, The End of American Labor Unions: The Right-to-Work Movement and the Erosion of Collective Bargaining (2015).

5. MODIFICATION OF THE AT WILL RULE

Page 55. Please insert the following case after note 3.

Yardley v. Hospital Housekeeping Systems, LLC
470 S.W.3d 800 (Tenn. 2015).

SHARON G. LEE, Chief Justice.

We accepted a question of law certified by the United States District Court for the Middle District of Tennessee to determine whether a job applicant has a cause of action under the
Tennessee Workers' Compensation Act against a prospective employer for failure to hire if the prospective employer failed to hire the job applicant because that applicant had filed, or is likely to file, a workers' compensation claim against a previous employer, and if such a cause of action exists, what standard should apply. We hold that there is no cause of action for failure to hire under the Tennessee Workers' Compensation Act.

Factual and Procedural Background

Beginning in 1998, Kighwaunda M. Yardley worked as a housekeeping aide at the University Medical Center (“the Hospital”) in Lebanon. In 2010, Ms. Yardley was hurt on the job and began receiving workers' compensation benefits. Between June 2010 and September 2012, she received medical treatment for her injury. As of July 1, 2012, she was performing light duty work for the Hospital's materials management group with the expectation that when released to full duty, she would return to her job as a housekeeping aide.

On January 1, 2012, the Hospital entered into a contract with Hospital Housekeeping Systems (“the Company”), whereby the Company agreed to provide housekeeping services for the Hospital beginning July 1, 2012. As part of its contract, the Company agreed to interview the Hospital's current housekeeping employees and, at the Company's discretion, hire the employees to continue in their positions. The Company hired most of the Hospital's housekeeping staff. As of July 1, 2012, Ms. Yardley had neither been interviewed nor hired because she was still on light duty. When Ms. Yardley was released to full duty, she sought to return to work in the housekeeping department. The Hospital referred her to the Company for employment. In August 2012, she spoke with the Company's Division Vice President, Michael Cox, who, according to Ms. Yardley, told her that the Company would not hire anyone receiving workers' compensation benefits. In an email to the Company, Mr. Cox said that Ms. Yardley had “been out on Workers’ Comp with the hospital long before [the Company's] arrival,” that her shoulder was hurting her again, and that “[b]ringing her on board with [the Company] would seem to be a Workers’ Comp claim waiting to happen.” Mr. Cox said he “would advise against [hiring Ms. Yardley] IF we have that option.” After she was not hired, Ms. Yardley sued the Company in the United States District Court for the Middle District of Tennessee.

We accepted the following certified question of law from the federal district court: If a prospective employer refuses to hire a job applicant because that applicant had filed, or is likely to file, a workers' compensation claim incurred while working for a previous employer, can that applicant maintain a cause of action under the Workers' Compensation Act (“the Act”) against the prospective employer for failure to hire, and if such a claim exists, should courts apply the motivating factor standard of causation, as they do with retaliatory discharge claims?

Analysis

* * *

This is a case of first impression. In Tennessee, there is no statutory or common law cause of action for retaliatory failure to hire. Ms. Yardley asks this Court to create this cause of action. Relying on public policy grounds and retaliatory discharge cases from this and other
jurisdictions, Ms. Yardley argues that if employers can lawfully refuse to hire job applicants because applicants have filed, or are likely to file, workers' compensation claims, this action by employers will have a chilling effect on workers' decisions to file claims and obtain their rightful remedies under the Act. She also asserts that if employers are allowed to refuse to hire applicants on such a basis, it would frustrate the purpose of the Second Injury Fund, see Tenn. Code Ann. § 50–6–208 (2014), which the Legislature established to encourage the hiring of workers who have suffered previous injuries. Amicus curiae Tennessee Employment Lawyers Association argues that an employer's failure to hire a job applicant because the applicant asserted a claim for compensation against a previous employer constitutes a device that would relieve an employer of an obligation under the Act; such devices are prohibited by Tennessee Code Annotated section 50–6–114 (2014).

The Company and amicus curiae Tennessee Defense Lawyers Association oppose the creation of a cause of action for retaliatory failure to hire. They argue that there was no employer-employee relationship between Ms. Yardley and the Company and, therefore, the retaliatory discharge cases cited by Ms. Yardley are distinguishable. They contend that Tennessee's employment-at-will doctrine should be protected, that employers should be free to hire and fire as they choose, and that an exception to the employment-at-will doctrine should not be made in this case.

* * *

One exception to the employment-at-will doctrine is that an at-will employee may not be fired for taking an action encouraged by public policy. Filing a workers' compensation claim is an action encouraged by public policy. Therefore, an employer may not lawfully discharge an employee for filing a workers' compensation claim. An employee who believes that she has been fired for filing a workers' compensation claim may bring a claim for retaliatory discharge. This cause of action was recognized "to enforce the duty of the employer, to secure the rights of the employee[,] and to carry out the intention of the [L]egislature."

To decide whether a job applicant may bring a retaliatory failure to hire action against a prospective employer, we start by examining Tennessee Code Annotated section 50–6–114(a). When interpreting statutes, our primary function is to carry out the Legislature's intent without broadening the statute beyond its intended scope. To carry out this function, we presume that every word in a statute has meaning and purpose and should be given full effect, as long as the result does not violate the Legislature's obvious intent. When the statutory language is clear and unambiguous, we simply apply its plain meaning.

Tennessee Code Annotated section 50–6–114 provides, in part, "No contract or agreement, written or implied, or rule, regulation or other device, shall in any manner operate to relieve any employer ... of any obligation created by this chapter...." Although an employer's decision to fire an employee for filing a worker's compensation claim has been held to be an unlawful device, this holding does not apply to Ms. Yardley because she was not an employee of the Company. The Act applies to employers and employees. An employer is defined as "any individual, firm, association or corporation ... using the services of not less than five (5) persons for pay." An employee is defined as a "person ... in the service of an employer ... under any
contract of hire or apprenticeship, written or implied.” Under this definition, Ms. Yardley was not an employee, but merely a job applicant. As such, the Company had no obligation to her under the Act.

Ms. Yardley argues that retaliatory discharge cases are analogous. The elements of a common law prima facie case for a workers' compensation retaliatory discharge claim are: (1) the plaintiff was an employee of the defendant at the time of the injury; (2) the plaintiff made a claim against the defendant for workers' compensation benefits; (3) the defendant terminated the plaintiff's employment; and (4) the claim for workers' compensation benefits was a substantial factor in the employer's motivation to terminate the employee's employment.

Ms. Yardley cites a number of retaliatory discharge cases to support her position and argues that the Tennessee and out-of-state cases cited form the basis for a retaliatory failure-to-hire cause of action. But these cases are distinguishable, as they all involve parties who had been in an employer-employee relationship with each other at the time the tort allegedly occurred. Ms. Yardley was not an employee of the Company, and thus, there was never a relationship. This is an important distinction. The employer-employee relationship involves mutual acquiescence, and certain levels of trust and dependence are created upon its formation. Both parties have rights and responsibilities that naturally flow from that relationship and which are not present before the relationship is formed. For this reason, failure to hire cannot be equated with termination of employment, as employees and job applicants are on different footing.


Ms. Yardley argues that if employers may legally refuse to hire job applicants because they have current or prospective workers' compensation claims, then employees will be discouraged from filing such claims. We find the alleged harm to be too speculative to justify an exception to the employment-at-will doctrine. This State has an interest in ensuring that its
citizens have access to employment and the ability to earn a livelihood, but at the same time, employers should have freedom to choose their employees.

***

Conclusion

We respectfully decline to create an exception to the employment-at-will doctrine, and we therefore hold that a job applicant does not have a cause of action under the Tennessee Workers' Compensation Act against a prospective employer for failure to hire if the prospective employer refused to hire the job applicant because that applicant had filed, or is likely to file, a workers' compensation claim against a previous employer.

6. ARBITRATION

Page 55. Please delete the *Campbell* case and replace with the following.

**Lewis v. Epic Systems Corp.**

823 F.3d 1147 (7th Cir. 2016),
cert. granted, 137 S.Ct. 809 (2017).

WOOD, Chief Judge.

Epic Systems, a health care software company, required certain groups of employees to agree to bring any wage-and-hour claims against the company only through individual arbitration. The agreement did not permit collective arbitration or collective action in any other forum. We conclude that this agreement violates the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151, et seq., and is also unenforceable under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1, et seq. We therefore affirm the district court's denial of Epic's motion to compel arbitration.

I

On April 2, 2014, Epic Systems sent an email to some of its employees. The email contained an arbitration agreement mandating that wage-and-hour claims could be brought only through individual arbitration and that the employees waived “the right to participate in or receive money or any other relief from any class, collective, or representative proceeding.” The agreement included a clause stating that if the “Waiver of Class and Collective Claims” was unenforceable, “any claim brought on a class, collective, or representative action basis must be filed in a court of competent jurisdiction.” It also said that employees were “deemed to have accepted this Agreement” if they “continue [d] to work at Epic.” Epic gave employees no option to decline if they wanted to keep their jobs. The email requested that recipients review the agreement and acknowledge their agreement by clicking two buttons. The following day, Jacob Lewis, then a “technical writer” at Epic, followed those instructions for registering his agreement.
Later, however, Lewis had a dispute with Epic, and he did not proceed under the arbitration clause. Instead, he sued Epic in federal court, contending that it had violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, et seq. and Wisconsin law by misclassifying him and his fellow technical writers and thereby unlawfully depriving them of overtime pay. Epic moved to dismiss Lewis's claim and compel individual arbitration. Lewis responded that the arbitration clause violated the NLRA because it interfered with employees' right to engage in concerted activities for mutual aid and protection and was therefore unenforceable. The district court agreed and denied Epic's motion. Epic appeals, arguing that the district court erred in declining to enforce the agreement under the FAA. We review de novo a district court's decision to deny a motion to compel arbitration.

II

A

Section 7 of the NLRA provides that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. Section 8 enforces Section 7 unconditionally by deeming that it “shall be an unfair labor practice for an employer ... to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7].” The National Labor Relations Board is “empowered ... to prevent any person from engaging in any unfair labor practice ... affecting commerce.”

Contracts “stipulat[ing] ... the renunciation by the employees of rights guaranteed by the [NLRA]” are unlawful and may be declared to be unenforceable by the Board. In accordance with this longstanding doctrine, the Board has, “from its earliest days,” held that “employer-imposed, individual agreements that purport to restrict Section 7 rights” are unenforceable. It has done so with “uniform judicial approval.”

Section 7's “other concerted activities” have long been held to include “resort to administrative and judicial forums.” Similarly, both courts and the Board have held that filing a collective or class action suit constitutes “concerted activity” under Section 7. This precedent is in line with the Supreme Court's rule recognizing that even when an employee acts alone, she may “engage in concerted activities” where she “intends to induce group activity” or “acts as a representative of at least one other employee.”

* * *

Collective, representative, and class legal remedies allow employees to band together and thereby equalize bargaining power. Given Section 7's intentionally broad sweep, there is no reason to think that Congress meant to exclude collective remedies from its compass.

Straining to read the term through our most Epic-tinted glasses, “concerted activity” might, at the most, be read as ambiguous as applied to collective lawsuits. But even if Section 7 were ambiguous—and it is not—the Board, in accordance with the reasoning above, has
interpreted Sections 7 and 8 to prohibit employers from making agreements with individual employees barring access to class or collective remedies. The Board's interpretations of ambiguous provisions of the NLRA are “entitled to judicial deference.” This Court has held that the Board's views are entitled to Chevron deference, and the Supreme Court has repeatedly cited Chevron in describing its deference to the NLRB's interpretation of the NLRA. The Board's interpretation is, at a minimum, a sensible way to understand the statutory language, and thus we must follow it.

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Congress was aware of class, representative, and collective legal proceedings when it enacted the NLRA. The plain language of Section 7 encompasses them, and there is no evidence that Congress intended them to be excluded. Section 7's plain language controls, and protects collective legal processes. Along with Section 8, it renders unenforceable any contract provision purporting to waive employees' access to such remedies.

B

The question thus becomes whether Epic's arbitration provision impinges on “Section 7 rights.” The answer is yes.

In relevant part, the contract states “that covered claims will be arbitrated only on an individual basis,” and that employees “waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding.” It stipulates that “[n]o party may bring a claim on behalf of other individuals, and any arbitrator hearing [a] claim may not: (i) combine more than one individual's claim or claims into a single case; (ii) participate in or facilitate notification of others of potential claims; or (iii) arbitrate any form of a class, collective or representative proceeding.” It notes that “covered claims” include any “claimed violation of wage-and-hour practices or procedures under local, state, or federal statutory or common law.” It thus combines two distinct rules: first, any wage-and-hour dispute must be submitted to arbitration rather than pursued in court; and second, no matter where the claim is brought, the plaintiff may not take advantage of any collective procedures available in the tribunal.

Insofar as the second aspect of its provision is concerned, Epic's clause runs straight into the teeth of Section 7. The provision prohibits any collective, representative, or class legal proceeding. Section 7 provides that “[e]mployees shall have the right to ... engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection.” A collective, representative, or class legal proceeding is just such a “concerted activi[y].” Under Section 8, any employer action that “interfer[e] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in [Section 7]” constitutes an “unfair labor practice.” Contracts that stipulate away employees' Section 7 rights or otherwise require actions unlawful under the NRLA are unenforceable.

***
In short, Sections 7 and 8 of the NLRA render Epic's arbitration provision unenforceable. Even if this were not the case, the Board has found that substantively identical arbitration agreements, agreed to under similar conditions, violate Sections 7 and 8. We conclude that, insofar as it prohibits collective action, Epic's arbitration provision violates Sections 7 and 8 of the NLRA.

III

That would be all that needs to be said, were it not for the Federal Arbitration Act. Epic argues that the FAA overrides the labor law doctrines we have been discussing and entitles it to enforce its arbitration clause in full. Looking at the arbitration agreement, it is not clear to us that the FAA has anything to do with this case. The contract imposes two rules: (1) no collective action, and (2) proceed in arbitration. But it does not stop there. It also states that if the collective-action waiver is unenforceable, then any collective claim must proceed in court, not arbitration. Since we have concluded in Part II of this opinion that the collective-action waiver is incompatible with the NLRA, we could probably stop here: the contract itself demands that Lewis's claim be brought in a court. Epic, however, contends that we should ignore the contract's saving clause because the FAA trumps the NLRA. In essence, Epic says that even if the NLRA killed off the collective-action waiver, the FAA resuscitates it, and along with it, the rest of the arbitration apparatus. We reject this reading of the two laws.

In relevant part, the FAA provides that any written contract “evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” Enacted in “response to judicial hostility to arbitration,” its purpose was “to make arbitration agreements as enforceable as other contracts, but not more so.” Federal statutory claims are just as arbitrable as anything else, “unless the FAA's mandate has been ‘overridden by a contrary congressional command.’ The FAA's ‘saving clause permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses,’ ... but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”

* * *

A

Epic must overcome a heavy presumption to show that the FAA clashes with the NLRA. “[W]hen two statutes are capable of co-existence ... it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” Moreover, “[w]hen two statutes complement each other”—that is, “each has its own scope and purpose” and imposes “different requirements and protections”—finding that one precludes the other would flout the congressional design. Courts will harmonize overlapping statutes “so long as each reaches some distinct cases.” Implied repeal should be found only when there is an “‘irreconcilable conflict’ between the two federal statutes at issue.”
Epic has not carried that burden, because there is no conflict between the NLRA and the FAA, let alone an irreconcilable one. As a general matter, there is “no doubt that illegal promises will not be enforced in cases controlled by the federal law.” The FAA incorporates that principle through its saving clause: it confirms that agreements to arbitrate “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” The NLRA prohibits the enforcement of contract provisions like Epic's, which strip away employees' rights to engage in “concerted activities.” Because the provision at issue is unlawful under Section 7 of the NLRA, it is illegal, and meets the criteria of the FAA’s saving clause for nonenforcement. Here, the NLRA and FAA work hand in glove.

B

***

The FAA contains a general policy “favoring arbitration and a liberal federal policy favoring arbitration agreements.” Its “substantive command” is “that arbitration agreements be treated like all other contracts.” Its purpose is “to make arbitration agreements as enforceable as other contracts, but not more so.” “To immunize an arbitration agreement from judicial challenge on” a traditional ground such as illegality “would be to elevate it over other forms of contract—a situation inconsistent with the ‘saving clause.’ ” The FAA therefore renders Epic's arbitration provision unenforceable.

***

IV

Because it precludes employees from seeking any class, collective, or representative remedies to wage-and-hour disputes, Epic's arbitration provision violates Sections 7 and 8 of the NLRA. Nothing in the FAA saves the ban on collective action. The judgment of the district court is therefore Affirmed.
PART II

ESTABLISHING THE EMPLOYMENT RELATIONSHIP

CHAPTER 3

THE HIRING PROCESS

A. THE LABOR POOL

3. ALIENS UNAUTHORIZED TO WORK IN THE U.S.

Page 81. Please add the following:


Page 99. Note 10. Please add the following after the Wyoming statute in line 2.

But see In re Arellano, 344 P.3d 249 (Wyo. 2015) (upholding workers' compensation benefits; amendment to workers’ compensation statute was interpreted to cover undocumented workers whom employers reasonably believed were authorized to work in the U.S. because the purpose of the amendment was to preclude common law actions for damages filed by undocumented workers who sustained injuries on the job).


See Hernandez v. U.S.D. 233, 390 P.3d 875 (Kan. 2017) (workers' compensation award upheld for claimant who was not legally authorized to work in the United States and who used false name and documents to apply for job).

Page 100. Please add the following note.

14. More aggressive enforcement of immigration laws under the Trump Administration has resulted in a significant drop in workers' compensation claims filed in California by undocumented workers. What are the likely consequences for these workers, their employers, and workers authorized to work in the United States?

B. APPLICATIONS, INTERVIEWS AND REFERENCES

3. REFERENCES
The most recent jurisdiction to reject compelled self-publication is Texas. Exxon Mobil Corp. v. Rincones, 2017 WL 2324710 (Tex. 2017).

Pauline T. Kim & Erika Hanson, People Analytics and the Regulation of Information under the Fair Credit Reporting Act 61 St. Louis U.L.J. 17, 17-20 (2016).

People analytics--the use of big data and computer algorithms to make personnel decisions--has been drawing increasing public and scholarly scrutiny. Software is now available for screening applicants to identify the most promising candidates, or searching online profiles to find top prospects for recruitment. Algorithms claim to predict which workers will be most productive or which employees are most likely to leave their jobs. These tools are built by collecting and analyzing vast amounts of data about individual characteristics and behaviors that go far beyond traditional factors like education and training. The datasets are subject to data mining, a process by which computers examine the data to uncover statistical patterns. Those patterns are then used to make predictions about future cases and to inform decision-making.

As workplace use of data analytic tools expands, commenters are raising alarms about the potential unfairness of relying on them to make consequential employment decisions. Some concerns focus on the potential intrusiveness of the data gathering required to develop and use these tools. People analytics depend on the collection of large amounts of information, some of it highly personal. Efforts to harvest health-related data, or information about off-duty behavior and activities on social media potentially threaten employees' personal privacy. Even relatively trivial bits of information--when aggregated with other data about an individual--can reveal highly sensitive personal information. For example, information recorded by electronic activity trackers and collected as part of employee wellness programs can be analyzed to reveal when an employee is pregnant or trying to conceive.

Other commenters charge that people analytic tools can be unfair if the data contains errors or mischaracterizations. Inaccurate information in individuals' consumer records may cause them to unjustifiably lose out on employment opportunities. Employees have alleged that inaccuracies in reports about their criminal records or credit histories caused employers to deny them jobs. Similarly, when algorithms rely on error-ridden personal data, they may make inaccurate predictions that arbitrarily reduce individuals' employment opportunities. Even when personal information is technically accurate, it can be presented in ways that are misleading. And algorithms may draw inferences or make predictions that are unjustified, resulting in the arbitrary denial of employment opportunities.

In addition, big data tools may produce discriminatory effects. Although workforce analytics may sometimes help to counter biased human judgments, data is not always objective or neutral. Scholars have documented numerous ways that reliance on algorithms can result in discrimination. Relatively trivial information, such as zip code or Facebook “likes,” may
correlate closely with protected characteristics like race or gender, or reveal a person's political or religious views. These types of data may operate as proxies, allowing a biased employer to hide its discriminatory intent behind a seemingly neutral data model. Even when no discrimination is intended, algorithms can produce discriminatory outcomes. If, for example, the underlying data reflects biased judgments about workers' performance, an algorithm built using that data may simply reproduce that bias. In other cases, the data used to create the algorithm may not be representative of the workforce, resulting in a skewed model that systematically disadvantages groups of workers along the lines of race or other protected classification.

* * *

The FCRA establishes certain procedural requirements, and these can sometimes help individual workers challenge inaccurate information about them. However, although employers face significant liability risks if they disregard the statute's requirements, the FCRA in fact does little to curb invasive data collection practices or to address the risks of discriminatory algorithms. Examining how the FCRA does and does not apply to people analytics reveals the limitations of a purely procedural approach. Given these limits, protecting employee privacy and preventing workplace discrimination will require looking to other models of regulation.

D. MEDICAL SCREENING

1. PURPOSE

Page 147. Please delete the excerpt in D-1 and replace with the following:


In the United States, occupational medical evaluations of applicants and employees began in the mid-nineteenth century. The use of medical criteria for selection and retention of employees was largely unregulated for over a century; employers and their physicians (either employees or consultants) had largely unfettered discretion in deciding what criteria to apply in making recommendations about individuals’ fitness for various types of employment. The first regulation of occupational medical evaluations was incidental to legislation intended primarily to prevent discrimination in employment on the basis of disability (originally referred to as “handicap”). At the same time that workplace medical evaluations became subject to legal scrutiny, evolving professional norms of occupational medicine began limiting the scope of medical inquiry for fitness-for-duty and other evaluations.

* * *

Fitness-for-duty remains a central concern in occupational medicine and the most common area in which issues of the ADA—and less commonly, GINA—arise. Rather than assessing future risk
of illness or disability, fitness-for-duty involves assessing present capacity to do the job as well as potential risk to self and others when performing work functions. Some employers attempted to control healthcare costs or reduce employee turnover by trying to identify future risk through medical screening. In the twentieth century, especially in the early decades, there had been a history of applying novel testing protocols to predict future disability, and tests were performed without proper scientific validation or with susceptibility to harm by chemical exposure. Sometimes the was the result of new test being adopted before it was properly evaluated, and sometimes it resulted from the enthusiasm of management champions who seized on something they had heard about, but did not understand, as a way to reduce workers’ compensation costs by excluding workers at risk. The result was that many workers who were entirely fit to do the work were unfairly disqualified from employment on the basis of tests of no value. Some of these tests, such as low-back X-rays (used to predict risk of low back pain but actually worthless), even carried some risk of harm, and few of them had any value or predictive accuracy. This is one reason that most test currently used in routine occupational medical practice are simple and very old, such as the chest X-ray; another is that the limitations of the test are well known and results can be readily interpreted on the basis of vast experience, unlike a more sophisticated but novel test with which there is little experience.

***

In recent years, the conduct of occupational medical evaluations has been influenced by two independent but related factors: (1) the composition and practice standards of the occupational medicine workforce *** and (2) increased legal regulation. *** To begin with, it is clear that the practice of occupational medicine has evolved. Although the actual number of physicians practicing occupational medicine full or part-time has remained relatively stable for the last thirty years (at sub-optimal levels), the practice arrangements and conduct of medical evaluations have changed, There is little evidence on whether the actual practice patterns of physicians differ based on their employment arrangements, but occupational medical evaluations in all settings have change in recent years to embrace more evidence-based medicine and more limited and targeted medical evaluations. Thus, controversial past practices, such as comprehensive medical questionnaires, single-sex “fetal protection” policies, and low-back X-ray practices, are no longer used. These modifications of occupational medicine practices may have taken place in any event, but they were certainly hastened by new developments in the law—both statutory and case law.

E. DRUG TESTING AND OTHER LABORATORY PROCEDURES

1. DRUG TESTING

Page 172. Please add the following to note 11.

The Supreme Court of Colorado unanimously affirmed. Coats v. Dish Network, L.L.C., 350 P.3d 849 (Colo. 2015). The plaintiff challenged his firing under a Colorado law that prohibits discharge of an employee for engaging in “lawful activity” off the job (primarily designed to protect cigarette smokers). See p. 157, note 1. Would the plaintiff have had a better chance by
alleging that permitting him to smoke marijuana at home for pain relief was a reasonable accommodation for his disability and therefore was required by the Americans with Disabilities Act or state disability nondiscrimination law?

2. GENETIC DISCRIMINATION

b. LEGISLATIVE RESPONSES

(ii) Genetic Information Nondiscrimination Act (GINA)

Page 178. Please insert the following after the second paragraph.

The EEOC has issued amended regulations and interpretive guidance on employer sponsored wellness programs under GINA and the ADA. 81 Fed. Reg. 31126 (2016).

Page 178. Please delete the Poore case and replace with the following:

Lowe v. Atlas Logistics
102 F.Supp. 3d 1360 (N.D. G.a. 2015).

AMY TOTENBERG, District Judge.

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

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

* * *

III. Analysis

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

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

* * *

A. The Unambiguous Statutory Language of GINA

The Court begins its analysis with the language of GINA. GINA makes it “an unlawful employment practice for an employer to request, require, or purchase genetic information with respect to an employee. Section 2000ff–1(b) lists six exceptions to this general prohibition, but Atlas admits that none of the statutory exceptions apply here. The parties' disagreement centers on a single phrase in Section 2000ff–1(b): “genetic information.”

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

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

If all the Court considers is the language of GINA, the undisputed evidence in the record establishes that the DNA analysis at issue here clearly falls within the definition of “genetic test.” The parties agree that Dr. Howenstine [of the testing laboratory] conducted an “analysis” of Lowe's and Reynolds's DNA. And the undisputed evidence in the record shows that this analysis at a minimum detects genotypes and mutations. Because the parties agree that Atlas requested a comparison of Lowe's and Reynolds's DNA to the fecal DNA found in the warehouse, Atlas's request and course of action appear to constitute a violation of 42 U.S.C. § 2000ff–1(b)'s prohibition against requesting genetic information from employees.
Defendant argues that this straightforward but broad interpretation of GINA is erroneous. Defendant urges the Court to interpret the “genetic test” language of GINA to exclude analyses of DNA, RNA, chromosomes, proteins, or metabolites if such analyses do not reveal an individual's propensity for disease. This proposed definition of “genetic tests”—a definition which limits genetic tests to those related to one's propensity for disease—renders other language in GINA superfluous, and should thus be rejected.

Section 2000ff–1(b) makes it unlawful to request, require, or purchase genetic information, except in six contexts. Section 1(b)(6), in turn, expressly allows employers to request, require, or purchase some genetic information which has nothing to do with the propensity for disease. Specifically, an employer is not liable under GINA where it conducts a “DNA analysis ... for purposes of human remains identification, and requests or requires genetic information of such employer's employees, but only to the extent that such genetic information is used for analysis of DNA identification markers for quality control to detect sample contamination.” 42 U.S.C. § 2000ff–1(b)(6). This exception would be unnecessary if Atlas's construction of GINA were correct, because under Atlas's construction, the term “genetic information” already excludes DNA analyses for purposes of human remains identification—a type of analysis unrelated to testing for disease propensity. Thus, the exception in § 2000ff–1(b)(6) weighs against Atlas's interpretation.

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

* * *

**IV. Conclusion**

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

**NOTE**

Unlike all of the other discrimination laws enforced by the EEOC, since the effective date of GINA in 2010 until 2015 there were only 24 non-frivolous charges filed with the EEOC alleging violations of GINA, and 21 of them involved employer efforts to obtain or use family health histories. Only three cases alleged improper activity with regard to an employee's genetic

F. NEGLIGENT HIRING

Page 189. Please add the following to the end of note 10.

Recent cases to uphold the potential liability of employers for negligent retention and supervision include Anicich v. Home Depot U.S.A., Inc., 852 F.3d 643 (7th Cir. 2017) (applying Illinois law, the court held that the employer's duty to monitor its employees extended to a supervisor's known harassing conduct that culminated in the employee's murder); Delorenzo v. HP Enterprise Services LLC, 207 F. Supp.3d 26 (D.D.C. 2016) (in cases based on fatal shooting of 7 employees at Washington Navy Yard by contractor's employee, all negligence actions were dismissed except for negligent retention and supervision).
CHAPTER 4

DISCRIMINATION

A. DISCRIMINATION ON THE BASIS OF RACE OR SEX

1. SOURCES OF PROTECTION

a. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

The Act also established the Equal Employment Opportunity Commission (EEOC) and charged it with investigating charges of discrimination and enforcing federal antidiscrimination laws. As part of its mandate, the EEOC was required to engage in conciliation efforts with an employer in instances in which the EEOC determined that there was reasonable cause to believe that the charge was true. The adequacy of such pre-suit conciliation efforts has become its own source of litigation in EEOC initiated lawsuits. In Mach Mining, LLC v. EEOC, 135 S. Ct. 1645 (2015), the Supreme Court vacated a Seventh Circuit decision that shielded pre-suit conciliation efforts from judicial review. In Mach, the Supreme Court held that a court could review whether the EEOC had satisfied its conciliation obligation as a prerequisite to a Title VII action, but the scope of judicial review was narrow and the remedy for failing to conciliate was not dismissal, but a stay of the action and an order to the EEOC to conciliate. The Court then set forth the EEOC’s pre-suit conciliation obligations in a two-part test. First, the EEOC “must inform the employer about the specific allegation.” Second, the EEOC must try to engage the employer in an informal method of “conference, conciliation, and persuasion.” Id. at 1652, 1656. On remand, the district court held that the EEOC had satisfied its conciliation obligations. EEOC v. Mach Mining, LLC, 161 F. Supp.3d 632 (S.D. Ill. 2016).

2. WHAT IS UNLAWFUL DISCRIMINATION?

a. DISPARATE TREATMENT

In Quigg v. Thomas Cnty. Sch. Dist., 814 F.3d 1227 (11th Cir. 2016), the Eleventh Circuit joined the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits in holding that at summary judgment, mixed motive claims involving circumstantial evidence should not be evaluated using the McDonnell Douglas standard. Instead, summary judgment should be denied in such cases if the plaintiff raises a genuine issue of material fact as to whether a protected characteristic was a motivating factor for the defendant’s adverse employment action. Only the Eighth Circuit has continued to hold, post Desert Palace, that the McDonnell Douglas approach
is appropriate at the summary judgment stage for mixed motive cases. See Griffin v. City of Des Moines, 387 F.3d 733 (8th Cir. 2004).

Page 234. Please add to the end of Note.
Moreover, in EEOC v. Bass Pro Outdoor World, L.L.C., 826 F.3d 791, 797-98 (5th Cir. 2016), the Fifth Circuit held that the EEOC was not required to meet the Rule 23 prerequisites of numerosity, commonality, typicality, and adequacy of representation when bringing an enforcement action in its own name because “[w]hen the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.”

(ii) Because of Race

Page 258. Please add to the end of note 2.

Trait mutability was also critical to the Eleventh Circuit’s recent decision in EEOC v. Catastrophe Management Solutions, 852 F.3d 1018 (11th Cir. 2016). In Catastrophe Management, the Eleventh Circuit affirmed the district court’s dismissal of plaintiff’s disparate treatment claim of race discrimination challenging her employer’s no dreadlocks policy. Title VII, the Eleventh Circuit held, prohibits only discrimination based on immutable traits.

Page 258. Please add as note 5.

5. In Village of Freeport v. Barella, 814 F.3d 594 (2d Cir. 2016), the Second Circuit did not take on the big question of what is race, but did hold that “Hispanic” is a “race” for the purposes of Title VII, and, more generally, that Title VII’s definition of race encompasses ethnicity.

Page 264. Please delete the last paragraph on page 264 including the carryover text on page 265, and insert the following.

Recently there has been a great deal of attention to the question of whether Title VII’s antidiscrimination mandate requires that transgender workers be permitted to use the restroom associated with their gender rather than their biological sex. The EEOC has ruled that an employer violates Title VII if it denies a transgender employee access to the restroom corresponding to the employee’s gender identity. See Lusardi v. Dep’t of the Army, 2015 WL 1607756 (April 1, 2015). Federal courts have not yet followed the EEOC’s lead. In Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007), for example, a bus driver informed her employer that she was transgender and would begin to present as female at work and use female restrooms while on her route. Her employer terminated her because it was unable to accommodate her restroom needs. The Tenth Circuit held that Etsitty was not entitled to protection under Title VII because the employer’s concern about potential liability stemming from her use of female restrooms, while still biologically male, was a legitimate business justification for burdening the plaintiff’s gender expression. See also Kastle v. Maricopa County Commun. Coll. Dist., 325 Fed. Appx. 492 (9th Cir. 2009) (explaining that “after Hopkins and Schwenk, it is unlawful to discriminate against a transgender (or any other person) because he or she does not behave in accordance with an employer’s expectations for men or women,” but
holding that the employer’s ban on a transgender plaintiff’s use of restroom for safety reasons did not constitute sex discrimination). Courts interpreting Title IX’s prohibition on sex discrimination in the context of education have interpreted that statute to require that transgender students be permitted to use the bathroom associated with their gender identity. In G.G. ex rel. Grimm v. Gloucester Sch. Bd., 2016 WL 1567467 (4th Cir. 2016), for example, the Fourth Circuit held that the prohibition on sex discrimination under Title IX requires educational institutions to give transgender students restroom access consistent with their gender identity. In reaching its conclusion, the court relied heavily on guidances to this effect offered by the Obama Administration. In March 2017, the Supreme Court vacated and remanded the case to the Fourth Circuit in light of the fact that the Department of Education and Department of Justice under the Trump Administration had withdrawn the relevant guidances. In G.G. v. Gloucester Cty Sch. Bd., 137 S.Ct 1239 (2017). More recently, the Seventh Circuit in Whitaker v. Kenosha Unified Sch. Dist., 2017 WL 2331751 (7th Cir. 2017), held that a transgender student was likely to succeed on the merits of his Title IX claim alleging that his school’s refusal to allow him to use the bathroom associated with his gender identity constituted sex discrimination. What may explain courts’ reluctance to extend the sex stereotyping logic to cases involving individuals’ choice of restroom? Is there any reason to interpret Title VII’s antidiscrimination mandate differently from Title IX’s in this regard?

Page 265. Please insert as new note 4.

4. While most courts, as will be discussed at the end of the chapter, continue to hold that discrimination based on sexual orientation per se is not an actionable form of sex discrimination under Title VII, the Second Circuit in Christiansen v. Omnicom Group, Inc., 852 F.3d 195, 200-01 (2d. Cir. 2017), made clear that “gay, lesbian, and bisexual individuals do not have less protection under Price Waterhouse against traditional gender stereotype discrimination than do heterosexual individuals.”

Page 271. Please insert at the end of note 1.

The Jespersen opinion has not been free from criticism from other courts. In EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp.3d 837, 853 (E.D. Mich. 2016), the court noted that it agreed with the dissent rather than the majority in Jespersen and held that an employer could not shield itself from liability under the sex stereotyping theory “simply by virtue of having put its gender-based stereotypes into a formal policy.”

Page 271. Please insert the following at the beginning of note 6.

6. As Jespersen makes clear, not all forms of sex-based differentiation violate Title VII. In Bauer v. Lynch, 812 F.3d 340, 351 (4th Cir. 2016), the Fourth Circuit held that an employer, in this case the Federal Bureau of Investigation, did not violate Title VII when it required male candidates seeking to become agents to complete 30 push ups as part of their physical fitness test but required female candidates to complete only 14.
JUSTICE BREYER delivered the opinion of the Court.

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

*  *  *

We begin with a summary of the facts. The petitioner, Peggy Young, worked as a part-time driver for the respondent, United Parcel Service (UPS). Her responsibilities included pickup and delivery of packages that had arrived by air carrier the previous night. In 2006, after suffering several miscarriages, she became pregnant. Her doctor told her that she should not lift more than 20 pounds during the first 20 weeks of her pregnancy or more than 10 pounds thereafter. UPS required drivers like Young to be able to lift parcels weighing up to 70 pounds (and up to 150 pounds with assistance). UPS told Young she could not work while under a lifting restriction. Young consequently stayed home without pay during most of the time she was pregnant and eventually lost her employee medical coverage.

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

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

*  *  *

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

On appeal, the Fourth Circuit affirmed. It wrote that “UPS has crafted a pregnancy-blind policy” that is “at least facially a ‘neutral and legitimate business practice,’ and not evidence of UPS’s discriminatory animus toward pregnant workers.” It also agreed with the District Court that Young could not show that “similarly-situated employees outside the protected class received more favorable treatment than Young.” Specifically, it believed that Young was different from those workers who were “disabled under the ADA” (which then protected only those with permanent disabilities) because Young was “not disabled”; her lifting limitation was only “temporary and not a significant restriction on her ability to perform major life activities.” Young was also different from those workers who had lost their DOT certifications because “no legal barrier stands between her and her work” and because many with lost DOT certifications retained physical (i.e., lifting) capacity that Young lacked. And Young was different from those “injured on the job because, quite simply, her inability to work [did] not arise from an on-the-job injury.” Rather, Young more closely resembled “an employee who injured his back while picking up his infant child or ... an employee whose lifting limitation arose from her off-the-job work as a volunteer firefighter,” neither of whom would have been eligible for accommodation under UPS’ policies.

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II

The parties disagree about the interpretation of the Pregnancy Discrimination Act’s second clause. As we have said, * * * the Act’s first clause specifies that discrimination “because of sex” includes discrimination “because of ... pregnancy.” But the meaning of the second clause is less clear; it adds: “[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work.” Does this clause mean that courts must compare workers only in respect to the work limitations that they suffer? Does it mean that courts must ignore all other similarities or differences between pregnant and nonpregnant workers? Or does it mean that courts, when deciding who the relevant “other persons” are, may consider other similarities and differences as well? If so, which ones?

***

The parties propose very different answers to this question. Young and the United States believe that the second clause of the Pregnancy Discrimination Act “requires an employer to provide the same accommodations to workplace disabilities caused by pregnancy that it provides to workplace disabilities that have other causes but have a similar effect on the ability to work.” In other words, Young contends that the second clause means that whenever “an employer accommodates only a subset of workers with disabling conditions,” a court should find a Title VII violation if “pregnant workers who are similar in the ability to work” do not “receive the same [accommodation] even if still other non-pregnant workers do not receive accommodations.”
UPS takes an almost polar opposite view. It contends that the second clause does no more than define sex discrimination to include pregnancy discrimination. Under this view, courts would compare the accommodations an employer provides to pregnant women with the accommodations it provides to others within a facially neutral category (such as those with off-the-job injuries) to determine whether the employer has violated Title VII.

A

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

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

***

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

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III

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

In our view, an individual pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the McDonnell Douglas framework. That framework requires a plaintiff to make out a prima facie case of discrimination. But it is
“not intended to be an inflexible rule.” Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575 (1978). Rather, an individual plaintiff may establish a prima facie case by “showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under” Title VII. The burden of making this showing is “not onerous.” In particular, making this showing is not as burdensome as succeeding on “an ultimate finding of fact as to” a discriminatory employment action. Neither does it require the plaintiff to show that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways.

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

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

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

The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers. Here, for example, if the facts are as Young says they are, she can show that UPS accommodates most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations. Young might also add that the fact that UPS has multiple policies that accommodate nonpregnant employees with lifting restrictions suggests that its reasons for failing to accommodate pregnant employees with lifting restrictions are not sufficiently strong—to the point that a jury could find that its reasons for failing to accommodate pregnant employees give rise to an inference of intentional discrimination.

* * *

IV
Under this interpretation of the Act, the judgment of the Fourth Circuit must be vacated. A party is entitled to summary judgment if there is “no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. Rule Civ. Proc. 56(a). We have already outlined the evidence Young introduced. Viewing the record in the light most favorable to Young, there is a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from Young’s. In other words, Young created a genuine dispute of material fact as to the fourth prong of the McDonnell Douglas analysis.

* * *

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

* * *

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

It is so ordered.

Page 272. Please delete note 2 and insert the following.

In Young, the Supreme Court made clear that the PDA does not grant pregnant workers a “most-favored-nation status” entitling them to the very best treatment that the employer provides to another group of employees similar in their ability or inability to work. Nonetheless, the Court also explained that an employer cannot always protect itself from liability simply by pointing to some other group of workers similar in their ability or inability to work that it treats similarly to pregnant workers. Instead, a plaintiff may still win if she can convince a jury that there is no legitimate non-discriminatory reason for the employer’s policies treating pregnant workers less favorably than other similarly situated categories of non-pregnant workers. For large employers who distinguish between many types of disabled workers, how much guidance does the Court’s ruling in Young provide about which particular subset of employees pregnant women will be compared to and when an employer will be found in violation of Title VII? State law may provide pregnant workers with greater protection. In January 2014, New Jersey amended its Law Against Discrimination to not only explicitly prohibit discrimination against pregnant women but also to require employers to make reasonable accommodations available to pregnant workers. N.J.S.A. 10:5-12. However, should an employer choose to provide special accommodations to pregnant employees, it may not necessarily be able to force the employees to accept the accommodations. This is particularly relevant when accommodations involve a reduction in hours or responsibilities resulting in a lower salary. In EEOC v. Catholic Healthcare W., 530 F. Supp.2d 1096 (C.D. Cal. 2008), a federal district court applied the BFOQ test to Catholic Healthcare’s unsolicited transfer of a pregnant radiology technologist to a different area of work. Catholic Healthcare’s transfer was found to be discriminatory.
b. Disparate Impact/Adverse Impact

Page 292. Please insert at the end of first full paragraph.

In Jones v. City of Boston, 845 F.3d 28, 31 (1st Cir. 2016) for example, the First Circuit deviated from the standard four-fifths rule of thumb to find an actionable disparate impact in a case involving a hair drug test that resulted in 99% of whites testing negative and 98% of blacks testing negative because “the difference in exam results by race was indisputably statistically significant.”

B. PROCEDURE

1. FILING A CHARGE OF EMPLOYMENT DISCRIMINATION

Page 323. Please insert before first full paragraph.

Federal employees must file a charge with the EEOC within 45 days of the “date of the matter alleged to be discriminatory” in order to preserve the right to sue in federal court for a violation of Title VII. In Green v. Brennan, 136 S. Ct. 1769 (2016), the Supreme Court held that for an employee alleging “constructive discharge” in violation of Title VII, the statutory period begins to run only after the employee resigns, not, as some circuits had previously held, at the time of the employer’s last allegedly discriminatory act giving rise to the resignation.

3. PROVING DISCRIMINATION

Page 330. Please insert at the end of Note.

In Vasquez v. Empress Ambulance Service, 835 F.3d 267, 272-73 (2d Cir. 2016), the Second Circuit held that “the ‘cat’s paw’ theory may also be used to support recovery for claims of retaliation in violation of Title VII.”

C. RETALIATION

Page 341. Please add to end of note.

The Court in Nassar was silent on how its ruling affected summary judgment standards, and a circuit split has emerged on the issue. Compare Foster v. University of Maryland-Eastern Shore, 787 F.3d 243 (4th Cir. 2015) (holding that Nassar did not change the plaintiff’s burden of proof regarding the prima facie case and the need to present evidence of pretext in order to survive summary judgment on a retaliation claim brought under the McDonnell Douglas standard) with EEOC v. Ford Motor Co., 782 F.3d 753 (6th Cir. 2015) (requiring evidence of but for causation as part of plaintiff’s prima facie case in order for plaintiff to survive summary judgment on her retaliation claim).
E. DISCRIMINATION BASED ON FACTORS OTHER THAN RACE OR SEX

1. RELIGION

Page 370. Please replace note 16 with the following.

What must an employee do to trigger an employer’s duty to accommodate her religion? In EEOC v. Abercrombie & Fitch, 135 S.Ct. 2028 (2015) (see also case excerpt in Chapter 7), the Supreme Court distinguished between motive and knowledge, making clear that a disparate treatment claim may succeed if an employer acts with the motive of avoiding accommodation even if the employer lacks actual knowledge that the applicant in fact needs a religious accommodation. In other words, an applicant need not provide explicit notification to a prospective employer that a particular practice is religiously motivated and would require accommodation in order to trigger the employer’s duty to provide religious accommodation. An employer may be found liable if its motive is to avoid accommodation even if the employer is acting on no more than “an unsubstantiated suspicion” that religious accommodation would be needed. Consistent with the Court’s ruling in Abercrombie & Fitch, is the earlier decision by the Seventh Circuit in Adeyeye v. Heartland Sweeteners, LLC, 721 F.3d 444 (7th Cir. 2013), in which the court held that an employee’s request to take unpaid leave to attend the funeral ceremonies of his father in Nigeria was sufficient to put the employer on notice of the religious nature of the request. The court explained that even though the plaintiff’s religious beliefs and practices were unfamiliar to most Americans, his request for leave gave sufficient notice of the religious nature of the leave by referring to “a funeral ceremony,’ a ‘funeral rite,’ and animal sacrifice.” Moreover, the court explained that “[i]f the managers who considered the request had questions about whether the request was religious, nothing would have prevented them from asking Adeyeye to explain a little more about the nature of his request. . . .”

Page 371. Please insert as new note 19 and renumber subsequent notes accordingly.

In addition to the religious exemptions to Title VII found in Section 702, the Religious Freedom Restoration Act provides additional protection for employers. In Burwell v. Hobby Lobby, 134 S.Ct 2751, 2761 (2014) (p. 541 of the main volume), the Supreme Court held that persons or “closely held” companies were entitled to exemption under RFRA from neutral laws of general applicability that burdened the exercise of religion unless the government demonstrated that the application of the burden “1) is in furtherance of a compelling governmental interest; and 2) is the least restrictive means of furthering that compelling interest.” Relying on Hobby Lobby, the court in EEOC v. R.G. & B.R. Harris Funeral Homes, 201 F. Supp.3d 837, 842 (E.D. Mich. 2016), held that a funeral home was entitled to a RFRA exemption from “Title VII, and the body of sex-stereotyping case law that has developed under it.”

2. DAMAGES

E. DISCRIMINATION BASED ON FACTORS OTHER THAN RACE OR SEX

3. AGE
The ADEA may not, however, be the exclusive remedy for workers alleging age discrimination. In Levin v. Madigan, 692 F.3d 607 (7th Cir. 2012), the Seventh Circuit permitted a state employee to bring an equal protection claim for age discrimination under 42 U.S.C. § 1983. While several district courts have ruled similarly, the other circuit courts to consider the issue have held that the ADEA is the exclusive remedy for age discrimination claims. Compare Shapiro v. N.T. City Dep’t of Educ., 561 F.Supp.2d 413 (S.D.N.Y. 2008) (ADEA does not preclude a § 1983 claim) and Mustafa v. State of Deb. Dep’t of Corr. Servs., 196 F.Supp.2d 945 (D. Neb. 2002) (same) with Hildebrand v. Allegheny Cnty., 757 F.3d 99 (3d Cir. 2014) (holding that a state or local government employee may not maintain an age discrimination claim under § 1983, but must instead proceed under the ADEA); Zombro v. Baltimore City Police Dep’t, 868 F.2d 1364 (4th Cir. 1989) (same); Ahlmeyer v. Nev. Sys. of Higher Ed., 555 F.3d 1051 (9th Cir. 2009) (same); Tapia-Tapia v. Potter, 322 F.3d 742 (1st Cir. 2003) (same); Lafleur v. Tex. Dep’t of Health, 126 F.3d 758 (5th Cir. 1997) (same); Chennareddy v. Bowsher, 935 F.2d 315 (D.C. Cir. 1991) (same). The Supreme Court accepted cert in Madigan v. Levin for the 2013 term, but then dismissed it as improvidently granted, 134 S.Ct. 2 (2013).

9. In Karlo v. Pittsburgh Glass Works, 849 F.3d 61 (3d Cir. 2017), the Third Circuit held that plaintiffs could show a disparate impact under the ADEA based on subgroup comparisons and were not limited to comparisons simply between employees age 40 and above and those under 40.

However, in Tramp v. Associated Underwriters, 768 F3d 793 (8th Cir. 2014), a disparate treatment case, the Eighth Circuit held that an employer’s consideration of health care costs in making decisions about which employees to terminate could constitute age discrimination if the employer “supposes a correlation” between costs and age “and acts accordingly.” Id. at 802.

11. In Villarreal v. R.J. Reynolds Tobacco Co., 806 F.3d 1288 (11th Cir. 2015), a panel of the Eleventh Circuit held that job seekers—not just employees—may bring disparate impact claims under the ADEA. The ruling was contrary to those by the Seventh, Eighth, and Tenth Circuits holding that disparate impact claims under the ADEA are limited to employees. In, 2016, the Eleventh Circuit vacated its prior decision in Villarreal. Rehearing the case en banc, the Eleventh Circuit held that the text of the ADEA “makes clear that an applicant for employment cannot sue an employer for disparate impact because the applicant has no ‘status as an employee.’” 839 F.3d 958 (11th Cir. 2016) (en banc).

4. DISABILITY
However, in Blatt v. Cabela’s Retail, Inc., No. 5:14-cv-04822-JFL (E.D. Pa., filed Aug. 15, 2014), a transgender plaintiff argued that the ADA’s exclusion of gender identity disorders violates the Equal Protection Clause of the U.S. Constitution. On September 21, 2015, the district court ordered the Department of Justice to intervene or file a supplemental statement of interest regarding the constitutionality of the gender identity disorder exclusion in the ADA. Subsequently, the Blatt court held that it could avoid the constitutional issue if it interpreted the term “gender identity disorders” in the ADA “narrowly to refer to simply the condition of identifying with a different gender, not to exclude from ADA coverage disabling conditions that persons who identify with a different gender may have—such as Blatt’s gender dysphoria, which substantially limits her major life activities of interacting with others, reproducing, and social and occupational functioning.” Given this interpretation of the ADA, the court concluded that Blatt’s gender dysphoria was not excluded from protection and denied the defendant’s motion to dismiss. Blatt v. Cabela’s Retail, Inc., 2017 WL 2178123 (E.D. Pa., May 18, 2017).

5. SEXUAL ORIENTATION

Page 417. Please delete entire section 5 and replace with the following.

Hively v. Ivy Tech Community College of Indiana
853 F.3d 339 (7th Cir. 2017) (en banc)

Wood, Chief Judge.

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers subject to the Act to discriminate on the basis of a person’s “race, color, religion, sex, or national origin....” 42 U.S.C. § 2000e-2(a). For many years, the courts of appeals of this country understood the prohibition against sex discrimination to exclude discrimination on the basis of a person’s sexual orientation. The Supreme Court, however, has never spoken to that question. In this case, we have been asked to take a fresh look at our position in light of developments at the Supreme Court extending over two decades. We have done so, and we conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination. We therefore reverse the district court’s judgment dismissing Kimberly Hively’s suit against Ivy Tech Community College and remand for further proceedings.

I

Hively is openly lesbian. She began teaching as a part-time, adjunct professor at Ivy Tech Community College’s South Bend campus in 2000. Hoping to improve her lot, she applied for at least six full-time positions between 2009 and 2014. These efforts were unsuccessful; worse yet, in July 2014 her part-time contract was not renewed. Believing that Ivy Tech was spurning her because of her sexual orientation . . . .

After receiving a right-to-sue letter, she filed this action in the district court (again acting pro se). Ivy Tech responded with a motion to dismiss for failure to state a claim on which relief can be granted. It argued that sexual orientation is not a protected class under Title VII . . . .
Relying on a line of this court’s cases exemplified by *Hammer v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000), the district court granted Ivy Tech’s motion and dismissed Hively’s case with prejudice.

Now represented by the Lambda Legal Defense & Education Fund, Hively has appealed to this court. After an exhaustive exploration of the law governing claims involving discrimination based on sexual orientation, the panel affirmed. *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698 (7th Cir. 2016). It began its analysis by noting that the idea that discrimination based on sexual orientation is somehow distinct from sex discrimination originated with dicta in *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984). *Ulane* stated (as if this resolved matters) that Title VII’s prohibition against sex discrimination “implies that it is unlawful to discriminate against women because they are women and against men because they are men.” *Id.* at 1085. From this truism, we deduced that “Congress had nothing more than the traditional notion of ‘sex’ in mind when it voted to outlaw sex discrimination....” *Doe v. City of Belleville, Ill.*, 119 F.3d 563, 572 (7th Cir. 1997), cert. granted, judgment vacated sub nom. *City of Belleville v. Doe*, 523 U.S. 1001, abrogated by *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

Later cases in this court, including *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058 (7th Cir. 2003), *Hammer*, and *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000), have accepted this as settled law. Almost all of our sister circuits have understood the law in the same way. See, e.g., *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997). A panel of the Eleventh Circuit, recognizing that it was bound by the Fifth Circuit’s precedent in *Blum*, 597 F.2d 936, recently reaffirmed (by a 2–1 vote) that it could not recognize sexual orientation discrimination claims under Title VII. *Evans v. Georgia Reg’l Hosp.*, 850 F.3d 1248, 1255-57 (11th Cir. 2017). On the other hand, the Second Circuit recently found that an openly gay male plaintiff pleaded a claim of gender stereotyping that was sufficient to survive dismissal. The court observed that one panel lacked the power to reconsider the court’s earlier decision holding that sexual orientation discrimination claims were not cognizable under Title VII. *Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195 (2d Cir. 2017) (per curiam). Nonetheless, two of the three judges, relying on many of the same arguments presented here, noted in concurrence that they thought their court ought to consider revisiting that precedent in an appropriate case. *Id.* at 198–99 (Katzmann, J., concurring). Notable in its absence from the debate over the proper interpretation of the scope of Title VII’s ban on sex discrimination is the United States Supreme Court.

That is not because the Supreme Court has left this subject entirely to the side. To the contrary, as the panel recognized, over the years the Court has issued several opinions that are relevant to the issue before us. Key among those decisions are *Price Waterhouse v. Hopkins*, 490 U.S. 228 and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). *Price Waterhouse
held that the practice of gender stereotyping falls within Title VII’s prohibition against sex discrimination, and Oncale clarified that it makes no difference if the sex of the harasser is (or is not) the same as the sex of the victim. Our panel frankly acknowledged how difficult it is “to extricate the gender nonconformity claims from the sexual orientation claims.” 830 F.3d at 709. That effort, it commented, has led to a “confused hodge-podge of cases.” Id. at 711. It also noted that “all gay, lesbian and bisexual persons fail to comply with the sine qua non of gender stereotypes—that all men should form intimate relationships only with women, and all women should form intimate relationships only with men.” Id. Especially since the Supreme Court’s recognition that the Due Process and Equal Protection Clauses of the Constitution protect the right of same-sex couples to marry, Obergefell v. Hodges, — U.S. ——, 135 S.Ct. 2584 (2015), bizarre results ensue from the current regime. As the panel noted, it creates “a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act.” 830 F.3d at 714. Finally, the panel highlighted the sharp tension between a rule that fails to recognize that discrimination on the basis of the sex with whom a person associates is a form of sex discrimination, and the rule, recognized since Loving v. Virginia, 388 U.S. 1 (1967), that discrimination on the basis of the race with whom a person associates is a form of racial discrimination.

Despite all these problems, the panel correctly noted that it was bound by this court’s precedents, to which we referred earlier. It thought that the handwriting signaling their demise might be on the wall, but it did not feel empowered to translate that message into a holding. “Until the writing comes in the form of a Supreme Court opinion or new legislation,” 830 F.3d at 718, it felt bound to adhere to our earlier decisions. In light of the importance of the issue, and recognizing the power of the full court to overrule earlier decisions and to bring our law into conformity with the Supreme Court’s teachings, a majority of the judges in regular active service voted to rehear this case en banc.

II

A

The question before us is not whether this court can, or should, “amend” Title VII to add a new protected category to the familiar list of “race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a). Obviously that lies beyond our power. We must decide instead what it means to discriminate on the basis of sex, and in particular, whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex.1 This is a pure question of statutory interpretation and thus well within the judiciary’s competence.

* * *

Ivy Tech sets great store on the fact that Congress has frequently considered amending Title VII to add the words “sexual orientation” to the list of prohibited characteristics, yet it has never done so. Many of our sister circuits have also noted this fact. In our view, however, it is simply too difficult to draw a reliable inference from these truncated legislative initiatives to rest our opinion on them. The goalposts have been moving over the years, as the Supreme Court has shed more light on the scope of the language that already is in the statute: no sex discrimination.
The dissent makes much of the fact that Congresses acting more than thirty years after the passage of Title VII made use of the term “sexual orientation” to prohibit discrimination or violence on that basis in statutes such as the Violence Against Women Act and the federal Hate Crimes Act. But this gets us no closer to answering the question at hand, for Congress may certainly choose to use both a belt and suspenders to achieve its objectives, and the fact that “sex” and “sexual orientation” discrimination may overlap in later statutes is of no help in determining whether sexual orientation discrimination is discrimination on the basis of sex for the purposes of Title VII. See, e.g., McEvoy v. IEI Barge Servs., Inc., 622 F.3d 671, 677 (7th Cir. 2010) (“Congress may choose a belt-and-suspenders approach to promote its policy objectives....”).

Moreover, the agency most closely associated with this law, the Equal Employment Opportunity Commission, in 2015 announced that it now takes the position that Title VII’s prohibition against sex discrimination encompasses discrimination on the basis of sexual orientation. See Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015). Our point here is not that we have a duty to defer to the EEOC’s position. We assume for present purposes that no such duty exists. But the Commission’s position may have caused some in Congress to think that legislation is needed to carve sexual orientation out of the statute, not to put it in. In the end, we have no idea what inference to draw from congressional inaction or later enactments, because there is no way of knowing what explains each individual member’s votes, much less what explains the failure of the body as a whole to change this 1964 statute.

***

It is therefore neither here nor there that the Congress that enacted the Civil Rights Act in 1964 and chose to include sex as a prohibited basis for employment discrimination (no matter why it did so) may not have realized or understood the full scope of the words it chose. Indeed, in the years since 1964, Title VII has been understood to cover far more than the simple decision of an employer not to hire a woman for Job A, or a man for Job B. The Supreme Court has held that the prohibition against sex discrimination reaches sexual harassment in the workplace, see Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986), including same-sex workplace harassment, see Oncale; it reaches discrimination based on actuarial assumptions about a person’s longevity, see City of Los Angeles, Dep’t of Water and Power v. Manhart, 435 U.S. 702 (1978); and it reaches discrimination based on a person’s failure to conform to a certain set of gender stereotypes, see Hopkins. It is quite possible that these interpretations may also have surprised some who served in the 88th Congress. Nevertheless, experience with the law has led the Supreme Court to recognize that each of these examples is a covered form of sex discrimination.

B

Hively offers two approaches in support of her contention that “sex discrimination” includes discrimination on the basis of sexual orientation. The first relies on the tried-and-true comparative method in which we attempt to isolate the significance of the plaintiff’s sex to the employer’s decision: has she described a situation in which, holding all other things constant and
changing only her sex, she would have been treated the same way? The second relies on the 
*Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), line of cases, which she 
argues protect her right to associate intimately with a person of the same sex. Although the 
analysis differs somewhat, both avenues end up in the same place: sex discrimination.

1

***

Hively alleges that if she had been a man married to a woman (or living with a woman, or 
dating a woman) and everything else had stayed the same, Ivy Tech would not have refused to 
promote her and would not have fired her. . . . This describes paradigmatic sex discrimination. 
To use the phrase from *Ulane*, Ivy Tech is disadvantaging her because she is a woman. Nothing 
in the complaint hints that Ivy Tech has an anti-marriage policy that extends to heterosexual 
relationships, or for that matter even an anti-partnership policy that is gender-neutral.

Viewed through the lens of the gender non-conformity line of cases, Hively represents 
the ultimate case of failure to conform to the female stereotype (at least as understood in a place 
such as modern America, which views heterosexuality as the norm and other forms of sexuality 
as exceptional): she is not heterosexual. Our panel described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it 
does not exist at all. Hively’s claim is no different from the claims brought by women who were 
rejected for jobs in traditionally male workplaces, such as fire departments, construction, and 
policing. The employers in those cases were policing the boundaries of what jobs or behaviors 
they found acceptable for a woman (or in some cases, for a man).

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The virtue of looking at comparators and paying heed to gender non-conformity is that 
this process sheds light on the interpretive question raised by Hively’s case: is sexual-orientation 
discrimination a form of sex discrimination, given the way in which the Supreme Court has 
interpreted the word “sex” in the statute? The dissent criticizes us for not trying to *rule out* 
sexual-orientation discrimination by controlling for it in our comparator example and for not 
placing any weight on the fact that if someone had asked Ivy Tech what its reasons were at the 
time of the discriminatory conduct, it probably would have said “sexual orientation,” not “sex.” 
We assume that this is true, but this thought experiment does not answer the question before 
us—instead, it begs that question. It commits the logical fallacy of assuming the conclusion it 
sets out to prove. It makes no sense to control for or rule out discrimination on the basis of sexual 
orientation if the question before us is *whether* that type of discrimination is nothing more or less 
than a form of sex discrimination. Repeating that the two are different, as the dissent does at 
numerous points, also does not advance the analysis.

2

As we noted earlier, Hively also has argued that action based on sexual orientation is sex 
discrimination under the associational theory. It is now accepted that a person who is
discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits. This line of cases began with Loving, in which the Supreme Court held that “restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.” 388 U.S. at 12. The Court rejected the argument that miscegenation statutes do not violate equal protection because they “punish equally both the white and the Negro participants in an interracial marriage.” Id. at 8. When dealing with a statute containing racial classifications, it wrote, “the fact of equal application does not immunize the statute from the very heavy burden of justification” required by the Fourteenth Amendment for lines drawn by race. Id. at 9.

** * * *

The dissent would instead have us compare the treatment of men who are attracted to members of the male sex with the treatment of women who are attracted to members of the female sex, and ask whether an employer treats the men differently from the women. But even setting to one side the logical fallacy involved, Loving shows why this fails. In the context of interracial relationships, we could just as easily hold constant a variable such as “sexual or romantic attraction to persons of a different race” and ask whether an employer treated persons of different races who shared that propensity the same. That is precisely the rule that Loving rejected, and so too must we, in the context of sexual associations.

The fact that Loving . . . dealt with racial associations, as opposed to those based on color, national origin, religion, or sex, is of no moment. The text of the statute draws no distinction, for this purpose, among the different varieties of discrimination it addresses—a fact recognized by the Hopkins plurality. See 490 U.S. at 244 n.9. This means that to the extent that the statute prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the national origin, or the color, or the religion, or (as relevant here) the sex of the associate. No matter which category is involved, the essence of the claim is that the plaintiff would not be suffering the adverse action had his or her sex, race, color, national origin, or religion been different.

III

Today’s decision must be understood against the backdrop of the Supreme Court’s decisions, not only in the field of employment discrimination, but also in the area of broader discrimination on the basis of sexual orientation. We already have discussed the employment cases, especially Hopkins and Oncale. The latter line of cases began with Romer v. Evans, 517 U.S. 620 (1996), in which the Court held that a provision of the Colorado Constitution forbidding any organ of government in the state from taking action designed to protect “homosexual, lesbian, or bisexual” persons, id. at 624, violated the federal Equal Protection Clause. Romer was followed by Lawrence v. Texas, 539 U.S. 558 (2003), in which the Court found that a Texas statute criminalizing homosexual intimacy between consenting adults violated the liberty provision of the Due Process Clause. Next came United States v. Windsor, — U.S. – —, 133 S.Ct. 2675 (2013), which addressed the constitutionality of the part of the Defense of Marriage Act (DOMA) that excluded a same-sex partner from the definition of “spouse” in other federal statutes. The Court held that this part of DOMA “violate[d] basic due process and equal
protection principles applicable to the Federal Government.” *Id.* at 2693. Finally, the Court’s decision in *Obergefell*, *supra*, held that the right to marry is a fundamental liberty right, protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. 135 S.Ct. at 2604. The Court wrote that “[i]t is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality.” *Id.*


***

. . . We hold only that a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes. It was therefore wrong to dismiss Hively’s complaint for failure to state a claim. The judgment of the district court is REVERSED and the case is REMANDED for further proceedings.

NOTES AND QUESTIONS

1. Traditionally, federal courts have distinguished discrimination based on sex from discrimination based on sexual orientation and held that the latter did not constitute discrimination based on sex. Under the Obama Administration, the EEOC pushed the argument that discrimination based on sexual orientation is a form of discrimination based on sex. See EEOC Press Release, EEOC Files First Suits Challenging Sexual Orientation Discrimination as Sex Discrimination, (3/1/16), available at https://www.eeoc.gov/eeoc/newsroom/release/3-1-16.cfm. In *Baldwin v. Foxx*, EEOC Doc. 0120133080, 2015 WL 4397641 (July 15, 2015), the EEOC collapsed the distinction between sex and sexual orientation discrimination holding that discrimination based on sexual orientation is a form of sex discrimination. In *Hively*, the en banc Seventh Circuit reversed its own precedent to become the first circuit court to agree with the
EEOC and hold that discrimination based on sexual orientation is actionable sex discrimination. Other courts have maintained the distinction between sex and sexual orientation holding that only the former is actionable under Title VII. See Evans v. Georgia Reg’l Hosp., 850 F.3d 1248 (11th Cir. 2017) (holding that discrimination based on sexual orientation is not actionable under Title VII, though discrimination based on failure to conform to a gender stereotype is); Hinton v. Virginia Union Univ., 2016 WL 2621967 at *5 (E.D. Va., May 5, 2016) (holding that “Title VII does not encompass sexual orientation discrimination claims, and cannot be supplanted by the merely persuasive power of the EEOC’s decision”); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) (rejecting plaintiff’s argument that discrimination based on sex includes discrimination based on sexual orientation). From the perspective of legal logic, does it make sense to treat discrimination based on sexual orientation as a form of sex discrimination or as a distinct form of discrimination? From a policy standpoint, which approach is most appropriate?

2. Employees have also been unsuccessful establishing a Title VII violation for religious discrimination based on sexual orientation discrimination. See Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285 (3d Cir. 2009) (held: no claim for religious discrimination under Title VII where homosexual employee claimed he was harassed for failing to conform to his employer’s religious beliefs).

3. Although courts have held that discrimination based on sexual orientation does not violate Title VII, sexual orientation does not preclude an employee from establishing a valid Title VII claim for harassment based on sex where the alleged harasser is of the same sex. See Ellsworth v. Pot Luck Enters., Inc., 624 F. Supp. 2d 868 (M.D. Tenn. 2009).

4. About half of the states, the District of Columbia, and numerous cities have enacted laws prohibiting discrimination in private employment on the basis of sexual orientation. In Underwood v. Archer Mgmt. Servs. Inc., 857 F. Supp. 96 (D.D.C. 1994), the court held that the District of Columbia’s law prohibiting discrimination based on sexual orientation did not extend to transsexuals, although a discharge based on the plaintiff’s masculine appearance stated a claim for discrimination based on the D.C. statute prohibiting discrimination based on personal appearance.

5. In Romer v. Evans, 517 U.S. 620 (1996), the Supreme Court, 6-3, held that Colorado’s “Amendment 2” was unconstitutional. The amendment invalidated all existing and future state and local legislative, executive, or judicial action in Colorado, including those dealing with employment, that protect homosexuals from discrimination. In holding that Amendment 2 violated Equal Protection, Justice Kennedy wrote that Amendment 2 “seems inexplicable by anything but animus toward the class it affects.” State efforts to limit the expansion of antidiscrimination protection have not ended however, but only changed forms. In 2015, Arkansas passed the Intrastate Commerce Improvement Act prohibiting local governments from providing protections against discrimination that exceeded those provided by state law. Ark. Code § 14-1-403. The Act was passed in response to a City of Fayetteville ordinance prohibiting discrimination in employment and housing based on sexual orientation and gender identity. Tennessee passed similar legislation, the Equal Access to Intrastate Commerce Act, in 2011. T.C.A. § 7-51-1801. In Howe v. Haslam, 2014 WL 5698877 (Tenn. Ct. App., Nov. 4, 2014), the Tennessee Court of Appeals upheld that state’s law against an equal protection challenge and

6. In Goins v. West Group, 635 N.W.2d 717 (Minn. 2001), however, a former employee was unsuccessful in a claim of sexual orientation discrimination under state law. The Minnesota Supreme Court held that an employer did not violate the law’s prohibition on sexual orientation discrimination by designating employee restroom use on the basis of biological gender rather than “self-image” gender.
PART III

TERMS AND CONDITIONS OF EMPLOYMENT

CHAPTER 5

WAGES AND HOURS

A. FEDERAL AND STATE WAGE AND HOUR REGULATION

1. FEDERAL WAGE AND HOUR REGULATION: THE FAIR LABOR STANDARDS ACT

b. BASIC PROVISIONS OF THE FAIR LABOR STANDARDS ACT

Page 441. Please insert as new note.

3. California has a "day of rest" statute. That law prohibits an employer from "causing employees to work more than six days in seven" but does not apply "when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof." If the employer fails to comply, it will have to pay the relevant workers an "overtime premium." For interpretation of the complicated ambiguities of this statute, some sections of which go back to 1858, see Mendoza v. Nordstrom, Inc., 393 P.3d 375 (Cal. 2017).

c. COVERAGE

Page 453. Please insert before Note 7; make Notes 7 and 8 into Notes 1 and 2.

Glatt v. Fox Searchlight Pictures, Inc.
811 F.3d 528 (2d Cir. 2015).

JOHN M. WALKER, JR., Circuit Judge:

Plaintiffs, who were hired as unpaid interns, claim compensation as employees under the Fair Labor Standards Act and New York Labor Law. Plaintiffs Eric Glatt and Alexander Footman moved for partial summary judgment on their employment status. Plaintiff Eden Antalik moved to certify a class of all New York interns working at certain of defendants’ divisions between 2005 and 2010 and to conditionally certify a nationwide collective of all interns working at those same divisions between 2008 and 2010. The district court granted Glatt and Footman’s motion for partial summary judgment, certified Antalik’s New York class, and conditionally certified Antalik’s nationwide collective. On defendants’ interlocutory appeal, we VACATE the district court’s order granting partial summary judgment to Glatt and Footman, VACATE its order certifying Antalik’s New York class, VACATE its order conditionally certifying Antalik’s nationwide collective, and REMAND for further proceedings.
Plaintiffs worked as unpaid interns either on the Fox Searchlight- distributed film *Black Swan* or at the Fox corporate offices in New York City. They contend that the defendants, Fox Searchlight and Fox Entertainment Group, violated the Fair Labor Standards Act (FLSA) by failing to pay them as employees during their internships as required by the FLSA’s and NYLL’s minimum wage and overtime provisions. The following background facts are undisputed except where noted.

Eric Glatt graduated with a degree in multimedia instructional design from New York University. Glatt was enrolled in a non-matriculated (non-degree) graduate program at NYU’s School of Education when he started working on *Black Swan*. His graduate program did not offer him credit for his internship.

From December 2, 2009, through the end of February 2010, Glatt interned in *Black Swan’s* accounting department under the supervision of Production Accountant Theodore Au. He worked from approximately 9:00 a.m. to 7:00 p.m. five days a week. As an accounting intern, Glatt’s responsibilities included copying, scanning, and filing documents; tracking purchase orders; transporting paperwork and items to and from the *Black Swan* set; maintaining employee personnel files; and answering questions about the accounting department.

Glatt interned a second time in *Black Swan’s* post-production department from March 2010 to August 2010, under the supervision of Post Production Supervisor Jeff Robinson. Glatt worked two days a week from approximately 11:00 a.m. until 6:00 or 7:00 p.m. His post-production responsibilities included drafting cover letters for mailings; organizing filing cabinets; filing paperwork; making photocopies; keeping the take-out menus up-to-date and organized; bringing documents to the payroll company; and running errands, one of which required him to purchase a non-allergenic pillow for Director Darren Aronofsky.

Alexander Footman graduated from Wesleyan University with a degree in film studies. He was not enrolled in a degree program at the time of his *Black Swan* internship. From September 29, 2009, through late February or early March 2010, Footman interned in the production department under the supervision of Production Office Coordinator Lindsay Feldman and Assistant Production Office Coordinator Jodi Arneson. Footman worked approximately ten-hour days. At first, Footman worked five days a week, but, beginning in November 2009, he worked only three days a week. After this schedule change, *Black Swan* replaced Footman with another unpaid intern in the production department.

Footman’s responsibilities included picking up and setting up office furniture; arranging lodging for cast and crew; taking out the trash; taking lunch orders; answering phone calls; watermarking scripts; drafting daily call sheets; photocopying; making coffee; making deliveries to and from the film production set, rental houses, and the payroll office; accepting deliveries; admitting guests to the office; compiling lists of local vendors; breaking down, removing, and selling office furniture and supplies at the end of production; internet research; sending invitations to the wrap party; and other similar tasks and errands, including bringing tea to Aronofsky and dropping off a DVD of *Black Swan* footage at Aronofsky’s apartment.
Eden Antalik worked as an unpaid publicity intern in Fox Searchlight’s corporate office in New York from the beginning of May 2009 until the second week of August 2009. During her internship, Antalik was enrolled in a degree program at Duquesne University that required her to have an internship in order to graduate.

Antalik was supposed to receive credit for her internship at Fox Searchlight, but, for reasons that are unclear from the record, she never actually received the credit. Antalik began work each morning around 8:00 a.m. by assembling a brief, referred to as “the breaks,” summarizing mentions of various Fox Searchlight films in the media. She also made travel arrangements, organized catering, shipped documents, and set up rooms for press events.

***

On June 11, 2013, the district court concluded that Glatt and Footman had been improperly classified as unpaid interns rather than employees and granted their partial motion for summary judgment. The district court also granted Antalik’s motions to certify the class of New York interns and to conditionally certify the nationwide FLSA collective.

***

At its core, this interlocutory appeal raises the broad question of under what circumstances an unpaid intern must be deemed an “employee” under the FLSA and therefore compensated for his work. That broad question underlies our answers to the three specific questions on appeal. First, did the district court apply the correct standard in evaluating whether Glatt and Footman were employees, and, if so, did it reach the correct result? Second, did the district court err by certifying Antalik’s class of New York interns? Third, did the district court err by conditionally certifying Antalik’s nationwide collective?

***

With certain exceptions not relevant here, the FLSA requires employers to pay all employees a specified minimum wage, and overtime of time and one-half for hours worked in excess of forty hours per week. NYLL requires the same, except that it specifies a higher wage rate than the federal minimum. An employee cannot waive his right to the minimum wage and overtime pay because waiver “would nullify the purposes of the [FLSA] and thwart the legislative policies it was designed to effectuate.”

The strictures of both the FLSA and NYLL apply only to employees. The FLSA unhelpfully defines “employee” as an “individual employed by an employer.” “Employ” is defined as “to suffer or permit to work.” New York likewise defines “employee” as “any individual employed, suffered or permitted to work by an employer.” Because the statutes define “employee” in nearly identical terms, we construe the NYLL definition as the same in substance as the definition in the FLSA.

The Supreme Court has yet to address the difference between unpaid interns and paid employees under the FLSA. In 1947, however, the Court recognized that unpaid railroad brakemen trainees
should not be treated as employees, and thus that they were beyond the reach of the FLSA’s minimum wage provision. The Court adduced several facts. First, the brakemen-trainees at issue did not displace any regular employees, and their work did not expedite the employer’s business. Second, the brakemen-trainees did not expect to receive any compensation and would not necessarily be hired upon successful completion of the course. Third, the training course was similar to one offered by a vocational school. Finally, the employer received no immediate advantage from the work done by the trainees.

In 1967, the Department of Labor (“DOL”) issued informal guidance on trainees as part of its Field Operations Handbook. The guidance enumerated six criteria and stated that the trainee is not an employee only if all of the criteria were met. In 2010, the DOL published similar guidance for unpaid interns working in the for-profit private sector. This Intern Fact Sheet provides that an employment relationship does not exist if all of the following factors apply:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

The district court evaluated Glatt’s and Footman’s employment using a version of the DOL’s six-factor test. However, the district court, unlike the DOL, did not explicitly require that all six factors be present to establish that the intern is not an employee and instead balanced the factors. The district court found that the first four factors weighed in favor of finding that Glatt and Footman were employees and the last two factors favored finding them to be trainees. As a result, the district court concluded that Glatt and Footman had been improperly classified as unpaid interns and granted their motion for partial summary judgment.

The specific issue we face—when is an unpaid intern entitled to compensation as an employee under the FLSA?—is a matter of first impression in this Circuit. When properly designed, unpaid internship programs can greatly benefit interns. For this reason, internships are widely supported by educators and by employers looking to hire well-trained recent graduates. However, employers can also exploit unpaid interns by using their free labor without providing them with an appreciable benefit in education or experience. Recognizing this concern, all parties agree that there are circumstances in which someone who is labeled an unpaid intern is actually an employee entitled to compensation under the FLSA. All parties also agree that there are circumstances in which unpaid interns are not employees under the FLSA. They do not agree on what those circumstances are or what standard we should use to identify them.
The plaintiffs urge us to adopt a test whereby interns will be considered employees whenever the employer receives an immediate advantage from the interns’ work. Plaintiffs argue that focusing on any immediate advantage that accrues to the employer is appropriate because, in their view, the Supreme Court in [1947] rested its holding on the finding that the brakemen trainees provided no immediate advantage to the employer.

The defendants urge us to adopt a more nuanced primary beneficiary test. Under this standard, an employment relationship is created when the tangible and intangible benefits provided to the intern are greater than the intern’s contribution to the employer’s operation. They argue that the primary beneficiary test best reflects the economic realities of the relationship between intern and employer. They further contend that a primary beneficiary test that considers the totality of the circumstances is in accordance with how we decide whether individuals are employees in other circumstances.

DOL, appearing as amicus curiae in support of the plaintiffs, defends the six factors enumerated in its Intern Fact Sheet and its requirement that every factor be present before the employer can escape its obligation to pay the worker. DOL argues (1) that its views on employee status are entitled to deference because it is the agency charged with administering the FLSA and (2) that we should use the six factors because they come directly from [the Supreme Court].

We decline DOL’s invitation to defer to the test laid out in the Intern Fact Sheet.

***

Instead, we agree with defendants that the proper question is whether the intern or the employer is the primary beneficiary of the relationship. The primary beneficiary test has two salient features. First, it focuses on what the intern receives in exchange for his work. Second, it also accords courts the flexibility to examine the economic reality as it exists between the intern and the employer.

Although the flexibility of the primary beneficiary test is primarily a virtue, this virtue is not unalloyed. The defendants’ conception of the primary beneficiary test requires courts to weigh a diverse set of benefits to the intern against an equally diverse set of benefits received by the employer without specifying the relevance of particular facts.

In somewhat analogous contexts, we have articulated a set of non-exhaustive factors to aid courts in determining whether a worker is an employee for purposes of the FLSA. In the context of unpaid internships, we think a non-exhaustive set of considerations should include:

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

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

***

The approach we adopt also reflects a central feature of the modern internship—the relationship between the internship and the intern’s formal education. The purpose of a bona-fide internship is to integrate classroom learning with practical skill development in a real-world setting, and, *** all of the plaintiffs were enrolled in or had recently completed a formal course of post-secondary education. By focusing on the educational aspects of the internship, our approach better reflects the role of internships in today’s economy than the DOL factors, which were derived from a 68-year old Supreme Court decision that dealt with a single training course offered to prospective railroad brakemen.

In sum, we agree with the defendants that the proper question is whether the intern or the employer is the primary beneficiary of the relationship, and we propose the above list of non-exhaustive factors to aid courts in answering that question. The district court limited its review to the six factors in DOL’s Intern Fact Sheet. Therefore, we vacate the district court’s order granting partial summary judgment to Glatt and Footman and remand for further proceedings. On remand, the district court may, in its discretion, permit the parties to submit additional evidence relevant to the plaintiffs’ employment status, such as evidence on Glatt’s and Footman’s formal education. Of course, we express no opinion with respect to the outcome of any renewed motions for summary judgment the parties might make based on the primary beneficiary test we have set forth.

***

For the foregoing reasons, the district court’s orders are VACATED and the case REMANDED for further proceedings consistent with this opinion.
On May 18, 2016, the Department of Labor announced a raise in the salary threshold for mandatory overtime pay from $23,660 to $47,476. The rule was blocked by a U.S. District Court. Nevada v. United States Department of Labor, 218 F.Supp.3d 520 (E.D. Tex. 2016). As of June 2017, the Trump administration has not decided whether to pursue the Obama administration’s appeal of the District Court decision.

Page 465. Please add to Note 5.

5. Beginning in 1975, the Department of Labor's interpretation of the statutory exemption from FLSA protections for certain "domestic service" workers included caretakers employed by third-party agencies. In 2013 the DOL changed its interpretation to restrict the exemption to workers hired directly by the home care recipients and their families. Held: The DOL's change in the law's coverage is reasonable and therefore within its authority. Home Care Ass’n of America v. Weil, 799 F.3d 1084 (D.C. Cir. 2015), cert. denied, 136 S.Ct. 2506 (2016).

Page 465. Please add notes.


Lola v. Skadden, Arps, Slate, Meagher & Flom
620 Fed. Appx. 37 (2d Cir. 2015).

POOLER, Circuit Judge.

David Lola, on behalf of himself and all others similarly situated, appeals from the September 16, 2014 opinion and order of the United States District Court for the Southern District of New York (Sullivan, J.) dismissing his putative collective action seeking damages from Skadden, Arps, Slate, Meagher & Flom LLP and Tower Legal Staffing, Inc. for violations of the overtime provision of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. ("FLSA"), arising out of Lola's work as a contract attorney in North Carolina. We agree with the district court's conclusion that: (1) state, not federal, law informs FLSA's definition of "practice of law;" and (2) North Carolina, as the place where Lola worked and lived, has the greatest interest in this litigation, and thus we look to North Carolina law to determine if Lola was practicing law within the meaning of FLSA. However, we disagree with the district court's conclusion, on a motion to
dismiss, that by undertaking the document review Lola allegedly was hired to conduct, Lola was necessarily "practicing law" within the meaning of North Carolina law. We find that accepting the allegations as pleaded, Lola adequately alleged in his complaint that his document review was devoid of legal judgment such that he was not engaged in the practice of law, and remand for further proceedings.

***

Lola, a North Carolina resident, alleges that beginning in April 2012, he worked for Defendants for fifteen months in North Carolina. He conducted document review for Skadden in connection with a multi-district litigation pending in the United States District Court for the Northern District of Ohio. Lola is an attorney licensed to practice law in California, but he is not admitted to practice law in either North Carolina or the Northern District of Ohio.

Lola alleges that his work was closely supervised by the Defendants, and his "entire responsibility . . . consisted of (a) looking at documents to see what search terms, if any, appeared in the documents, (b) marking those documents into the categories predetermined by Defendants, and (c) at times drawing black boxes to redact portions of certain documents based on specific protocols that Defendants provided." Lola further alleges that Defendants provided him with the documents he reviewed, the search terms he was to use in connection with those documents, and the procedures he was to follow if the search terms appeared. Lola was paid $25 an hour for his work, and worked roughly forty-five to fifty-five hours a week. He was paid at the same rate for any hours he worked in excess of forty hours per week. Lola was told that he was an employee of Tower, but he was also told that he needed to follow any procedures set by Skadden attorneys, and he worked under the supervision of Skadden attorneys. Other attorneys employed to work on the same project performed similar work and were likewise paid hourly rates that remained the same for any hours worked in excess of forty hours per week.

***

Pursuant to FLSA, employers must generally pay employees working overtime one and one-half times the regular rate of pay for any hours worked in excess of forty a week. However, employees "employed in a bona fide . . . professional capacity" are exempt from that requirement. The statute does not provide a definition of "professional capacity," instead delegating the authority to do so to the Secretary of the Department of Labor ("DOL"), who defines "professional employees" to include those employees who are:

(1) Compensated on a salary or fee basis at a rate of not less than $455 per week . . . ; and

(2) Whose primary duty is the performance of work:

(i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of intellectual instruction; or

(ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
These requirements, however, do not apply to attorneys engaged in the practice of law. Instead, attorneys fall under 29 C.F.R. § 541.304, which exempts from the overtime requirement:

Any employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and is actually engaged in the practice thereof.[]

While it is undisputed that Lola is an attorney licensed to practice law in California, the parties dispute whether the document review he allegedly performed constitutes "engaging in the practice of law."

Lola urges us to fashion a new federal standard defining the "practice of law" within the meaning of Section 541.304. We decline to do so because we agree with the district court that the definition of "practice of law" is "primarily a matter of state concern."

***

Just as "there is no federal law of domestic relations," here there is no federal law governing lawyers. Regulating the "practice of law" is traditionally a state endeavor. No federal scheme exists for issuing law licenses. As the district court aptly observed, "[s]tates regulate almost every aspect of legal practice: they set the eligibility criteria and oversee the admission process for would-be lawyers, promulgate the rules of professional ethics, and discipline lawyers who fail to follow those rules, among many other responsibilities." The exemption in FLSA specifically relies on the attorney possessing "a valid license . . . permitting the practice of law." The regulation's history indicates that the DOL was well aware that such licenses were issued by the states. In rejecting a proposal to exempt librarians from the overtime rules, the DOL noted that "states do not generally license the practice of library science, so that in this respect . . . the profession is not comparable to that of law or medicine." A similar distinction was drawn in a discussion of extending the exemption to architects and engineers:

The practice of law and medicine has a long history of state licensing and certification; the licensing of engineers and architects is relatively recent. While it is impossible for a doctor or lawyer legally to practice his profession without a certificate or license, many architects and engineers perform work in these fields without possessing licenses, although failure to hold a license may limit their permissible activities to those of lesser responsibilities.

We thus find no error with the district court's conclusion that we should look to state law in defining the "practice of law."

We turn to the question of which state's law to apply. "Where jurisdiction is based on the existence of a federal question . . . we have not hesitated to apply a federal common law choice of law analysis." *** Here, there are four possible forum states: North Carolina (where Lola worked and lived); Ohio (where the underlying litigation is venued); California (where Lola is barred); and New York (where Skadden is located). ***
Here, the services were rendered in North Carolina. Moreover, as the state where Lola resides, North Carolina possesses a strong interest in making sure Lola is fairly paid. We find no error in the district court's decision to apply North Carolina law.

North Carolina defines the "practice of law" in its General Statutes, Section 84-2.1, which provides that:

The phrase "practice law" as used in this Chapter is defined to be performing any legal service for any other person, firm or corporation, with or without compensation, specifically including . . . the preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or quasi-judicial bodies, or assisting by advice, counsel, or otherwise in any legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation . . . .

North Carolina courts typically read Section 84-2.1 in conjunction with Section 84-4, which defines the unauthorized practice of law as follows:

Except as otherwise permitted by law, . . . it shall be unlawful for any person or association of persons except active members of the Bar, for or without a fee or consideration, to give legal advice or counsel, [or] perform for or furnish to another legal services . . . .

The North Carolina General Statutes do not clarify whether "legal services" includes the performance of document review. Nevertheless, the North Carolina State Bar issued a formal ethics opinion shedding light on what is meant by "legal services." The question considered in the ethics opinion was: "May a lawyer ethically outsource legal support services abroad, if the individual providing the services is either a nonlawyer or a lawyer not admitted to practice in the United States (collectively `foreign assistants')?" In its opinion, the Bar's Ethics Committee opined that:

A lawyer may use foreign assistants for administrative support services such as document assembly, accounting, and clerical support. A lawyer may also use foreign assistants for limited legal support services such as reviewing documents; conducting due diligence; drafting contracts, pleadings, and memoranda of law; and conducting legal research. Foreign assistants may not exercise independent legal judgment in making decisions on behalf of a client . . . . The limitations on the type of legal services that can be outsourced, in conjunction with the selection and supervisory requirements associated with the use of foreign assistants, insures that the client is competently represented. See Rule 5.5(d).
Nevertheless, when outsourcing legal support services, lawyers need to be mindful of the prohibitions on unauthorized practice of law in Chapter 84 of the General Statutes and on the prohibition on aiding the unauthorized practice of law in Rule 5.5(d).

The district court found that (1) under North Carolina law, document review is considered "legal support services," along with "drafting contracts, pleadings, and memoranda of law[,] and conducting legal research;" (2) the ethics opinion draws a clear line between legal support
services, like document review, and "administrative support services," like "document assembly, accounting, and clerical support;" and (3) by emphasizing that only lawyers may undertake legal work, the ethics opinion makes clear that "document review, like other legal support services, constitutes the practice of law and may be lawfully performed by a non-lawyer only if that non-lawyer is supervised by a licensed attorney." Thus, the district court concluded, any level of document review is considered the "practice of law" in North Carolina. The district court also concluded that because FLSA's regulatory scheme carves doctors and lawyers out of the salary and duty analysis employed to discern if other types of employees fall within the professional exemption, a fact-intensive inquiry is at odds with FLSA's regulatory scheme.

We disagree. The district court erred in concluding that engaging in document review per se constitutes practicing law in North Carolina. The ethics opinion does not delve into precisely what type of document review falls within the practice of law, but does note that while "reviewing documents" may be within the practice of law, "[f]oreign assistants may not exercise independent legal judgment in making decisions on behalf of a client." The ethics opinion strongly suggests that inherent in the definition of "practice of law" in North Carolina is the exercise of at least a modicum of independent legal judgment.

***

The gravamen of Lola's complaint is that he performed document review under such tight constraints that he exercised no legal judgment whatsoever—he alleges that he used criteria developed by others to simply sort documents into different categories. Accepting those allegations as true, as we must on a motion to dismiss, we find that Lola adequately alleged in his complaint that he failed to exercise any legal judgment in performing his duties for Defendants. A fair reading of the complaint in the light most favorable to Lola is that he provided services that a machine could have provided. The parties themselves agreed at oral argument that an individual who, in the course of reviewing discovery documents, undertakes tasks that could otherwise be performed entirely by a machine cannot be said to engage in the practice of law. We therefore vacate the judgment of the district court and remand for further proceedings consistent with this opinion.

NOTE


e. HOURS

Page 467. Please add to note 8.

If a restaurant is paying legal minimum wage or more to both servers and kitchen employees, can it require "tips" received by servers to be shared with both groups of workers? The legal question is whether an Obama Administration Department of Labor regulation saying that servers should get all the tip money is an invalid extension of the FLSA. The regulation was
The Los Angeles Living Wage Ordinance requires contractors who operate at the city's airports to pay their employees $14.89 per hour or $10.30 per hour if the contractor provides health benefits. See Calop Bus. Sys., Inc. v. City of Los Angeles, 614 Fed. Appx. 867 (9th Cir. 2015).

Seattle raised minimum wages more for large employers and classified certain franchisees as large employers. The new policy survived legal challenges. International Franchise Ass'n v. City of Seattle, 803 F.3d 389 (9th Cir. 2015), cert. denied, 136 S. Ct. 1838 (2016).

Efforts by cities to raise the minimum wage are not always successful, however. In at least seventeen states, state legislatures have prohibited localities from enacting minimum wage ordinances. The most recent state to do so was Alabama. In April 2015, the Birmingham City Council adopted a series of ordinances enacting a local minimum wage. Shortly thereafter, the Alabama state legislature passed the Alabama Uniform Minimum Wage and Right-to-Work Act. Ala. Code §§25-7-40 (2016). An effort to increase state uniformity in labor policy, the Act gave the legislature complete control over minimum wage policy and a host of other labor policy issues. The plaintiffs brought suit in district court, alleging that the Act has the effect of transferring control over minimum wages in the City of Birmingham from officials elected by a majority-black electorate to legislators elected by a majority-white electorate, and therefore violates protections under Section 2 of the Voting Rights Act, and the Thirteenth, Fourteenth, and Fifteenth Amendments. The court upheld the defendants’ motion to dismiss, finding that the plaintiffs (1) lacked standing by suing the wrong defendants, (2) failed to state a claim under Section 2 of the Voting Rights Act, (3) raised Section 2 claims that were barred by the Eleventh Amendment, (4) failed to plausibly plea an equal protection claim, and (5) were not entitled to go forward on their race discrimination claims. Lewis v. Bentley, 2017 WL 432464 (N.D. Ala., 2017). The plaintiffs filed an appeal in the 11th Circuit in March 2017. Lewis v. Governor of Alabama, No. 17-11009 (11th Cir. filed Mar. 3, 2017).

California law requires employers to permit their employees to take off-duty rest periods. The California Supreme Court decided that employers may not require employees to remain "on call" during these rest periods. Thus, ABM Security Services cannot require guards to keep their pagers and radio phones on during rest periods and to "remain vigilant and responsive to calls when needs arose." Augustus v. ABM Security Services, Inc., 347 P.3d 89 (Cal. 2016) (5-2).

The Supreme Court reversed, holding that by enacting the Portal-to-Portal Act, Congress cut back on the broad judicial interpretation given to the FLSA's undefined terms "work" and "workweek." The Court unanimously held that employers do not have to pay for "activities
which are preliminary to or postliminary to” the principal activities that an employee is hired to perform. Integrity Staffing Solutions, Inc. v. Busk, 135 S. Ct. 513 (2014).

Page 476. Please insert as new notes.

13. In 1999 and 2001, the Department of Labor said that mortgage-loan officers are not administrators exempt from overtime pay requirements. In 2006, the Department said they were exempt as administrators. In 2010, the Department withdrew the 2006 letter and restored overtime pay to them. The Mortgage Bankers Association sued, arguing that the 2010 action did not meet the procedural requirements of the Administrative Procedure Act. The Supreme Court said the Department's 2010 action did satisfy the APA. Perez v. Mortgage Bankers Ass’n, 135 S. Ct. 1199 (2015).

Should the hours worked by employees employed by two companies be aggregated for the purposes of the FLSA? The pivotal question to answer in such cases is whether the employees are jointly or separately employed. An employer of a separately employed employee can disregard the work the employee performs for the other employer. If the employee is jointly employed, however, then the work the employee performs for both employers is aggregated when determining compliance of both employers with the FLSA. 29 C.F.R. §791.2 (1961).

The Fourth Circuit recently took up this issue in Salinas v. Commercial Interiors, Inc. 848 F.3d 125 (4th Cir. 2017). There, a host of plaintiffs employed as dry wall installers for both J.I., a dry wall installation subcontractor, and Commercial, a general contracting company, sued the two companies, arguing that the hours they worked for both companies be aggregated to assess the companies’ compliance with the FLSA. The district court granted summary judgment to Commercial, finding that joint employment did not exist because the agreement entered into between the two companies was a traditionally recognized contractor-subcontractor relationship, and the companies did not intent to avoid compliance with the FLSA. The Fourth Circuit reversed and remanded, holding:

Joint employment exists when (1) two or more persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of a worker’s employment and (2) the two entities’ combined influence over the essential terms and conditions of the worker’s employment render the worker an employee as opposed to an independent contractor. 848 F.3d at 130.

Applying this test, the court found that the undisputed facts in the case established that the J.I. and Commercial shared authority over and codetermined the terms and conditions of the plaintiffs’ employment. Commercial actively supervised the work of J.I.’s employees, provided all the tools needed for the work, coordinated staffing hours and pay with J.I., and, on at least one occasion, required J.I. employees to apply for employment with Commercial. The court affirmed the district court’s finding that the plaintiffs were employees and not independent contractors using the economic realities test.
14. A group of Tyson Foods employees brought a class action against the company, asserting that their FLSA rights were violated when Tyson failed to provide overtime compensation for donning and doffing protective equipment and clothing before work, before and after lunch, and at the end of the workday. The Supreme Court affirmed a $5.7 million jury verdict for the class, concluding that statistical evidence derived from studying a sample of the plaintiffs was an adequate basis for the class action. The Court was influenced by the fact that the employer had not kept records adequate for challenging the plaintiffs' sample evidence. The employees had done similar work and were paid under the same policy, a reason for distinguishing this case from Wal-Mart Stores, Inc. v. Dukes, p. 226. The Supreme Court affirmed a jury verdict of $5.7 million for the class. Chief Justice Roberts, joined by Justice Alito, concurred but expressed his "concern that the District Court may not be able to fashion a method for awarding damages only to those class members who suffered an actual injury." Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2016) (6-2).

15. In 1974, Congress amended the FLSA to exempt from overtime compensation requirements "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles..." Does that statutory exemption include "service advisors," who sell repair and maintenance services but not vehicles? Over the years, the Department of Labor took different positions on that question. The most recent was in 2011, when DOL issued a rule saying that "salesman" means only an employee who sells vehicles. Thus, sellers of service would continue to get time and a half for overtime. The Supreme Court was unimpressed because the agency had "failed to provide even a minimal level of analysis" or a "reasoned analysis" so its rule was arbitrary and capricious and did not deserve Chevron deference. Justice Kennedy, joined by five colleagues, sent the matter back to the court of appeals to decide, without deference to the Labor Department's interpretation, the right reading of the statute. Justices Thomas and Alito dissented, saying the Court should have ended the matter by interpreting the clear statutory language as exempting service advisors from overtime pay. Encino Motorcars, LLC v. Navarro, 136 S.Ct. 2117 (2016).

On remand, the Ninth Circuit panel reversed the decision of the district court and held that service advisors do not fall within the FLSA exemption. 845 F.3d 925 (9th Cir. 2017).

g. ENFORCEMENT OF THE FLSA

Page 486. Please replace Note 6 with the following:

6. Does a lawsuit become moot when one party (usually the defendant) offers to pay everything the plaintiff requested? Compare Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013)(5-4), an FLSA case, with Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016)(6-3), not an employment law case. The two cases found different reasons for concluding that the plaintiff's case was not mooted.

B. WHAT IS A JOB WORTH?

2. WAGE COMPARABILITY FOR INDIVIDUALS: THE QUEST FOR PAY EQUITY
Figures from the Bureau of Labor Statistics for 2015 show that the median weekly earnings for full-time wage and salary workers were: $920 for white males; $680 for black males; $1,129 for Asian males; $631 for Hispanic males; $743 for white females; $615 for black females; $877 for Asian females; $566 for Hispanic females. Bureau of Labor Statistics, Highlights of Women’s Earnings in 2015 (2016). On average, women who work full-time earn roughly 81% of what their male counterparts earn.

According to a Pew Research Center analysis, while wage disparity by gender has shrunk from 36 cents on the dollar in 1980 to 17 cents in 2015, certain groups have seen notable differences. For young women ages 25-34, the wage gap with young men has decreased from 37 cents in 1980 to 10 cents in 2015. By race, the disparity is also striking. Compared to white males, the wage gap between 1980 and 2015 among white women decreased by 22 cents; for black women, 9 cents; for Asian women, the records only start after 1980 but are approximately the same as for white women; for Hispanic women, 5 cents. Pew Research Center tabulations of Current Population Survey data, 2015.

c. THE LILLY LEDBETTER FAIR PAY ACT

A new California law prohibits employers from paying different wages to employees who do "substantially similar work." The law also prohibits retaliation against employees who inquire about their colleagues' salaries. The California law is a version of the Paycheck Fairness Act that the U.S. Congress declined to enact in 2014. Cal. Lab. Code § 1197.5 (2016).

In 2016, Massachusetts became the first state to amend their equal pay laws by prohibiting employers from inquiring about an applicant’s current or previous salary. In 2017, Philadelphia became the first city to implement laws with similar prohibitions, followed by the city of New York. The Massachusetts amendment also follows several other states in providing employees the right to discuss their salary with other employees, free from retaliation by the employer. Additionally, Massachusetts has struck out any definition of “Woman” (previously “a female 18 or older”), and uses the term “gender” in regard to pay discrimination, with no mention of “male” or “female.” While some states’ equal pay acts continue to prohibit wage discrepancy between men and women, or to include phrases such as “the opposite gender,” the use of non-binary terms has increased as further laws are being passed.
Another Supreme Court case challenging the legality of the ACA is King v. Burwell, 135 S. Ct. 2480 (2015). The plaintiffs lived in Virginia, a state that has not created a state exchange and whose residents therefore used the federal exchange to purchase individual health insurance. The plaintiffs argued that there was no statutory basis for the IRS to give tax credits for use on the federal exchange because Section 36B of the ACA only describes tax credits for exchanges "established by the State." The Supreme Court, 6-3, rejected the plaintiffs' argument. In an opinion by Chief Justice Roberts, the Court held that the challenged portion of the text needs to be considered in light of the ACA's context and structure. The majority noted that the lack of a state and federal exchange in any state would deny tax credits and health coverage, thereby threatening the basic goals of the law.

Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress's plan, and that is the reading we adopt.

135 S. Ct. at 2496. In a characteristically animated dissent, Justice Scalia wrote:

The Act that Congress passed makes tax credits available only on an "Exchange established by the State." This Court, however, concludes that this limitation would prevent the rest of the Act from working as well as hoped. So it rewrites the law to make tax credits available everywhere. We should start calling this law SCOTUScare.

135 S. Ct. at 2506.

In Zubik v. Burwell, 136 S.Ct. 444 (2016), nonprofit organizations that provide health insurance to their employees challenged a regulation promulgated to implement the ACA requiring them to provide certain contraceptive services as part of their health plans unless they submit a form either to their insurer or to the federal government indicating that they object on religious grounds. The organizations alleged that submitting the notice substantially burdens the exercise of their religion in violation of the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb et seq. In a per curiam opinion, the Court vacated decisions of the lower courts and remanded the case to allow the parties to resolve the issues themselves. Many commentators
believed that this action was to avoid a four-to-four split by the justices caused by the death of Justice Scalia.

**Page 546. Please add the following at the bottom of the page.**

When employee wellness programs ask for individual and family medical histories they may implicate the ADA and GINA. Provisions of these two laws permit employer-sponsored wellness programs to request medical or genetic information, but only if participation in the programs is voluntary. Under the final rule issued by the EEOC, 81 Fed. Reg. 31126 (2016), employers are able to award an "incentive" of up to 30% of the total cost of self-only coverage or as high as 50% of the total cost of self-only coverage to implement a smoking cessation program. The average cost of a self-only plan in 2015 was $6251 per year. The EEOC rejected the argument that the amount of the "incentive" (or "penalty" for those who refuse to participate), was so high as to be coercive for lower paid employees who, for all practical purposes, have no choice but to submit their health information and that of their spouse.

For a discussion of litigation involving employer wellness plans, see Mark A. Rothstein, Employer Wellness Programs Challenged in Court, 47(1) Hastings Center Report 4 (2017).

**C. ERISA – PREEMPTION OF STATE ACTIONS**

**Page 568. Please insert the following notes.**

4A. In Montanile v. Bd. of Trustees, 136 S. Ct. 651 (2016), Montanile was seriously injured by a drunk driver, and his ERISA plan paid more than $120,000 for his medical expenses. Montanile sued the drunk driver and obtained a $500,000 settlement. Pursuant to the plan's subrogation clause the plan administrator sued to recover the funds expended for Montanile's care. Because of the delay in asserting the claim, Montanile spent all of the money on "nontraceable items," such as services or food. The Court held that when the participant dissipates the whole settlement on nontraceable items, the fiduciary cannot bring an action to attach the participant's general assets because the suit is not one for "appropriate equitable relief" under ERISA § 502(a)(3). Because it was unclear whether the participant dissipated all of the settlement in this manner, the case was remanded.

4B. Gobeille v. Liberty Mut. Ins. Co., 136 S. Ct. 936 (2016), involved a challenge to a Vermont law requiring health insurers to report health care claims and other information to a state agency for compilation in an all-inclusive health care database. These "all-payer claims databases" have been enacted in 18 states, and they attempt to generate data on the cost and effectiveness of health care. The Supreme Court held that the Vermont law was preempted by ERISA because ERISA requires plans to file detailed reports with the Secretary of Labor (although different data than required by Vermont) and therefore reporting is a fundamental ERISA function. "Any difference in purpose does not transform this direct regulation of a 'central matter of plan administration,' into an innocuous and peripheral set of additional rules." 136 S. Ct. at 940
In Coventry Health Care of Missouri, Inc. v. Nevils, 137 S. Ct. 1190 (2017), Jody Nevils, a federal employee, was insured under a health plan pursuant to the Federal Employees Health Benefits Act (FEHBA). Nevils was injured in an auto accident and Coventry paid his medical expenses. After Nevil obtained a settlement against the driver of the other car, Coventry asserted a lien against part of the settlement. Nevils satisfied the lien and then sued in Missouri state court asserting that the lien violated Missouri law. The Missouri Supreme Court held that Missouri law applied and prohibited the lien, but the Supreme Court reversed, holding that the Missouri law was preempted. The Court noted that the preemption language in the FEHBA, prohibiting contractual provisions for subrogation that "relate to" benefits, is the same language that has been broadly construed to require preemption under ERISA.

D. FAMILY AND MEDICAL LEAVE

Page 582. Please add the following note.

6A. In Coutard v. Municipal Credit Union, 848 F.3d 102 (2d Cir. 2017), the plaintiff alleged that his employer violated the FMLA by refusing to permit him to take leave to care for his seriously ill grandfather, who, in loco parentis, had raised him as a child. The FMLA provides for leave under these circumstances, but in requesting leave the plaintiff did not specifically mention the loco parentis relationship. The Second Circuit held that when the employee requested leave, the employer had an obligation to specify any additional information it needed to determine whether the employee was eligible for leave.

Page 582. Please add the following to note 7.


Page 583. Please add the following to note 14.

Additional paid sick leave laws have been enacted in California, Massachusetts, and Oregon. Pursuant to Executive Order 13706 (2015), federal contractors are required to provide up to 7 days annually of paid sick leave.

Page 584. Please add the following notes.

15. Under California law, Cal. Gov’t Code § 12945.2, workers are entitled to paid parental leave for six weeks at 55% of their pay, paid for by employee-financed public disability insurance. In 2016, San Francisco enacted a law mandating full pay for parental leave, with the 45% difference being paid by employers. S.F. Police Code art. 33H. New Jersey, N.J. Pub. L. 1948, ch. 110, § 2, and Rhode Island, R.I. Gen. Laws § 28-48, also provide for paid parental leave, but not at full pay, and also financed by employee-funded insurance.

E. NONDISCRIMINATION IN BENEFITS
1. PREGNANCY

Page 588. Please add the following notes.

3. In Young v. United Parcel Service, 135 S. Ct. 1338 (2015) (this supplement at p. 29), the Supreme Court held that a plaintiff could make out a disparate treatment pregnancy discrimination case based on an employer's failure to provide reasonable accommodation when other employees with similar inability to work were accommodated. Although the case did not involve discrimination in benefits, it could well presage a more sympathetic view of the needs of pregnant employees in general, including in the realm of health benefits.

4. On the issue of mandatory coverage of contraceptives, see Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014) (p. 541 of the main volume).

2. MARITAL STATUS

Page 592. Please add the following note before Part 3.

As discussed in the following section, the law of employee health benefits has been changed substantially by striking down state prohibitions on same-sex marriage. In states where same-sex marriage was illegal, some employers extended eligibility for health benefits to domestic partnerships or other non-marital arrangements of same-sex partners, but not opposite-sex partners, on the ground that opposite-sex partners could marry and same-sex partners could not. Now that same-sex marriage is legal in all states, many employers have restructured their benefits to apply to all married couples, but not to any couples in non-marital arrangements. There have been no reported cases as yet by non-marital couples, including by same-sex unmarried couples who lost benefits. Could such a couple argue that if there is a right to marry, there is also a right not to marry, and therefore it is unlawful to deny otherwise available benefits to couples, both same-sex and opposite-sex, that in all other respects are the same as married couples? What arguments, pro and con, would you make in the public sector and the private sector?

3. SEXUAL ORIENTATION

Page 592. Please delete this entire section and replace with the following text.

In 1996, Congress overwhelmingly enacted, and President Clinton signed, the Defense of Marriage Act (DOMA), which provided that "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." DOMA § 3. In United States v. Windsor, 133 S. Ct. 2675 (2013), a lawsuit was brought by a surviving same-sex spouse whose inheritance was taxed as if she were unmarried, and thus at a higher rate. The Supreme Court, five-to-four, held that section 3 of DOMA was unconstitutional as a violation of "the liberty of the person protected by the Fifth Amendment."
Later in 2013, the Department of Labor provided guidance to plans, plan sponsors, fiduciaries, participants, and beneficiaries on the Windsor decision's impact on ERISA. According to DOL Technical Release No. 2013-04, generally the terms "spouse" and "marriage" in ERISA include same-sex couples who are legally married in any state or foreign jurisdiction that recognizes such marriages, regardless of where the couple currently resides. Windsor and the DOL's guidance established a conflict between state law (many of which prohibited same-sex marriage) and federal law, which provided that same-sex benefits had to be treated equally under ERISA.

In Obergefell v. Hodges, 135 S. Ct. 2584 (2015), The Supreme Court held, five-to-four, with Justice Kennedy writing for the majority, the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and liberty. Also, states must recognize same-sex marriages performed in other states.

In a sense, the Obergefell case simplifies health benefits because there is only one rule that applies to all employees in all states. Nevertheless, there is still a level of uncertainty or confusion. Although the Affordable Care Act requires employers to offer coverage to employees (or they will be assessed a penalty), employers are not required to offer health plan coverage to spouses. Also, a spouse who is covered by an employee's health insurance is entitled to 36 months of health care continuation (at no more than 102% of cost) in the event of the participant's termination of employment, or the couple's divorce or legal separation. See pp. 537-538 in the main volume.
PART III

TERMS AND CONDITIONS
OF EMPLOYMENT

CHAPTER 7

EMPLOYEE LIBERTY

A. APPEARANCE

1. GROOMING

Page 607. Please add the following note.

5A. In EEOC v. Catastrophe Management Solutions, 852 F.3d 1018 (11th Cir. 2016), Chastity Jones was hired as a customer service representative, a position that did not have contact with the public. Her offer was rescinded, however, when she refused to cut her dreadlocks. The employer's grooming policy called for hairstyle to reflect a "business/professional image." The EEOC alleged that the employer's policy constituted race discrimination because "dreadlocks are a manner of wearing hair that is physiologically and culturally associated with people of African descent." The Eleventh Circuit affirmed dismissal of the case on the ground that race discrimination does not entail cultural practices.

2. DRESS

Page 613. Please delete the principal case and replace with the following.

EEOC v. Abercrombie & Fitch Stores, Inc.

JUSTICE SCALIA delivered the opinion of the Court.

Title VII of the Civil Rights Act of 1964 prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without undue hardship. The question presented is whether this prohibition applies only where an applicant has informed the employer of his need for an accommodation.

I

We summarize the facts in the light most favorable to the Equal Employment Opportunity Commission (EEOC), against whom the Tenth Circuit granted summary judgment. Respondent Abercrombie & Fitch Stores, Inc., operates several lines of clothing stores, each with its own “style.” Consistent with the image Abercrombie seeks to project for each store, the
company imposes a Look Policy that governs its employees' dress. The Look Policy prohibits "caps"—a term the Policy does not define—as too informal for Abercrombie's desired image.

Samantha Elauf is a practicing Muslim who, consistent with her understanding of her religion's requirements, wears a headscarf. She applied for a position in an Abercrombie store, and was interviewed by Heather Cooke, the store's assistant manager. Using Abercrombie's ordinary system for evaluating applicants, Cooke gave Elauf a rating that qualified her to be hired; Cooke was concerned, however, that Elauf's headscarf would conflict with the store's Look Policy.

Cooke sought the store manager's guidance to clarify whether the headscarf was a forbidden "cap." When this yielded no answer, Cooke turned to Randall Johnson, the district manager. Cooke informed Johnson that she believed Elauf wore her headscarf because of her faith. Johnson told Cooke that Elauf's headscarf would violate the Look Policy, as would all other headwear, religious or otherwise, and directed Cooke not to hire Elauf.

The EEOC sued Abercrombie on Elauf's behalf, claiming that its refusal to hire Elauf violated Title VII. The District Court granted the EEOC summary judgment on the issue of liability, 798 F.Supp.2d 1272 (N.D.Okla.2011), held a trial on damages, and awarded $20,000. The Tenth Circuit reversed and awarded Abercrombie summary judgment. 731 F.3d 1106 (2013). It concluded that ordinarily an employer cannot be liable under Title VII for failing to accommodate a religious practice until the applicant (or employee) provides the employer with actual knowledge of his need for an accommodation. We granted certiorari.

II

Title VII of the Civil Rights Act of 1964, as amended, prohibits two categories of employment practices. It is unlawful for an employer:

“(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.”

These two proscriptions, often referred to as the “disparate treatment” (or “intentional discrimination”) provision and the “disparate impact” provision, are the only causes of action under Title VII. The word “religion” is defined to “includ[e] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably
accommodate to” a “religious observance or practice without undue hardship on the conduct of
the employer's business.”

Abercrombie's primary argument is that an applicant cannot show disparate treatment
without first showing that an employer has “actual knowledge” of the applicant's need for an
accommodation. We disagree. Instead, an applicant need only show that his need for an
accommodation was a motivating factor in the employer's decision.

The disparate-treatment provision forbids employers to: (1) “fail ... to hire” an applicant
(2) “because of” (3) “such individual's ... religion” (which includes his religious practice). Here,
of course, Abercrombie (1) failed to hire Elauf. The parties concede that (if Elauf sincerely
believes that her religion so requires) Elauf's wearing of a headscarf is (3) a “religious practice.”
All that remains is whether she was not hired (2) “because of” her religious practice.

The term “because of” appears frequently in antidiscrimination laws. It typically imports,
at a minimum, the traditional standard of but-for causation. Title VII relaxes this standard,
however, to prohibit even making a protected characteristic a “motivating factor” in an
employment decision. “Because of” in § 2000e–2(a)(1) links the forbidden consideration to each
of the verbs preceding it; an individual's actual religious practice may not be a motivating factor
in failing to hire, in refusing to hire, and so on.

It is significant that § 2000e–2(a)(1) does not impose a knowledge requirement. As
Abercrombie acknowledges, some antidiscrimination statutes do. For example, the Americans
with Disabilities Act of 1990 defines discrimination to include an employer's failure to make
“reasonable accommodations to the known physical or mental limitations” of an applicant. Title
VII contains no such limitation.

Instead, the intentional discrimination provision prohibits certain motives, regardless of
the state of the actor's knowledge. Motive and knowledge are separate concepts. An employer
who has actual knowledge of the need for an accommodation does not violate Title VII by
refusing to hire an applicant if avoiding that accommodation is not his motive. Conversely, an
employer who acts with the motive of avoiding accommodation may violate Title VII even if he
has no more than an unsubstantiated suspicion that accommodation would be needed.

Thus, the rule for disparate-treatment claims based on a failure to accommodate a
religious practice is straightforward: An employer may not make an applicant's religious
practice, confirmed or otherwise, a factor in employment decisions. For example, suppose that an
employer thinks (though he does not know for certain) that a job applicant may be an orthodox
Jew who will observe the Sabbath, and thus be unable to work on Saturdays. If the applicant
actually requires an accommodation of that religious practice, and the employer's desire to avoid
the prospective accommodation is a motivating factor in his decision, the employer violates Title
VII.

Abercrombie urges this Court to adopt the Tenth Circuit's rule “allocat[ing] the burden of
raising a religious conflict.” This would require the employer to have actual knowledge of a
conflict between an applicant's religious practice and a work rule. The problem with this
approach is the one that inheres in most incorrect interpretations of statutes: It asks us to add words to the law to produce what is thought to be a desirable result. That is Congress's province. We construe Title VII's silence as exactly that: silence. Its disparate-treatment provision prohibits actions taken with the motive of avoiding the need for accommodating a religious practice. A request for accommodation, or the employer's certainty that the practice exists, may make it easier to infer motive, but is not a necessary condition of liability.

Abercrombie argues in the alternative that a claim based on a failure to accommodate an applicant's religious practice must be raised as a disparate-impact claim, not a disparate-treatment claim. We think not. That might have been true if Congress had limited the meaning of “religion” in Title VII to religious belief—so that discriminating against a particular religious practice would not be disparate treatment though it might have disparate impact. In fact, however, Congress defined “religion,” for Title VII's purposes, as “includ[ing] all aspects of religious observance and practice, as well as belief.” Thus, religious practice is one of the protected characteristics that cannot be accorded disparate treatment and must be accommodated.

Nor does the statute limit disparate-treatment claims to only those employer policies that treat religious practices less favorably than similar secular practices. Abercrombie's argument that a neutral policy cannot constitute “intentional discrimination” may make sense in other contexts. But Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment, affirmatively obligating employers not “to fail or refuse to hire or discharge any individual ... because of such individual's” “religious observance and practice.” An employer is surely entitled to have, for example, a no-headwear policy as an ordinary matter. But when an applicant requires an accommodation as an “aspect of religious ... practice,” it is no response that the subsequent “failure ... to hire” was due to an otherwise-neutral policy. Title VII requires otherwise-neutral policies to give way to the need for an accommodation.

* * *

The Tenth Circuit misinterpreted Title VII's requirements in granting summary judgment. We reverse its judgment and remand the case for further consideration consistent with this opinion.

* * *

JUSTICE ALITO, concurring in the judgment.

* * *

JUSTICE THOMAS, concurring in the judgment.

* * *

I would hold that Abercrombie's conduct did not constitute “intentional discrimination.” Abercrombie refused to create an exception to its neutral Look Policy for Samantha Elauf's
religious practice of wearing a headscarf. In doing so, it did not treat religious practices less favorably than similar secular practices, but instead remained neutral with regard to religious practices. To be sure, the effects of Abercrombie’s neutral Look Policy, absent an accommodation, fall more harshly on those who wear headscarves as an aspect of their faith. But that is a classic case of an alleged disparate impact. It is not what we have previously understood to be a case of disparate treatment because Elauf received the same treatment from Abercrombie as any other applicant who appeared unable to comply with the company’s Look Policy. Because I cannot classify Abercrombie’s conduct as “intentional discrimination,” I would affirm.

* * *

QUESTIONS

1. Suppose the employer's agent, unaware of the likely religious significance of the headscarf she wore to the interview, refused to hire Elauf because she thought the color of Elauf's headscarf "clashed" with her dress and therefore she believed Elauf lacked the sense of style to be a sales associate for Abercrombie & Fitch. Would this be actionable religious discrimination? How would you apply the reasoning of the majority?

2. Suppose the employer's agent knew that another applicant was not a Muslim and refused to hire her because he thought it was "wrong" for a non-Muslim to wear an assumedly Muslim headscarf. Would this violate Title VII?

3. Suppose yet another applicant was not a Muslim and wore a headscarf simply because she liked the way it looked. Further suppose that the employer refused to hire her because it erroneously believed she was a Muslim. Would this be a violation of Title VII? Compare the "regarded as" provision of the ADA. Does there need to be a "regarded as" provision for Title VII?


5. A similar issue was raised before the European Court of Justice, the highest court of the EU. A Muslim woman in Belgium, Samira Achbita, was fired from her job as a receptionist at a security company. In an advisory opinion, the court stated that a ban on head scarves "does not constitute direct discrimination based on religion if that ban is founded on a general company rule prohibiting visible political, philosophical and religious symbols in the workplace, and not on stereotypes or prejudice against one or more particular religions or against religious beliefs in general." Sewell Chan, E.U. Legal Opinion Upholds Employer Ban on Muslim Women's Head Scarves, N.Y. Times, June 1, 2016, at A9. Would this argument work in the U.S. under Title VII?
C. FREEDOM OF EXPRESSION

1. PUBLIC SECTOR

Page 658. Please add the following notes.

3A. A police sergeant with 25 years of service posted on her Facebook page comments highly critical of the police chief because he did not permit officers to use their police cars to attend the funeral of an officer killed in the line of duty in a surrounding town. Are the postings protected under Garcetti, thereby allowing her to challenge her subsequent discharge? See Graziosi v. City of Greenville, 775 F.3d 731 (5th Cir. 2015) (held: no; speech was not on a matter of public concern). See also Brown v. Chicago Board of Educ., 824 F.3d 713 (7th Cir. 2016) (statements made in classroom by a teacher are within official duties and therefore not about a public concern); Rock v. Leviniski, 791 F.3d 1215 (10th Cir. 2015) (statement by school principal opposing school district's plan to close her school was not protected because it was a statement by a policymaking individual with the potential to have a detrimental impact on close working relationships).

6A. In Liverman v. City of Petersburg, 844 F.3d 400 (4th Cir. 2016), the Fourth Circuit held that the police department's social media policy, prohibiting all posts that tended to discredit or reflect unfavorably on the department, was overbroad. "The advent of social media does not provide cover for the airing of purely personal grievances, but neither can it provide a pretext for shutting off meaningful discussion of larger public issues in this new public sphere." Id. at 414.

Page 664. Please add the following note.

5. Private sector employees may be extended free speech rights in the workplace by state statute. See, e.g., Trusz v. UBS Realty Investors, LLC, 123 A.3d 1212 (Conn. 2015).

E. COLLECTIVE ACTION

Page 674. Please add the following note.

2A. Although employees have a right to engage in protected concerted activity, it is sometimes a close case as to whether the conduct of the employees cross the line into misconduct, thereby justifying discipline or termination by the employer. In DIRECTV, Inc. v. NLRB, 837 F.3d 25 (D.C. Cir. 2016), employees unhappy with a new pay policy aired their grievances ibn an interview with a reported for a local television news station. The D.C. Circuit held that the "third party appeal" in the interview was protected and, quoting the NLRB, said it was not "flagrantly disloyal, wholly incommensurate with any grievances which they might have."

Page 674. Please delete note 6 and replace with the following.

6. In NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975), the Supreme Court held that an employee has a right to have a union representative present at an investigatory interview. The NLRB has changed its view on whether these so-called Weingarten rights also extend to
nonunion employees. In its latest decision, IBM Corp., 341 NLRB 148 (2004), the NLRB (3-2) held that the right to have a coworker present at an investigatory interview does not extend to nonunion employees. The Board relied on the need for prompt investigatory interviews because of the threat of terrorism. "Further, because of the events of Sept. 11, 2001 and the aftermath, we must now take into account the presence of both real and threatened attacks. We hold that the *Weingarten* right does not extend to the non-union workplace." Should the possibility of exigent circumstances justify the rule or the exception?

F. REGULATION OF OFF-WORK ACTIVITY

2. POLITICAL ACTIVITY

Page 688. Please add the following note.

2A. Heffernan v. City of Paterson, 136 S. Ct. 1412 (2016), involved a police officer working in the office of the chief of police of Paterson, New Jersey. Both the chief of police and Heffernan's supervisor had been appointed by the mayor, who was running for re-election against Spagnola, a good friend of Heffernan's. Heffernan was not involved in Spagnola's campaign in any capacity. As a favor to his bedridden mother, Heffernan agreed to pick up a Spagnola campaign yard sign to replace one that had been stolen. When Heffernan was observed by other police officers while holding a Spagnola yard sign, word spread throughout the force and Heffernan was demoted from a detective to a patrol officer because of his "overt involvement" in Spagnola's campaign. Heffernan brought suit under section 1983, arguing that he had been demoted in violation of his First Amendment rights. The district court and the Third Circuit held that Heffernan's case was actionable only if his employer's conduct was prompted by his actual, rather than his perceived, exercise of free-speech rights. The Supreme Court, 6-2, reversed in an opinion by Justice Breyer. "When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. § 1983 – even if, as here, the employer makes a factual mistake about the employee's behavior." 136 S. Ct. at 1418. In dissent, Justice Thomas (with Justice Alito) argued, as had the Third Circuit, that Heffernan had no cause of action because his constitutional rights had not been violated.
CHAPTER 8

OCCUPATIONAL SAFETY AND HEALTH

A. INTRODUCTION

1. BACKGROUND

Page 705. Please add the following note.

1A. Section 701 of the Bipartisan Budget Act of 2015 (Pub. L. No. 114-74) contains a provision requiring OSHA to increase the maximum penalties through a one-time "catch-up" increase based on the Consumer Price Index (CPI) since 1990. From 1990 to 2015 the CPI increased 82%, which would be the maximum percent of increase of OSHA penalties. On July 1, 2016, OSHA announced the following penalty scale effective for citations alleged between August 1, 2016 and July 31, 2017. In future years, OSHA is required to increase maximum penalties by the amount of inflation in the prior year.

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B. PROMULGATION OF STANDARDS

2. NEW STANDARDS

Page 728. Please add the following note.

5. For an article proposing a new, more expansive approach to "feasibility" under section 6(b)(5), see Jason R. Bent, Health Theft, 48 U. Conn. L. Rev. 637 (2016).

C. EMPLOYER DUTIES

2. GENERAL DUTY CLAUSE

Page 740. Please add the following to the end of note 3.

In Western World, Inc. v. Secretary of Labor, 604 F. Appx. 188 (3d Cir. 2015), cert. denied 136 S.Ct. 1161 (2016), the court affirmed a section 5(a)(1) violation arising at the employer's Wild West theme park where an actor staging a gun fight mistakenly used live bullets and shot another actor in the head. The OSHA violation was the employer's failure to prohibit employees from using their own firearms, which were capable of shooting live bullets.
F. NON-OSHA SAFETY AND HEALTH LAW

Page 768. Please add the following to note 4.

On an employer's duty to accommodate a pregnant employee under the PDA, see Young v. UPS, p. 29 in this supplement.
CHAPTER 9

DISABLING INJURY AND ILLNESS

B. WORKERS' COMPENSATION COVERAGE

2. "COURSE OF EMPLOYMENT"

Pages 782-783. Please insert the following notes.

2A. In Layne v. Crist Elec. Contractor, Inc., 768 S.E.2d 261 (Va. App. 2015), an employee suffered severe injuries when a scissor lift he was operating was struck by a crane, and he plunged to the floor in a large warehouse. The Virginia Court of Appeals held that the claimant was not entitled to workers' compensation benefits because his violation of the "lock-out-tagout" safety rule was a willful violation. The employee knew of the rule and had followed it in the past. He was unable to explain his failure in the case because his severe brain injuries prevented him from testifying. What does it mean to "willfully" violate a safety standard?

2B. Bates and McDaniel were employees at a sugar cooperative. While performing his work duties Bates encountered McDaniel and began attacking him with a brass hammer because Bates had discovered on the Internet that McDaniel is a registered sex offender. Bates was immediately fired, and McDaniel filed for workers' compensation benefits. Is McDaniel entitled to recover for the injuries caused by his coworker? See McDaniel v. Western Sugar Coop., 867 N.W.2d 302 (Neb. Ct. App. 2015) (held: no; the injury did not "arise out of" employment because it was not caused by or exacerbated by the employment).

3A. The business manager of a Girl Scout summer camp went on an end-of-the-season horseback ride with other staff members. Her horse unexpectedly bolted, throwing her in the air and seriously injuring her back. Is she entitled to workers' compensation? See Pollock v. Girl Scouts of Southern Ala., Inc., 176 So. 3d 222 (Ala. Ct. App. 2015)( held: no; injury occurred during voluntary recreational activity).

3B. In Calumet School District #132 v. Illinois Workers' Comp. Comm'n, 67 N.E.3d 966 (Ill. Ct. App. 2016), a teacher was injured in a an after-school basketball game with students. The teacher only agreed to participate because he was pressured to do so by the principal. In upholding an award of benefits, the court held that the basketball game was not a "voluntary recreational program" under the Illinois statute, which would have made his injury noncompensable.
PART IV
TERMINATING THE EMPLOYMENT RELATIONSHIP
CHAPTER 10
DISCHARGE
A. STATUTORY AND CONSTITUTIONAL PROTECTIONS OF EMPLOYEES

1. WHISTLEBLOWER LAWS

Page 850. Please insert as new notes.

6. The Homeland Security Act, enacted in 2002, requires the Transportation Security Administration to prohibit disclosure of information detrimental to transportation security. MacLean, a federal air marshal, believed that cancelling certain missions from Las Vegas was dangerous and illegal. He told a newspaper reporter about the TSA decision he didn't like. TSA fired him. MacLean sued, alleging that his disclosure was whistleblowing protected by a federal statute protecting employees who disclose "any violation of any law, rule, or regulation," or "a substantial ... danger to public ... safety." The Supreme Court ruled for MacLean, saying that the exception to whistleblowing protection for leaking information in violation of law did not create an exception for violations of the regulation TSA had issued concerning "sensitive security information." A regulation, said the Court majority, is not a "law." Dep’t of Homeland Sec. v. MacLean, 135 S. Ct. 913 (2015) (7-2).

7. Menendez complained to Halliburton management about what he thought were questionable accounting practices. He also complained to the SEC. Halliburton let Menendez's colleagues know that he had been the whistleblower. The colleagues, whom he had essentially accused of fraud, ostracized him. Held: What Halliburton did was illegal retaliation under section 806 of the Sarbanes-Oxley Act. Halliburton, Inc. v. Admin. Rev. Bd., 771 F.3d 254 (5th Cir. 2014).

8. Henry Roop was fired by Southern Pharmaceuticals Corporation (SPC) one day after he told his boss on the telephone that another executive had offered to make payments to the wife of Patrick Gregory, clinical coordinator at Central Medical Health Services, if Gregory referred diabetic equipment purchases to SPC. The wife, Josephine, would not be expected to perform work for SPC. The Mississippi Supreme Court said the jury had enough evidence to conclude that Roop was fired for reporting conduct that violated the federal Medicare and Medicaid Anti-Kickbacks statute and that terminating him for that reason violated the "narrow public-policy exception to Mississippi's employment-at-will doctrine." Roop v. Southern Pharm. Corp., 188 So.3d 1179 (Miss. 2016).

9. One of the most common statutes whistleblowers seek protection under is the False Claims Act (FCA). 31 U.S.C. §§3729, 3730(b-g). The FCA empowers private plaintiffs to bring suits on behalf of the government against persons who knowingly present false or fraudulent claims to the government for approval or payment. In Universal Health Services Inc. v. US ex rel Julio
Escobar, 136 S.Ct. 1989 (2016), the Supreme Court expanded the basis upon which these claims can be made. Specifically, the Court held that false claims may be the basis for liability when two conditions are satisfied: (1) the claim does not merely request payment, but also makes specific representations about the goods or services provided; and (2) the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.

The Court’s decision is already having ripple effects. In May 2016, the Second Circuit ruled against the whistleblowers seeking protection under the FCA in Bishop v. Wells Fargo & Co. 823 F.3d 35 (2nd Cir. 2016). The plaintiffs in the case, Paul Bush and Robert Krauss, claimed that the banks they used to work for engaged in massive fraud in the early to mid-2000s when executives used improper accounting practices to hide toxic assets off its balance sheet. This made the banks look far more financially secure than they actually were, allowing them to gain preferential interest rates from the Fed on loans totaling in the billions of dollars. Both plaintiffs were fired when they brought the alleged fraud to the attention of executives at their banks.

Originally, the Second Circuit held that the plaintiffs had no claim under the False Claims Act because, prior to Escobar, the only circumstance in which a claim was legally “false” was when the allegedly fraudulent party certifies compliance with a statute or regulation as a condition to the government payment. Whether the Second Circuit will change their opinion due to Escobar remains to be seen. Would the Fed have granted the loans they did had the true financial position of the banks been disclosed? Does the failure to disclose the truth of the banks financial position make the representations the banks gave to the Fed “misleading half-truths?”

2. CONSTITUTIONAL PROTECTIONS

Page 859. Please add the following note.

10. Linhoff had worked at University of Connecticut Health Center for 15 years as a "skilled maintainer ... changing heating, ventilation and air conditioning filters on hospital roof" with no prior discipline. A police officer spotted him sitting with a coworker in a state van while smoking marijuana. He was fired. The arbitrator under a public employee union contract said Linhoff should be suspended from work for 6 months without pay and after that experience random drug testing for a year. Connecticut appealed and trial court said Linhoff should be terminated. The Supreme Court reversed and approved the arbitrator's much lighter punishment, saying it did not violate public policy. State of Connecticut v. Connecticut Employees Union, 142 A.3d 1122 (Conn. 2016).

3. STATUTORY CONTRACTS – THE MONTANA EXCEPTION

Page 865. Please add the following note.

3. How much evidence does a plaintiff need in order to prove a firing decision was not made for “good cause?” In Moe v. Butte-Silver Bow County, 371 P.3d 415 (Mont. 2016), the plaintiff, a human resources director, was fired for inappropriate conduct and job performance deficiencies articulated in a complaint by a subordinate. The court reversed the district court, finding that
there was a genuine issue of material fact as to whether the plaintiff was fired for good cause because the plaintiff’s response letter “presented exhaustive responses to the allegations against her.” In Bird v. Cascade County, 386 P.3d. 602 (Mont. 2016), the plaintiff, also a human resources director was terminated for, among other allegations, using public resources for political purposes and disclosing confidential information. Distinguishing Moe, the court upheld the decision for summary judgment largely because the majority of the plaintiff’s response letter amounted to “conclusory statements, speculative assertions, and mere denials.”

C. TORT EXCEPTIONS TO EMPLOYMENT AT WILL

2. PUBLIC POLICY

Page 921. Please add to note 3.

Does the analysis change if the wrongdoing was used as “pretext” for an otherwise discriminatory termination? Katie Mayes supervised employees on the night-shift freight crew at WinCo, an Idaho Falls grocery store. Because the job was difficult and often required employees to work beyond their shift, Mayes would often take stale cakes from the store’s bakery and offer it to her employees in the break room. While Mayes discussed this practice with management, in 2011 she was fired for her cake “theft.” A panel of the Ninth Circuit reversed the district court’s summary judgment in favor of the defendant on gender discrimination claims under Title VII, finding that the plaintiff put forth sufficient evidence that WinCo’s proffered reasons for the termination were pretextual. See Mayes v. WinCo Holdings Inc. 846 F.3d 1274 (9th Cir. 2017), supra 203.

Page 928. Please insert after note 1.

1A. In a recent post- Hansen case, the Utah Supreme Court found that the state treats the right of self-defense as an important public policy. Wal-Mart's policy required employees to disengage and withdraw from potentially violent situations. The company fired several employees who were involved in physical confrontations with shoplifting customers. The court said that their dismissal might violate the public policy tort but limited the exception from at-will employment "to situations where an employee reasonably believes that force is necessary to defend against an imminent threat of serious bodily harm and the employee has no opportunity to withdraw.” Ray v. Wal-Mart Stores, Inc., 359 P.3d 614 (Utah 2015). The doctrinal question had been certified to the Utah Supreme Court by the U.S. District Court. See also Swindol v. Aurora Flight Sciences Corp., 805 F.3d 516 (5th Cir. 2016), saying that Mississippi law makes terminating an employee for having a firearm inside his locked vehicle on company property "legally impermissible." This was the first time Mississippi recognized any statutory exception to employment-at-will.

Page 931. Please add note.

13. Plaintiff made false statements about her immigration status when she was hired in 2009. Three years later she injured her back and obtained workers’ compensation benefits.
When her employer discovered her false statements, it fired her. But the Kansas Supreme Court said she should nonetheless receive workers’ compensation benefits. Mera-Hernandez v. U.S.D. 233, 390 P.3d 875 (Kan. 2017).

Page 935. Please add note.

6. Maddin was a truck driver. Brakes on his trailer froze because of subzero temperatures. After reporting the problem and waiting several hours for a repair truck, Maddin--his torso numb and his feet with no feeling because of the cold--unhitched truck from trailer and drove away. He was terminated for abandoning the trailer. Held, Administrative Law Judge correctly determined that Maddin was fired in violation of the whistleblower and health and safety provisions of the federal Surface Transportation Assistance Act. Judge Gorsuch (then on 10th Circuit) dissented, saying that the federal law only forbids employers from firing employees who "refuse to operate a vehicle" out of safety concerns and that Maddin therefore should have waited longer in the truck. This is a major Gorsuch anti-Chevron opinion, saying courts should apply the words of the statute and not search for Congress's meaning. Transam Trucking, Inc. v. Admin. Rev. Bd., 833 F.3d 1206 (10th Cir. 2016).
CHAPTER 11

EMPLOYEES’ DUTIES TO THE EMPLOYER

B. POST-EMPLOYMENT RESTRICTIONS

1. FUTURE EMPLOYMENT

Page 1006. Please insert this note after note 14:

14A. Socko was a salesperson for a company that provided basement water-proofing services. Three years after starting at the company, he signed a two-year non-compete agreement saying that for two years after leaving that employer, he would not compete in nine specific mid-east states. The agreement said that the parties "intend to be legally bound," but the Pennsylvania Supreme Court said that "when a non-competition clause is required after an employee has commenced his or her employment, it is enforceable only if the employee receives 'new' and valuable consideration--that is, some corresponding benefit or a favorable change in employment status." This can be "a promotion, a change from part-time to full-time employment, or even a change to a compensation package ..." The mere continuation of employment is insufficient to serve as consideration, "despite it being an at-will relationship terminable by either party." Socko v. Mid-Atlantic Sys. of CPA, Inc., 126 A.3d 1266 (Pa. 2015).

Page 1007. Please add to note 18.


Several states have been experimenting ... with various models of how to best evaluate or restrict the use of noncompetes for their citizens. For example, Colorado's statute restricts noncompetes to executives making high salaries and their executive assistants. Oregon's non-competition statute ... requires that an employee asked to sign a non-compete must be provided at least two weeks' advance notice of the request before the start of employment. Oregon ... changed to shorten the allowable temporal scope of noncompetes from two years to eighteen months. ... Hawaii changed its law in 2015 to restrict the use of employee noncompetes for high-tech workers in an attempt to match California's success in developing the Silicon Valley agglomeration economy. Other states ... [protected] broadcasters in New York, physicians in Massachusetts, [and] used car salesmen in Louisiana.
6. About 55 million American workers have no access to an employer-created retirement savings plan. As a solution, several states passed or were considering legislation that would require certain employers or permit certain cities or counties to enroll workers in a state plan. The Obama Department of Labor issued a rule encouraging states to do this. But the Republican Congress and President have now “disapproved” the rule so that “such rule shall have no force or effect.” The Senate vote was 50-49. Public Law 115–35, 115th Congress.

Page 1158. Please replace Note 15 with the following.

15. In Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014), the Supreme Court held that fiduciaries’ investments in company stock were not entitled to a “presumption of prudence,” and instead held that “[t]o state a claim for breach of the duty of prudence on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it.” In Amgen Inc. v. Harris, 136 S. Ct. 758 (2016), the Court clarified that the plaintiff bears a significant burden of proposing an alternative course of action so clearly beneficial that a prudent fiduciary could not conclude that it would be more likely to harm the fund than to help it.

In Whitley v. BP, P.L.C., 838 F.3d 523 (5th Cir. 2016), former investors of the BP Stock Fund, an employee stock ownership plan (ESOP) comprised primarily of the company’s stock, sued the company for breaching their fiduciary duties under ERISA. The Fifth Circuit reversed and remanded the district court’s judgment in granting the stockholders’ motion to amend the complaint because it found that the amended complaint failed to state a plausible claim under the new pleading standards. Similarly, in Rinehart v. Lehman Bros. Holdings Inc., 817 F.3d 56 (2d Cir. 2016), cert. denied, 137 S.Ct. ___ (2017) former participants in an employee stock ownership plan (ESOP) who invested exclusively in Lehman’s common stock filed suit against the company for breaching their fiduciary duties under ERISA by continuing to permit investment in Lehman stock in circumstances arguably foreshadowing its bankruptcy in 2008. The Second Circuit affirmed the district court’s judgment in granting the defendant fiduciaries’ motion to dismiss because plaintiffs failed to plead plausibly that defendants breached their ERISA duties. Under Amgen standards, the Court found here that a prudent fiduciary could have concluded divesting Lehman stock, or simply holding it without purchasing more, “would do more harm than good.”
16. In June 2017, the Supreme Court ruled unanimously that religiously affiliated hospitals can run their pension plans as church plans, which are exempt from ERISA requirements. The ruling reverses the decisions of three federal appeals courts, which had held that a church plan exempt from ERISA requirements must be established by a church. The Supreme Court disagreed, holding that a church plan may include pension plans that are established by an organization that is not a church but is affiliated with a church. The decision permits religious affiliated hospitals to avoid compliance with ERISA and its rules designed to protect the beneficiaries of pension plans. Advocate Health Care Network v. Stapleton, 2017 WL 2407476 (U.S. June 5, 2017).

17. Difficult issues arise with multi-employer plans, which are usually managed by relevant labor unions. See Treasury Department (decision by famous mediator Ken Feinberg) blocking Teamsters' Central States Pension Fund from cutting benefits to retirees to attempt to keep fund solvent. Decades ago, the plan had four active workers contributing for each retiree collecting. Now there are more retirees than active workers. It has about $17 billion in assets and $35 billion in liabilities. The highest compensated retirees get about $2,400 per month. See Wall St. J., May 7, 2016, page B1.

18. Early in 2016, the Obama Department of Labor issued new fiduciary standards for those who provide retirement investment advice. The regulations were meant to protect retirement savers from conflicts of interest faced by brokers and advisers who charge for investment recommendations. With their new fiduciary status, investment managers would have to recommend products that best suit their clients' interests as opposed to those that maximize their own profits. As of June 2017, the new rules were in judicial limbo with the Trump administration opposing them. Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20,946 (April 8, 2016). Nine groups, including the U.S. Chamber of Commerce, filed a lawsuit against the DOL claiming that the regulations are unlawful under both the Administrative Procedure Act and the First Amendment and will ultimately have negative consequences for retirement savers.

19. Beneficiaries of defined-contribution 401(k) retirement savings plan filed a class action suit against the plan fiduciaries, alleging that the employer breached its fiduciary duties by offering higher-priced retail-class mutual funds as plan investments when materially-identical lower-price institutional-class mutual funds were available. After the Supreme Court vacated the Ninth Circuit’s decision that ERISA’s six-year statute of limitation barred the plaintiffs’ claim, the en banc court on remand vacated the district court’s judgment in favor of the plan fiduciaries and held that the duty of prudence required defendants to reevaluate investments periodically and to take into account their power to obtain favorable investment products, particularly when those products were substantially identical—other than their lower cost—to products they had already selected. Tibble v. Edison Int’l, 843 F.3d 1187 (9th Cir. 2016).

Page 1163. Please add as new note.

3. The ex-wife of a military retiree filed a motion to enforce a divorce decree that granted her 50% of her ex-husband's military retirement pay (MRP). After he waived a portion of MRP in order to collect service-related disability benefits, the former wife’s share was reduced. The
MRP reduction reduced the MRP amount by about $250 per month, thus $125 each for husband and former wife. (The veteran made that decision because retirement benefits are taxable and disability benefits are not.) The Arizona Supreme Court ruled that the divorce award from family court should survive the reduction in the husband's MRP. The U.S. Supreme Court reversed, deciding unanimously that the federal statute allowing states to treat as community property and divide at divorce a veteran's MRP payments exempts from this grant of permission any amount that the federal government deducts as a result of a waiver that the veteran must make in order to receive disability benefits. Howell v. Howell, 136 S.Ct. 1704 (2017).

3. GOVERNMENT PENSIONS AS CONTRACT

Page 1178. Please insert on bottom of page.

In re Pension Reform Litigation
(Heaton v. Quinn)
32 N.E.3d 1 (Ill. 2015).

JUSTICE KARMEIER delivered the judgment of the court, with opinion.

At issue on this appeal is the constitutionality of Public Act 98-599 (eff. June 1, 2014), which amends the Illinois Pension Code by reducing retirement annuity benefits for individuals who first became members of four of Illinois’ five State-funded pension systems prior to January 1, 2011. Members of the retirement systems affected by Public Act 98-599 and groups representing those members brought five separate actions challenging the validity of the new law on the grounds that it violated numerous provisions of the Illinois Constitution of 1970, including article XIII, section 5 (Ill. Const. 1970, art. XIII, § 5), popularly known as the pension protection clause.

* * *

Illinois has established five State-funded retirement systems for public employees. * * * These systems provide traditional defined benefit plans under which members earn specific benefits based on their years of service, income and age. All are subject to the pension protection clause of our state constitution, which provides: “Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.” Ill. Const. 1970, art. XIII, § 5.

Among the benefits which members of the five State-funded retirement systems are entitled to receive are retirement annuities. The amount of a member’s retirement annuity and how soon a member is eligible to begin receiving annuity payments depends on when the member first began making contributions into one of the retirement systems. Members who first contributed prior to January 1, 2011, receive what are known as “Tier 1” annuity benefits. Members first contributing on or after January 1, 2011, receive a lower level of benefits designated as “Tier 2.” Public Act 98-599, the legislation challenged in this case, is directed
primarily at Tier 1 annuities and is limited in its application to benefits earned under the [four of the pension plans]. Annuities paid to judges under the JRS system were intentionally excluded from the law and are not affected by it.

Tier 1 retirement annuity benefits and eligibility requirements differ somewhat between the various systems. Because they all operate in approximately the same way, however, we will choose just one, SERS, to illustrate their basic features.

Members of [one plan] are eligible to retire at age 60 if they have at least eight years of credited service. They may retire with full benefits at any age if their age plus years of service credit equal 85. They are also eligible to retire if they are between the ages of 55 and 60 and have at least 25 years of credited service, but their benefit will be reduced by half of 1% for each month they are under the age of 60.

The amount of the retirement annuity benefit under SERS is calculated based on (1) the member’s final average compensation, which is the average monthly compensation they received during their highest-paid 48 consecutive months of service over the previous ten years, (2) their total credited service, and (3) a multiplier, which changes depending on (a) whether or not the member is also covered by Social Security or (b) qualifies for an “alternative retirement annuity” (applicable to, e.g., pilots and state policemen). For members who do have Social Security and are not subject to the alternative retirement annuity rules, the multiplier is 1.67% per year of credited service. Accordingly, a member of SERS who is eligible to retire, who has also paid into Social Security, and who has final average compensation of $1800 per month and 30 years of credited service will receive a retirement annuity of $901.80 per month (30 x .0167 x $1800).

SERS members may earn a retirement annuity of up to 75% of their final average compensation, although for members covered by Social Security, it would take nearly 45 years of State service to do so. These annuity payments are subject to 3% automatic annual increases beginning after the member’s first full year of retirement, except that some members who retire before 60 and do not meet the rule of 85 will not receive the increases until they turn 60 and have been retired at least one full year. The annual annuity adjustments are built-in to the pension benefit and are not tied to the cost of living. As a result, the real value of annuities may either increase or erode depending on economic conditions, notwithstanding the adjustments.

Funding to pay benefits under each of Illinois’ five State-funded systems is derived from three basic sources: contributions by the State through appropriation by the General Assembly; contributions by or on behalf of members based on their salaries; and income, interest and dividends derived from retirement fund deposits and investments. The contributions to the systems by or on behalf of members of the systems have not been problematic. There is no dispute that employees have paid their full share as required by law at all times relevant to this litigation. That has not been the case with respect to the contributions owed by the General Assembly.

For as long as there have been public pension systems in Illinois, there has been tension between the government’s responsibility for funding those systems, on the one hand, and the
costs of supporting governmental programs and providing governmental services, on the other. In the resulting political give and take, public pensions have chronically suffered. As long ago as 1917, a report commissioned by the General Assembly characterized the condition of State and municipal pension systems as “one of insolvency” and “moving toward a crisis” because of financial provisions which were “entirely inadequate for paying the stipulated pensions when due.”

* * *

Concern over ongoing funding deficiencies and the attendant threat to the security of retirees in public pension systems eventually led directly to adoption of article XIII, section 5, the pension protection clause, when the new constitution was adopted in 1970.

* * *

Despite the consistent warnings from the Pension Laws Commission, the current budgeting of pension costs necessary to ensure the financial stability of these funds, the General Assembly has failed to meet its commitments to finance the pension obligations on a sound basis.

* * *

The solution proposed by the drafters and ultimately approved by the people of Illinois was to protect the benefits of membership in public pension systems not by dictating specific funding levels, but by safeguarding the benefits themselves. Delegate Green explained that the pension protection clause does this in two ways: “[i]t first mandates a contractual relationship between the employer and the employee; and secondly, it mandates the General Assembly not to impair or diminish these rights.” Subsequent comments by other delegates reaffirmed that the provision was designed to confer contractual protection on the benefits of membership in public retirement systems and afford beneficiaries, pensioners or their dependents “‘a basic protection against abolishing their rights completely or changing the terms of their rights after they have embarked upon the employment—to lessen them.”

* * *

By the end of June, 2013, the five State-funded retirement systems contained a total of only 41.1% of the funding necessary to meet their accrued liabilities based on the market value of fund assets. The funding rate was thus nearly unchanged from the 41.8% funding rate prior to ratification of the 1970 Constitution and its pension protection clause.

* * *

Following downgrades in the State’s credit rating and facing the prospect that its credit rating would be reduced even further, the General Assembly engaged in heated and protracted debate over possible legislative strategies for dealing with the State’s fiscal problems through further changes to its pension obligations. After numerous failed attempts to reach
consensus, the General Assembly ultimately enacted what became Public Act 98-599, the legislation challenged in this case.

Introduced as Senate Bill 1 and passed during the legislature’s fall, 2013, “veto session,” Public Act 98-599 was described as an attempt to address the State’s large debts and deficits, plummeting credit ratings, and imperiled discretionary spending programs “that are essential to the people of Illinois” and to help shore up the long-term fiscal stability of both the State and its retirement systems. The mechanism chosen under the Act to accomplish those purposes was restructuring State-funded retirement systems. The law does not pertain to all five of the State-funded retirement systems, however. As noted earlier, JRS, the Judges Retirement System, was deliberately excluded.

* * *

The Act provides a limited number of Tier 1 plan participants with the opportunity, at a future date, to participate in a defined contribution plan. It affords a nominal reduction in the percentage of their salaries Tier 1 plan participants are required to contribute toward the employee share of annuity costs. Going forward, it bars persons hired by certain nongovernmental organizations from participating in the public pension system and prohibits new hires from using accumulated sick or vacation time to boost their pension benefits. Public Act 98-599 also eliminates the duty of employers to engage in collective bargaining or interest arbitration “over matters affected by the changes, the impact of changes, and the implementation of changes” made to the [pension] systems by the new law.

The centerpiece of Public Act 98-599, however, is a comprehensive set of provisions designed to reduce annuity benefits for members entitled to Tier 1 benefits, i.e., members who belonged to those systems prior to January 1, 2011. The new law utilizes five different mechanisms for achieving this goal. First, it delays, by up to five years, when members under the age of 46 are eligible to begin receiving their retirement annuities. Second, with certain exceptions and qualifications, it caps the maximum salary that may be considered when calculating the amount of a member’s retirement annuity. Third, it jettisons the current provisions under which retirees receive flat 3% annual increases to their annuities and replaces them with a system under which annual annuity increases are determined according to a variable formula and are limited. Fourth, it completely eliminates at least one and up to five annual annuity increases depending on the age of the pension system member at the time of the Act’s effective date. Finally, with respect to the TRS and SURS systems, the Act also alters how the base annuity amount is determined for purposes of what is known as the “money purchase” formula, something available to members of those two systems who began employment prior to July 1, 2005, as an alternative to the standard formula for calculating pensions. Because of this change, which involves use of a different interest rate, affected members will have smaller base pensions.

* * *

The first issue, whether Public Act 98-599’s reduction of retirement annuity benefits violates this State’s pension protection clause, is easily resolved. The pension protection
clause clearly states: “[m]embership in any pension or retirement system of the State *** shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.” This clause has been construed by our court on numerous occasions, most recently in Kanerva v. Weems, 2014 IL 115811. We held in that case that the clause means precisely what it says: “if something qualifies as a benefit of the enforceable contractual relationship resulting from membership in one of the State’s pension or retirement systems, it cannot be diminished or impaired.”

This construction of article XIII, section 5, was not a break from prior law. To the contrary, it was a reaffirmation of principles articulated by this court and the appellate court on numerous occasions since the 1970 Constitution took effect. Under article XIII, section 5, members of pension plans subject to its provisions have a legally enforceable right to receive the benefits they have been promised. The protections afforded to such benefits by article XIII, section 5 attach once an individual first embarks upon employment in a position covered by a public retirement system, not when the employee ultimately retires. Accordingly, once an individual begins work and becomes a member of a public retirement system, any subsequent changes to the Pension Code that would diminish the benefits conferred by membership in the retirement system cannot be applied to that individual.

* * *

That the annuity reduction provisions of Public Act 98-599 violate the pension protection clause’s prohibition against the diminishment of the benefits of membership in a State-funded retirement system is one the State has now all but conceded. After this court reaffirmed in Kanerva v. Weems that the pension protection clause means precisely what it says, the State shifted its focus to an argument it did not raise and we did not consider in Kanerva. The State’s position now rests on its affirmative defense that funding for the pension systems and State finances in general have become so dire that the General Assembly is authorized, even compelled, to invoke the State’s “reserved sovereign powers,” i.e., its police powers, to override the rights and protections afforded by article XIII, section 5, of the Illinois Constitution in the interests of the greater public good. This argument must also fail.

The circumstances presented by this case are not unique. Economic conditions are cyclical and expected, and fiscal difficulties have confronted the State before. In the midst of previous downturns, the State or political subdivisions of the State have attempted to reduce or eliminate expenditures protected by the Illinois Constitution, as the General Assembly is attempting to do with Public Act 98-599. Whenever those efforts have been challenged in court, we have clearly and consistently found them to be improper.

* * *

The State seeks to avoid this conclusion by arguing that because membership in public retirement systems is an enforceable contractual relationship under article XIII, section 5, it should be subject to the same limitations as all other contractual rights; that under “a century and a half of federal and state law defining contractual relationships,” these rights remain subject to modification—even invalidation—by the General Assembly through the exercise of the State’s
police power; and that the reduction in retirement annuity benefits under Public Act 98-599 is a valid exercise of police power because it is necessary and reasonable to secure the State’s fiscal health and the well being of its citizens.

This argument was rejected by the circuit court. We reject it as well. As a preliminary matter, the precedent on which the State relies does not involve the pension protection clause under article XIII, section 5. It arises, instead, under article I, section 16, and that provision’s counterpart in the United States Constitution. Those provisions, which are popularly referred to as the “contracts clause,” provide that the State shall not pass any “law impairing the obligation of contracts.”

* * *

This is not surprising. While impairment of a contract may survive scrutiny under the contracts clause if reasonable and necessary to serve an important public purpose, “’[t]he severity of the impairment measures the height of the hurdle the state legislation must clear.’” Changes in the factors used to compute public pension benefits constitute an impairment which is “obviously substantial.”

The United States Supreme Court has made clear that the United States Constitution “bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” Through Public Act 98-599, however, the General Assembly addressed the financial challenges facing our State by doing just that. It made no effort to distribute the burdens evenly among Illinoisans. It did not even attempt to distribute the burdens evenly among those with whom it has contractual relationships. Although it is undisputed that many vendors face delays in payment, the terms of their contracts are unchanged, and under the State Prompt Payment Act, vendors are actually entitled to additional compensation in the form of statutory interest if their bills are not paid within specified periods. In no sense is this comparable to the situation confronted by members of public retirement systems under Public Act 98-599, which, if allowed to take effect, would actually negate substantive terms of their contractual relationships and reduce the benefits due and payable to them in a real and absolute way. Under all of these circumstances, it is clear that the State could prove no set of circumstances that would satisfy the contracts clause. Its resort to the contracts clause to support its police powers argument must therefore be rejected as a matter of law.

* * *

Given the history of article XIII, section 5, and the language that was ultimately adopted, we therefore have no possible basis for interpreting the provision to mean that its protections can be overridden if the General Assembly deems it appropriate, as it sometimes can be under the contracts clause. To confer such authority on the legislature through judicial fiat would require that we ignore the plain language of the constitution and rewrite it to include “restrictions and limitations that the drafters did not express and the citizens of Illinois did not approve.” Indeed, accepting the State’s position that reducing retirement benefits is justified by economic circumstances would require that we allow the legislature to do the
very thing the pension protection clause was designed to prevent it from doing. Article XIII, section 5, would be rendered a nullity.

The State protests that this conclusion is tantamount to holding that the State has surrendered its sovereign authority, something it may not do. The State is incorrect. Article XIII, section 5, is in no sense a surrender of any attribute of sovereignty. Rather, it is a statement by the people of Illinois, made in the clearest possible terms, that the authority of the legislature does not include the power to diminish or impair the benefits of membership in a public retirement system. This is a restriction the people of Illinois had every right to impose.

* * *

The financial challenges facing state and local governments in Illinois are well known and significant. In ruling as we have today, we do not mean to minimize the gravity of the State’s problems or the magnitude of the difficulty facing our elected representatives. It is our obligation, however, just as it is theirs, to ensure that the law is followed. That is true at all times. It is especially important in times of crisis when, as this case demonstrates, even clear principles and long-standing precedent are threatened. Crisis is not an excuse to abandon the rule of law. It is a summons to defend it. How we respond is the measure of our commitment to the principles of justice we are sworn to uphold.

More than two centuries ago, as adoption of the Constitution of the United States was being considered by the citizens of our new nation, James Madison wrote:

“If men were angels, no government would be necessary. *** In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.” James Madison, Federalist No. 51 (1788).

Obliging the government to control itself is what we are called upon to do today. The Constitution of Illinois and the precedent of our court admit of only one conclusion: the annuity reduction provisions of Public Act 98-599 enacted by the legislature and signed into law by the Governor violate article XIII, section 5’s express prohibition against the diminishment of the benefits of membership in public retirement systems. The circuit court was therefore entirely correct when it declared those provisions void and unenforceable.

NOTES

1. This decision was followed in 2016 by a case reaching the same conclusion regarding Chicago’s obligation to keep its pension promises. Jones v. Municipal Employees’ Annuity & Benefit Fund, 50 N.E.3d 596 (2016). On the same day, the same supreme court refused to enforce an arbitration decision directing the state to pay a 2% wage increase to state employees covered by a multiyear collective bargaining agreement in State v. AFSCME, 51 N.E.3d 738 (Ill. 2016). It vacated the award and held that because the state’s constitution and statutes provide a well-defined and dominant public policy in which collective bargaining agreements are subject
to the appropriation power of the State (i.e., the State has the ability to appropriate and expend public funds), the arbitration award violated this public policy.

Further, the Illinois state court of appeals distinguished Jones in Pisani v. City of Springfield, 2017 IL App (4th) 160417, 73 N.E.3d 129 (2017), where it held that the city’s elimination of a pension-spiking opportunity did not violate the state constitution’s pension protection clause.


In Berg v. Christie, 137 A.3d 1143 (N.J. 2016), retired government employees filed suit against various New Jersey state defendants for suspending state pension cost-of-living adjustments (COLAs) in 2011, alleging that plaintiffs had contractual, statutory, and constitutional rights to pension COLAs. The Supreme Court of New Jersey held that although the state legislature enacted a non-forfeitable-right statute in 1997, the proof of unequivocal intent to create a non-forfeitable right to yet-unreceived COLAs is lacking, and the state legislature retained its inherent sovereign right to act in the best judgment of the public interest and to enact legislation suspending further COLAs.

3. Since 1996, retired employees of the City and County of San Francisco (“City”) have been eligible to receive a supplemental COLA as part of their pension benefits when the retirement fund’s earnings from the previous year exceeded projected earnings. Protect Our Benefits, a political action committee representing the interests of retired City employees, sought to invalidate a 2011 amendment to the city’s Charter to condition the payment of the supplemental COLA on the retirement fund being “fully funded” based on the market value of the assets for the previous year as an impairment of a vested contractual pension right under the contract clauses of the federal and state constitutions. The California Court of Appeals held that the 2011 amendment may be constitutionally applied to employees who retired before the 1996 initiative establishing the supplemental COLA, but not to current employees or those who retired after the 1996 initiative. It found that employees who retired before 1996 do not have the same vested rights based on the contract in effect during their employment because they did not have a contractual expectation while in service that they would receive a supplemental COLA. Protect Our Benefits v. City & Cnty. of San Francisco, 185 Cal. Rptr. 3d 410 (Cal. Ct. App. 2015).

Current county employees brought suit to halt a legislative amendment that would implement a revised formula for calculating retirement income to respond to the concerns of “pension spiking,” by which some public employees attempt to inflate their income and retirement benefits. The California Court of Appeals upheld the lower court’s finding that the
state legislature did not act impermissibly because although a public employee has a vested right to a pension, that right is only to a “reasonable” pension, not an immutable entitlement to the most optimal formula of calculating the pension. As long as the legislature’s modifications do not deprive the employee of a “reasonable” pension, there is no constitutional violation of the employee’s contractual rights. Marin Ass’n of Public Employees v. Marin Cnty. Employees’ Retirement Ass’n, 206 Cal. Rptr. 3d 365 (Cal. Ct. App. 2016).

D. RETIREE HEALTHCARE

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M&G Polymers USA v. Tackett

JUSTICE THOMAS delivered the opinion of the Court.

This case arises out of a disagreement between a group of retired employees and their former employer about the meaning of certain expired collective-bargaining agreements. The retirees (and their former union) claim that these agreements created a right to lifetime contribution-free health care benefits for retirees, their surviving spouses, and their dependents. The employer, for its part, claims that those provisions terminated when the agreements expired. The United States Court of Appeals for the Sixth Circuit sided with the retirees, relying on its conclusion *** that retiree health care benefits are unlikely to be left up to future negotiations. We granted certiorari and now conclude that such reasoning is incompatible with ordinary principles of contract law. We therefore vacate the judgment of the Court of Appeals and remand for it to apply ordinary principles of contract law in the first instance.

Respondents * * * worked at (and retired from) the Point Pleasant Polyester Plant in Apple Grove, West Virginia. During their employment, respondent United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC, or its predecessor unions, represented them in collective bargaining. Tackett and Pyles retired in 1996, and Conley retired in 1998. They represent a class of retired employees from the Plant, along with their surviving spouses and other dependents. Petitioner M&G Polymers USA, LLC, is the current owner of the Plant.

When M&G purchased the Plant in 2000, it entered a master collective-bargaining agreement and a Pension, Insurance, and Service Award Agreement (P & I agreement) with the Union, generally similar to agreements the Union had negotiated with M&G’s predecessor. The P & I agreement provided for retiree health care benefits as follows:

“Employees who retire on or after January 1, 1996 and who are eligible for and receiving a monthly pension under the 1993 Pension Plan . . . whose full years of attained age and full years of attained continuous service . . . at the time of retirement equals 95 or more points will receive a full Company contribution towards the cost of [health care] benefits described in this Exhibit B–1 . . . . Employees who have less than 95 points at the time of retirement will receive a
reduced Company contribution. The Company contribution will be reduced by 2% for every point less than 95. Employees will be required to pay the balance of the health care contribution, as estimated by the Company annually in advance, for the [health care] benefits described in this Exhibit B–1. Failure to pay the required medical contribution will result in cancellation of coverage.”

Exhibit B–1, which described the health care benefits at issue, opened with the following durational clause: “Effective January 1, 1998, and for the duration of this Agreement thereafter, the Employer will provide the following program of hospital benefits, hospital-medical benefits, surgical benefits and prescription drug benefits for eligible employees and their dependents. . . .” The P & I agreement provided for renegotiation of its terms in three years.

In December 2006, M&G announced that it would begin requiring retirees to contribute to the cost of their health care benefits. Respondent retirees, on behalf of themselves and others similarly situated, sued M&G and related entities, alleging that the decision to require these contributions breached both the collective-bargaining agreement and the P & I agreement, in violation of §301 of the Labor Management Relations Act, 1947 (LMRA) and [ERISA]. Specifically, the retirees alleged that M&G had promised to provide lifetime contribution-free health care benefits for them, their surviving spouses, and their dependents. They pointed to the language in the 2000 P & I agreement providing that employees with a certain level of seniority “will receive a full Company contribution towards the cost of [health care] benefits described in . . . Exhibit B–1.” The retirees alleged that, with this promise, M&G had created a vested right to such benefits that continued beyond the expiration of the 2000 P & I agreement.

* * *

This case is about the interpretation of collective-bargaining agreements that define rights to welfare benefits plans.

* * *

ERISA treats [pension plans and welfare benefit plans] differently. Although ERISA imposes elaborate minimum funding and vesting standards for pension plans, it explicitly exempts welfare benefits plans from those rules. Welfare benefits plans must be “established and maintained pursuant to a written instrument,” §1102(a)(1), but “[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans.” As we have previously recognized, “[E]mployers have large leeway to design disability and other welfare plans as they see fit.” And, we have observed, the rule that contractual “provisions ordinarily should be enforced as written is especially appropriate when enforcing an ERISA [welfare benefits] plan.” That is because the “focus on the written terms of the plan is the linchpin of a system that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [welfare benefits] plans in the first place.”

We interpret collective-bargaining agreements, including those establishing ERISA plans, according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy. “In this endeavor, as with any other contract, the parties’
intentions control.” “Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.”

In this case, the Court of Appeals applied the *Yard-Man* inferences to conclude that, in the absence of extrinsic evidence to the contrary, the provisions of the contract indicated an intent to vest retirees with lifetime benefits. As we now explain, those inferences conflict with ordinary principles of contract law.

The Court of Appeals has long insisted that its *Yard-Man* inferences are drawn from ordinary contract law. In *Yard-Man* itself, the court purported to apply “traditional rules for contractual interpretation.” The court first concluded that the provision governing retiree insurance benefits—which stated only that the employer “will provide” such benefits—was ambiguous as to the duration of those benefits. To resolve that ambiguity, it looked to other provisions of the agreement. The agreement included provisions for terminating active employees’ insurance benefits in the case of layoffs and for terminating benefits for a retiree’s spouse and dependents in case of the retiree’s death before the expiration of the collective-bargaining agreement, but no provision specifically addressed the duration of retiree health care benefits. From the existence of these termination provisions and the absence of a termination provision specifically addressing retiree benefits, the court inferred an intent to vest those retiree benefits for life.

* * *

We disagree with the Court of Appeals’ assessment that the inferences applied in *Yard-Man* and its progeny represent ordinary principles of contract law.

As an initial matter, *Yard-Man* violates ordinary contract principles by placing a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements. That rule has no basis in ordinary principles of contract law. And it distorts the attempt “to ascertain the intention of the parties.” *Yard-Man*’s assessment of likely behavior in collective bargaining is too speculative and too far removed from the context of any particular contract to be useful in discerning the parties’ intention.

* * *

The Court of Appeals also failed even to consider the traditional principle that courts should not construe ambiguous writings to create lifetime promises. The court recognized that “traditional rules of contractual interpretation require a clear manifestation of intent before conferring a benefit or obligation,” but asserted that “the duration of the benefit once clearly conferred is [not] subject to this stricture.” In stark contrast to this assertion, however, the court later applied that very stricture to noncollectively bargained contracts offering retiree benefits. The different treatment of these two types of employment contracts only underscores *Yard-Man*’s deviation from ordinary principles of contract law.

Similarly, the Court of Appeals failed to consider the traditional principle that “contractual obligations will cease, in the ordinary course, upon termination of the bargaining
agreement.” That principle does not preclude the conclusion that the parties intended to vest lifetime benefits for retirees. Indeed, we have already recognized that “a collective-bargaining agreement [may] provid[e] in explicit terms that certain benefits continue after the agreement’s expiration.” But when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life.

There is no doubt that *Yard-Man* and its progeny affected the outcome here. As in its previous decisions, the Court of Appeals here cited the “context of . . . labor-management negotiations” and reasoned that the Union likely would not have agreed to language ensuring its members a “full Company contribution” if the company could change the level of that contribution. It similarly concluded that the tying of eligibility for health care benefits to receipt of pension benefits suggested an intent to vest health care benefits. And it framed its analysis from beginning to end in light of the principles it announced in *Yard-Man* and its progeny.

We reject the *Yard-Man* inferences as inconsistent with ordinary principles of contract law. But because “[t]his Court is one of final review, not of first view,” the Court of Appeals should be the first to review the agreements at issue under the correct legal principles. We vacate the judgment of the Court of Appeals and remand the case for that court to apply ordinary principles of contract law in the first instance.

**JUSTICE GINSBURG,** with whom **JUSTICE BREYER,** **JUSTICE SOTOMAYOR,** and **JUSTICE KAGAN** join, concurring.

Today’s decision rightly holds that courts must apply ordinary contract principles, shorn of presumptions, to determine whether retiree health-care benefits survive the expiration of a collective-bargaining agreement. Under the “cardinal principle” of contract interpretation, “the intention of the parties, to be gathered from the whole instrument, must prevail.” To determine what the contracting parties intended, a court must examine the entire agreement in light of relevant industry-specific “customs, practices, usages, and terminology.” When the intent of the parties is unambiguously expressed in the contract, that expression controls, and the court’s inquiry should proceed no further. But when the contract is ambiguous, a court may consider extrinsic evidence to determine the intentions of the parties.

Contrary to M&G’s assertion, no rule requires “clear and express” language in order to show that parties intended health-care benefits to vest. “[C]onstraints upon the employer after the expiration date of a collective-bargaining agreement,” we have observed, may be derived from the agreement’s “explicit terms,” but they “may arise as well from . . . implied terms of the expired agreement.”

On remand, the Court of Appeals should examine the entire agreement to determine whether the parties intended retiree health-care benefits to vest. Because the retirees have a vested, lifetime right to a monthly pension, a provision stating that retirees “will receive” health-care benefits if they are “receiving a monthly pension” is relevant to this examination. So is a “survivor benefits” clause instructing that if a retiree dies, her surviving spouse will “continue to receive [the retiree’s health-care] benefits . . . until death or remarriage.” If, after considering all relevant contractual language in light of industry practices, the Court of Appeals concludes that
the contract is ambiguous, it may turn to extrinsic evidence—for example, the parties’ bargaining history. The Court of Appeals, however, must conduct the foregoing inspection without Yard-Man’s “thumb on the scale in favor of vested retiree benefits.”

Because I understand the Court’s opinion to be consistent with these basic rules of contract interpretation, I join it.

NOTES

1. M&G Polymers remains undecided after the latest Sixth Circuit decision, Tackett v. M&G Polymers, 811 F.3d 204 (6th Cir. 2016), remanding the matter to the district court to make more factual determinations using “ordinary principles of contract law.” For the Sixth Circuit's latest words on these issues (three cases decided on same day) see International Union, United Automobile Workers v. Kelsey-Hayes Co., 854 F.3d 862 (6th Cir. 2017) (2-1 that union contract meant to promise retiree medical benefits for life); Reese v. CNH Industrial N.V., 854 F.3d 877 (6th Cir. 2017) (also 2-1 and similar result); and Cole v. Meritor, Inc., 855 F.3d 695 (6th Cir. 2017) (contract did not create lifetime health benefits). Seven different CA6 judges filled the three-judge panels on these cases.

2. The Michigan Supreme Court found no constitutional violations in changes made to the retiree benefits plan for public school employees. The court also upheld changes to the pension plan. AFT Michigan v. State, 866 N.W.2d 782 (Mich. 2015).

3. In Gallo v. Moen Inc., 813 F.3d 265 (6th Cir. 2016), retirees and union filed suit against employer, seeking declaration that collective bargaining agreements (CBAs) entitled retirees to vested healthcare benefits for life. The Sixth Circuit reversed the district court’s ruling in order to rule consistently with M&G Polymers USA and held that under the “ordinary rules of contract law” without an inference in favor of vesting healthcare benefits for life, a series of CBAs cannot be interpreted as a lifetime guarantee of unalterable healthcare benefits to retirees and their dependents.