ESTREICHER, HARPER & TIPPETT, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW (5TH ed.) ("EDEL")

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Introduction for Instructors

Dear Colleagues,

Thank you for adopting our book. We hope you will continue to share your thoughts and feedback with us, especially as we prepare a new edition of the text. The best way to do so is to send an email to Liz Tippett (tippett@uoregon.edu), who is assembling feedback for our next edition.

This Supplement includes a number of additional cases, including the Supreme Court's recent Title VII decision on sexual orientation, *Bostock v. Clayton*. Other cases and statutes are included as additional resources should you wish to round out your coverage of the material, particularly for teaching more concentrated courses using a shorter version of the textbook. Some of these cases were decided after publication of the book, others are older but address topics the text does not examine in depth.

For those of you who will be teaching remotely due to the coronavirus pandemic, Liz Tippett has a YouTube channel containing interviews with many employment law/employment discrimination scholars discussing their research, including discussions of cases and topics covered in the text. See https://www.youtube.com/channel/UCNJNISicpDfNbhq_A9aib9g/. As always, the course website includes many exercises, worksheets, links, and powerpoint presentations. See https://blogs.uoregon.edu/tippett (email Liz for the password).

The Supplement includes:

1) Bostock v. Clayton – The Supreme Court declares that discrimination on the basis of sexual orientation qualifies as discrimination on the basis of sex under Title VII of the Civil Rights Act.

2) A note on Our Lady of Guadalupe School v. Morrissey-Berru, a recent Supreme Court decision on the "ministerial exception."

3) The Department of Labor's new rule on the standard for joint employment.

4) Richardson v. Chicago Transit – In this case, the Seventh Circuit explores the meaning of "impairment" in the context of obesity under the Americans with Disabilities Act.

5) Dynamex v. Superior Court – This California Supreme Court case applies the "ABC" test for determining employee vs. independent contractor status in a wage and hour case. This is an alternate, simplified test from those covered in the text. It places the burden on the employer to show the worker is an independent contractor. This test was adopted by the

California legislature in AB 5.

6) A New York law enacted in response to the #Metoo movement, which regulates secrecy in the settlement of discrimination claims, including harassment.

7)

8) Frey v. Coleman – A Title VII joint employment case from the Seventh Circuit with an interesting argument.

9) Jones v. City of Boston – A disparate impact case from the First Circuit that distinguishes between statistical significance and practical significance.

10) Maldonado v. City of Altus – A 2006 challenge to an English-only speaking rule.

11) Rizo v. Yovino – An Equal Pay Act case from the Ninth Circuit holding that employers cannot consider prior salary as a "factor other than sex" because it is not job related. The Supreme Court vacated the decision on the basis that Judge Reinhardt was deceased on the date the decision was issued. The Ninth Circuit then issued an *en banc* ruling that reached the same conclusion as the original *Rizo v. Yovino* decision.

12) A 2017 pay equity law from Oregon.

13) Weaving v. City of Hillsboro – A Ninth Circuit, post-ADAAA disability case that presents the difficult issue of a mental disability and "interacting with others."

14) Woods v. START Treatment & Recovery Centers, Inc. – This may be a useful FMLA case to help students grapple with the language in the statute.

15) Kleber v. CareFusion Corp. – A Seventh Circuit *en banc* decision precluding ADEA disparate impact cases for external job applicants.

Best wishes,
Samuel Estreicher, Michael Harper and Liz Tippett

Add at end of page 20 in Chapter 1 of EDEL, and end of page 17 in Chapter 1 of EL:

DYNAMEX OPERATIONS WEST, INC. v. SUPERIOR COURT
4 Cal.5th 903 (Cal. S. Ct. 2018)

CANTIL-SAKAUYE, C.J.

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Under both California and federal law, the question whether an individual worker should properly be classified as an employee or, instead, as an independent contractor has considerable significance for workers, businesses, and the public generally. On the one hand, if a worker should properly be classified as an employee, the hiring business bears the responsibility of paying federal Social Security and payroll taxes, unemployment insurance taxes and state employment taxes, providing worker's compensation insurance, and, most relevant for the present case, complying with numerous state and federal statutes and regulations governing the wages, hours, and working conditions of employees. The worker then obtains the protection of the applicable labor laws and regulations. On the other hand, if a worker should properly be classified as an independent contractor, the business does not bear any of those costs or responsibilities, the worker obtains none of the numerous labor law benefits, and the public may be required under

applicable laws to assume additional financial burdens with respect to such workers and their families.

Although in some circumstances classification as an independent contractor may be advantageous to workers as well as to businesses, the risk that workers who should be treated as employees may be improperly misclassified as independent contractors is significant in light of the potentially substantial economic incentives that a business may have in mischaracterizing some workers as independent contractors. Such incentives include the unfair competitive advantage the business may obtain over competitors that properly classify similar workers as employees and that thereby assume the fiscal and other responsibilities and burdens that an employer owes to its employees. In recent years, the relevant regulatory agencies of both the federal and state governments have declared that the misclassification of workers as independent contractors rather than employees is a very serious problem, depriving federal and state governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled.

The issue in this case relates to the resolution of the employee or independent contractor question in one specific context. Here we must decide what standard applies, under California law, in determining whether workers should be classified as employees or as independent contractors *for purposes of California wage orders*, which impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks) of California employees.

In the underlying lawsuit in this matter, two individual delivery drivers, suing on their own behalf and on behalf of a class of allegedly similarly situated drivers, filed a complaint against Dynamex Operations West, Inc. (Dynamex), a nationwide package and document delivery company, alleging that Dynamex had misclassified its delivery drivers as independent contractors rather than employees. The drivers claimed that Dynamex's alleged misclassification of its drivers as independent contractors led to Dynamex's violation of the provisions of Industrial Welfare Commission wage order No. 9, the applicable state wage order governing the transportation industry, as well as various sections of the Labor Code….

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For the reasons discussed below, we agree with the Court of Appeal that the trial court did not err in concluding that the "suffer or permit to work" definition of "employ" contained in the wage order may be relied upon in evaluating whether a worker is an employee or, instead, an independent contractor for purposes of the obligations imposed by the wage order. As explained, in light of its history and purpose, we conclude that the wage order's suffer or permit to work definition must be interpreted broadly to treat as "employees," and thereby provide the wage order's protection to, *all* workers who would ordinarily be viewed as *working in the hiring business.*

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Accordingly, we conclude that the judgment of the Court of Appeal should be affirmed.

I. FACTS AND PROCEEDINGS BELOW

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Dynamex is a nationwide same-day courier and delivery service that operates a number of business centers in California. Dynamex offers on-demand, same-day pickup and delivery services to the public generally and also has a number of large business customers—including Office Depot and Home Depot—for whom it delivers purchased goods and picks up returns on a regular basis. Prior to 2004, Dynamex classified its California drivers as employees and compensated them pursuant to this state's wage and hour laws. In 2004, Dynamex converted all of its drivers to independent contractors after management concluded that such a conversion would generate economic savings for the company. Under the current policy, all drivers are treated as independent contractors and are required to provide their own vehicles and pay for all of their transportation expenses, including fuel, tolls, vehicle maintenance, and vehicle liability insurance, as well as all taxes and workers' compensation insurance.

Dynamex obtains its own customers and sets the rates to be charged to those customers for its delivery services. It also negotiates the amount to be paid to drivers on an individual basis. For drivers who are assigned to a dedicated fleet or scheduled route by Dynamex, drivers are paid either a flat fee or an amount based on a percentage of the delivery fee Dynamex receives from the customer. For those who deliver on-demand, drivers are generally paid either

a percentage of the delivery fee paid by the customer on a per delivery basis or a flat fee basis per item delivered.

Drivers are generally free to set their own schedule but must notify Dynamex of the days they intend to work for Dynamex. Drivers performing on-demand work are required to obtain and pay for a Nextel cellular telephone through which the drivers maintain contact with Dynamex. On-demand drivers are assigned deliveries by Dynamex dispatchers at Dynamex's sole discretion; drivers have no guarantee of the number or type of deliveries they will be offered. Although drivers are not required to make all of the deliveries they are assigned, they must promptly notify Dynamex if they intend to reject an offered delivery so that Dynamex can quickly contact another driver; drivers are liable for any loss Dynamex incurs if they fail to do so. Drivers make pickups and deliveries using their own vehicles, but are generally expected to wear Dynamex shirts and badges when making deliveries for Dynamex, and, pursuant to Dynamex's agreement with some customers, drivers are sometimes required to attach Dynamex and/or the customer's decals to their vehicles when making deliveries for the customer. Drivers purchase Dynamex shirts and other Dynamex items with their own funds.

In the absence of any special arrangement between Dynamex and a customer, drivers are generally free to choose the sequence in which they will make deliveries and the routes they will take, but are required to complete all assigned deliveries on the day of assignment. If a customer requests, however, drivers must comply with a customer's requirements regarding delivery times and sequence of stops.

Drivers hired by Dynamex are permitted to hire other persons to make deliveries assigned by Dynamex. Further, when they are not making pickups or deliveries for Dynamex, drivers are permitted to make deliveries for another delivery company, including the driver's own personal delivery business. Drivers are prohibited, however, from diverting any delivery order received through or on behalf of Dynamex to a competitive delivery service.

Drivers are ordinarily hired for an indefinite period of time but Dynamex retains the authority to terminate its agreement with any driver without cause, on three days' notice. And, as noted, Dynamex reserves the right, throughout the contract period, to control the number and nature of deliveries that it offers to its on-demand drivers.

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In essence, the underlying action rests on the claim that, since December 2004, Dynamex drivers have performed essentially the same tasks in the same manner as when its drivers were classified as employees, but Dynamex has improperly failed to comply with the requirements imposed by the Labor Code and wage orders for employees with respect to such drivers.

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II. RELEVANT WAGE ORDER PROVISIONS

We begin with a brief review of the relevant provisions of the wage order that applies to the transportation industry.

In describing its scope, the transportation wage order initially provides in subdivision 1: "This order shall apply to all persons employed in the transportation industry, whether paid on a time, piece rate, commission, or other basis," except for persons employed in administrative, executive, or professional capacities, who are exempt from most of the wage order's provisions. (Cal. Code Regs., tit. 8, § 11090, subd. 1.)[8]

Subdivision 2 of the order, which sets forth the definitions of terms as used in the order, contains the following relevant definitions:

"(D) 'Employ' means to engage, suffer, or permit to work.

"(E) 'Employee' means any person employed by an employer.

"(F) 'Employer' means any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through

an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person." (Cal. Code Regs., tit. 8, § 11090, subd. 2(D)-(F).)

Thereafter, the additional substantive provisions of the wage order that establish protections for workers or impose obligations on hiring entities relating to minimum wages, maximum hours, and specified basic working conditions (such as meal and rest breaks) are, by their terms, made applicable to "employees" or "employers."

Subdivision 2 of the wage order does not contain a definition of the term "independent contractor," and the wage order contains no other provision that otherwise specifically addresses the potential distinction between workers who are employees covered by the terms of the wage order and workers who are independent contractors who are not entitled to the protections afforded by the wage order.

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IV. …. DID THE TRIAL COURT PROPERLY DETERMINE CLASS CERTIFICATION BASED ON THE DEFINITIONS OF "EMPLOY" AND "EMPLOYER" IN THE WAGE ORDER?

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As we explain, for a variety of reasons we [conclude] that the suffer or permit to work standard is relevant and significant in assessing the scope of the category of workers that the wage order was intended to protect. The standard is useful in determining who should properly be treated as covered employees, rather than excluded independent contractors, for purposes of the obligations imposed by the wage order.

At the outset, it is important to recognize that over the years and throughout the country, a number of standards or tests have been adopted in legislative enactments, administrative regulations, and court decisions as the means for distinguishing between those workers who should be considered employees and those who should be considered independent contractors. The suffer or permit to work standard was proposed and adopted in 1937 as part of the FLSA, the principal federal wage and hour legislation. One of the authors of the legislation, then-Senator (later United States Supreme Court Justice) Hugo L. Black, described this standard as "the broadest definition" that has been devised for extending the coverage of a statute or regulation to the widest class of workers that reasonably fall within the reach of a social welfare statute. (See *United States v. Rosenwasser* (1945) 323 U.S. 360, 363, fn. 3, 65 S.Ct. 295, 89 L.Ed. 301 (*Rosenwasser*).) More recent cases, in referring to the suffer or permit to work standard, continue to describe the standard in just such broad, inclusive terms. (See, e.g., *Darden*, *supra*, 503 U.S. at p. 326, 112 S.Ct. 1344 [noting the "striking breadth" of the suffer or permit to work standard]; *Zheng v. Liberty Apparel Co.*, *supra*, 355 F.3d at p. 69; *Lauritzen*, *supra*, 835 F.2d at p. 1543 (conc. opn. of Easterbrook, J.); *Donovan v. Dialamerica Marketing, Inc.* (3d Cir. 1985) 757 F.2d 1376, 1382.)[20]

[20] The various standards are frequently described as falling within three broad categories. (See, e.g., Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities* (2017) 105 Cal.L.Rev. 65, 72.)

The first category is commonly characterized as embodying the common law standard, because the standards within this category give significant weight to evidence of the hirer's right to control the details of the work, which had its origin in the common law tort and respondeat superior context. These standards supplement the control of details factor with a variety of additional circumstances, often described as secondary factors. The United States Supreme Court's decision in *Darden*, *supra*, 503 U.S. 318, 112 S.Ct. 1344, in holding that this standard applies in interpreting the meaning of the term "employee" in federal statutes that do not otherwise provide a meaningful definition of that term, lists 12 secondary factors to be considered in addition to the right to control factor. (503 U.S. at p. 323, 112 S.Ct. 1344 [quoting *Community for Creative Non-Violence v. Reid* (1989) 490 U.S. 730, 751-752, 109 S.Ct. 2166, 104 L.Ed.2d 811].) The IRS has adopted a variation of this standard which lists 20 secondary factors (IRS, Revenue Ruling 87-41, 1987-1 C. B. 296, 298-299); the state of Kansas also has adopted a variation which lists 20 secondary factors, some but not all of which are similar to those applied in other jurisdictions. (See, e.g., *Craig v. FedEx Ground Package Sys.* (2014) 300 Kan. 788, 335 P.3d 66, 75-76.) Although this court's decision in *Borello* has sometimes been described as adopting the common law standard, as discussed above (*ante*, pp. 232 Cal.Rptr.3d at pp. 18-24, 416 P.3d at pp. 16-21), in *Borello* we explained that under California law the control factor is not as concerned with the hiring entity's control over the details of a worker's work as it is with determining whether the hiring entity has retained "*necessary* control" over the work, and *Borello* further made clear that consideration of all of the relevant factors is directed at determining whether treatment of the worker as an employee or an independent contractor would best effectuate the purpose of the statute at issue. (*Borello*, *supra*, 48 Cal.3d at pp. 356-359, 256 Cal.Rptr. 543, 769 P.2d 399.)

The adoption of the exceptionally broad suffer or permit to work standard in California wage orders finds its justification in the fundamental purposes and necessity of the minimum wage and maximum hour legislation in which the standard has traditionally been embodied. Wage and hour statutes and wage orders were adopted in recognition of the fact that individual workers generally possess less bargaining power than a hiring business and that workers' fundamental need to earn income for their families' survival may lead them to accept work for substandard wages or working conditions. The basic objective of wage and hour legislation and wage orders is to ensure that such workers are provided at least the minimal wages and working conditions that are necessary to enable them to obtain a subsistence standard of living and to protect the workers' health and welfare. These critically important objectives support a very broad definition of the workers who fall within the reach of the wage orders.

These fundamental obligations of the IWC's wage orders are, of course, primarily for the benefit of the workers themselves, intended to enable them to provide at least minimally for themselves and their families and to accord them a modicum of dignity and self-respect. At the same time, California's *industry-wide* wage orders are also clearly intended for the benefit of those law-abiding businesses that comply with the obligations imposed by the wage orders, ensuring that such responsible companies are not hurt by unfair competition from competitor businesses that utilize substandard employment practices. (See § 90.5, subd. (a)).

* * *

The federal courts, in applying the suffer or permit to work standard set forth in the FLSA, have recognized that the standard was intended to be broader and more inclusive than the preexisting common law test for distinguishing employees from independent contractors, but at the same time, does not purport to render every individual worker an employee rather than an independent contractor the federal courts have developed what is generally described as the "economic reality" test for determining whether a worker should be considered an employee or independent contractor for purposes of the FLSA—namely, whether, as a matter of economic reality, the worker is economically dependent upon and makes a living in another's business (in which case he or she is considered to be a covered employee) or, instead is in business for himself or herself (and may properly be considered an excluded independent contractor). In applying the economic reality test, federal courts have looked to a list of factors that is briefer than, but somewhat

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The second category is the "economic reality" (or "economic realities") standard that has been adopted in federal decisions as the standard applicable in cases arising under the FLSA. (See, e.g., *Goldberg v. Whitaker House Co-op, Inc.* (1961) 366 U.S. 28, 33, 81 S.Ct. 933, 6 L.Ed.2d 100 (*Whitaker House Co-op*); *Tony & Susan Alamo Foundation v. Sec'y of Labor* (1985) 471 U.S. 290, 301, 105 S.Ct. 1953, 85 L.Ed.2d 278 (*Alamo Foundation*).) These cases interpret the "suffer or permit to work" definition of "employ" in the FLSA (29 U.S.C. § 203(g)) as intended to treat as employees those workers who, as a matter of economic reality, are economically dependent upon the hiring business, rather than realistically being in business for themselves. In making this determination, lower federal court decisions generally refer to a list of factors, many that are considered under the common law standards, including "(1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business." (*Zheng v. Liberty Apparel Co.* (2d Cir. 2003) 355 F.3d 61, 67; *Superior Care, supra*, 840 F.2d at pp. 1058-1059; see generally Annot., Determination of "Independent Contractor" and "Employee" Status For Purposes of § 3(e)(1) of the Fair Labor Standards Act (29 U.S.C.A. § 203(e)(1)) (1981) 51 A.L.R.Fed. 702.)

The third category of standards is described as embodying the "ABC standard." This standard, whose objective is to create a simpler, clearer test for determining whether the worker is an employee or an independent contractor, presumes a worker hired by an entity is an employee and places the burden on the hirer to establish that the worker is an independent contractor. Under the ABC standard, the worker is an employee unless the hiring entity establishes *each* of three designated factors: (a) that the worker is free from control and direction over performance of the work, both under the contract and in fact; (b) that the work provided is outside the usual course of the business for which the work is performed; *and* (c) that the worker is customarily engaged in an independently established trade, occupation or business (hence the ABC standard). If the hirer fails to show that the worker satisfies each of the three criteria, the worker is treated as an employee, not an independent contractor. (See generally Deknatel & Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes* (2015) 18 U.Pa. J.L. & Soc. Change 53 (*ABC on the Books*).)

In addition to these three categories, the recent Restatement of Employment Law, adopted by the American Law Institute in 2015, sets forth a standard which focuses, in addition to the control of details factor, on the entrepreneurial opportunity that the worker is afforded. (See Rest., Employment, § 1.01, subds. (a), (b); see also *FedEx Home Delivery v. NLRB* (D.C. Cir. 2009) 563 F.3d 492, 497.)

comparable to, the list of factors considered in the pre-*Borello* California decisions and in *Borello* itself. (See, e.g., *Superior Care*, *supra*, 840 F.2d at p. 1059; *Lauritzen*, *supra*, 835 F.2d at pp. 1534-1535.) Furthermore, like *Borello*, federal FLSA decisions applying the economic reality standard have held that no one factor is determinative and that the ultimate decision whether a worker is to be found to be an employee or independent contractor for purposes of the FLSA should be based on all the circumstances.

A multifactor standard—like the economic reality standard or the *Borello* standard—that calls for consideration of all potentially relevant factual distinctions in different employment arrangements on a case-by-case, totality-of-the-circumstances basis has its advantages. A number of state courts, administrative agencies and academic commentators have observed, however, that such a wide-ranging and flexible test for evaluating whether a worker should be considered an employee or an independent contractor has significant disadvantages, particularly when applied in the wage and hour context.

First, these jurisdictions and commentators have pointed out that a multifactor, "all the circumstances" standard makes it difficult for both hiring businesses and workers to determine in advance how a particular category of workers will be classified, frequently leaving the ultimate employee or independent contractor determination to a subsequent and often considerably delayed judicial decision. In practice, the lack of an easily and consistently applied standard often leaves both businesses and workers in the dark with respect to basic questions relating to wages and working conditions that arise regularly, on a day-to-day basis.

Second, commentators have also pointed out that the use of a multifactor, all the circumstances standard affords a hiring business greater opportunity to evade its fundamental responsibilities under a wage and hour law by dividing its work force into disparate categories and varying the working conditions of individual workers within such categories with an eye to the many circumstances that may be relevant under the multifactor standard.

As already noted a number of jurisdictions have adopted a simpler, more structured test for distinguishing between employees and independent contractors—the so-called "ABC" test—that minimizes these disadvantages. The ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies *each* of three conditions: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (b) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.[23]

Unlike a number of our sister states that included the suffer-or-permit-to-work standard in their wage and hour laws or regulations *after* the FLSA had been enacted and had been interpreted to incorporate the economic reality test, California's adoption of the suffer or permit to work standard predated the enactment of the FLSA. (See *Martinez*, *supra*, 49 Cal.4th at pp. 57-59, 109 Cal.Rptr.3d 514.) Thus, as a matter of legislative intent, the IWC's adoption of the suffer or permit to work standard in California wage orders was not intended to embrace the federal economic reality test. Furthermore, prior California cases have declined to interpret California wage orders as governed by the federal economic reality standard and instead have indicated that the California wage orders are intended to provide broader protection than that accorded workers under the federal standard

We find merit in the concerns noted above regarding the disadvantages, particularly in the wage and hour context, inherent in relying upon a multifactor, all the circumstances standard for distinguishing between employees and independent contractors. As a consequence, we conclude it is appropriate, and most consistent with the history and

[23] The wording of the ABC test varies in some respects from jurisdiction to jurisdiction. (See *ABC on the Books*, *supra*, 18 U.Pa. J.L. & Soc. Change, at pp. 67-71.) The version we have set forth in text (and which we adopt hereafter (*post*, pp. 66-77)) tracks the Massachusetts version of the ABC test. (See Mass.G.L., ch. 149, § 148B; see also Del.Code Ann., tit. 19, §§ 3501(a)(7), 3503(c).) Unlike some other versions, which provide that a hiring entity may satisfy part B by establishing *either* (1) that the work provided is outside the usual course of the business for which the work is performed, *or* (2) that the work performed is outside all the places of business of the hiring entity (see, e.g., N.J. Stat. Ann. § 43:21-19(i)(6)(A-C)), the Massachusetts version permits the hiring entity to satisfy part B only if it establishes that the work is outside the usual course of the business of the hiring entity. In light of contemporary work practices, in which many employees telecommute or work from their homes, we conclude the Massachusetts version of part B provides the alternative that is more consistent with the intended broad reach of the suffer or permit to work definition in California wage orders.

purpose of the suffer or permit to work standard in California's wage orders, to interpret that standard as: (1) placing the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order's coverage; and (2) requiring the hiring entity, in order to meet this burden, to establish *each* of the three factors embodied in the ABC test. …

We briefly discuss each part of the ABC test and its relationship to the suffer or permit to work definition.

1. Part A: Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact?
. . . [B]ecause a worker who is subject, either as a matter of contractual right or in actual practice, to the type and degree of control a business typically exercises over employees would be considered an employee under the common law test, such a worker would, a fortiori, also properly be treated as an employee for purposes of the suffer or permit to work standard. Further, as under *Borello, supra*, 48 Cal.3d at pages 353-354, 356-357, 256 Cal.Rptr. 543, 769 P.2d 399, depending on the nature of the work and overall arrangement between the parties, a business need not control the precise manner or details of the work in order to be found to have maintained the necessary control that an employer ordinarily possesses over its employees, but does not possess over a genuine independent contractor. The hiring entity must establish that the worker is free of such control to satisfy part A of the test.

2. Part B: Does the worker perform work that is outside the usual course of the hiring entity's business?
Second, independent of the question of control, the child labor antecedents of the suffer or permit to work language demonstrate that one principal objective of the suffer or permit to work standard is to bring within the "employee" category *all* individuals who can reasonably be viewed as working "*in the [hiring entity's] business*", that is, all individuals who are reasonably viewed as providing services to the business in a role comparable to that of an employee, rather than in a role comparable to that of a traditional independent contractor. Workers whose roles are most clearly comparable to those of employees include individuals whose services are provided within the usual course of the business of the entity for which the work is performed and thus who would ordinarily be viewed by others as working in the hiring entity's business and not as working, instead, in the worker's own independent business.

Thus, on the one hand, when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee. On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company, or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes, the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees. In the latter settings, the workers' role within the hiring entity's usual business operations is more like that of an employee than that of an independent contractor.

Treating all workers whose services are provided within the usual course of the hiring entity's business as employees is important to ensure that those workers who need and want the fundamental protections afforded by the wage order do not lose those protections. If the wage order's obligations could be avoided for workers who provide services in a role comparable to employees but who are willing to forgo the wage order's protections, other workers who provide similar services and are intended to be protected under the suffer or permit to work standard would frequently find themselves displaced by those willing to decline such coverage. As the United States Supreme Court explained in a somewhat analogous context in *Alamo Foundation, supra*, 471 U.S. at page 302, 105 S.Ct. 1953, with respect to the federal wage and hour law: "[T]he purposes of the [FLSA] require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act. [Citations.] Such exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses." (*Ibid.*)

As the quoted passage from the *Alamo Foundation* case suggests, a focus on the nature of the workers' role within a hiring entity's usual business operation also aligns with the additional purpose of wage orders to protect companies that in good faith comply with a wage order's obligations against those competitors in the same industry or line of

business that resort to cost saving worker classifications that fail to provide the required minimum protections to similarly situated workers. A wage order's *industry-wide* minimum requirements are intended to create a level playing field among competing businesses in the same industry in order to prevent the type of "race to the bottom" that occurs when businesses implement new structures or policies that result in substandard wages and unhealthy conditions for workers.

Accordingly, a hiring entity must establish that the worker performs work that is outside the usual course of its business in order to satisfy part B of the ABC test.

3. Part C: Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity?

Third, as the situations that gave rise to the suffer or permit to work language disclose, the suffer or permit to work standard, by expansively defining who is an employer, is intended to preclude a business from evading the prohibitions or responsibilities embodied in the relevant wage orders directly or indirectly—through indifference, negligence, intentional subterfuge, or misclassification. It is well established, under all of the varied standards that have been utilized for distinguishing employees and independent contractors, that a business cannot unilaterally determine a worker's status simply by assigning the worker the label "independent contractor" or by requiring the worker, as a condition of hiring, to enter into a contract that designates the worker an independent contractor. This restriction on a hiring business's unilateral authority has particular force and effect under the wage orders' broad suffer or permit to work standard.

As a matter of common usage, the term "independent contractor," when applied to an individual worker, ordinarily has been understood to refer to an individual who *independently* has made the decision to go into business for himself or herself. Such an individual generally takes the usual steps to establish and promote his or her independent business—for example, through incorporation, licensure, advertisements, routine offerings to provide the services of the independent business to the public or to a number of potential customers, and the like. When a worker has not independently decided to engage in an independently established business but instead is simply designated an independent contractor by the unilateral action of a hiring entity, there is a substantial risk that the hiring business is attempting to evade the demands of an applicable wage order through misclassification. A company that labels as independent contractors a class of workers who are not engaged in an independently established business in order to enable the company to obtain the economic advantages that flow from avoiding the financial obligations that a wage order imposes on employers unquestionably violates the fundamental purposes of the wage order. The fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself.

Accordingly, in order to satisfy part C of the ABC test, the hiring entity must prove that the worker is customarily engaged in an independently established trade, occupation, or business.

It bears emphasis that in order to establish that a worker is an independent contractor under the ABC standard, the hiring entity is required to establish the existence of each of the three parts of the ABC standard. Furthermore, inasmuch as a hiring entity's failure to satisfy any one of the three parts itself establishes that the worker should be treated as an employee for purposes of the wage order, a court is free to consider the separate parts of the ABC standard in whatever order it chooses. Because in many cases it may be easier and clearer for a court to determine whether or not part B or part C of the ABC standard has been satisfied than for the court to resolve questions regarding the nature or degree of a worker's freedom from the hiring entity's control for purposes of part A of the standard, the significant advantages of the ABC standard—in terms of increased clarity and consistency—will often be best served by first considering one or both of the latter two parts of the standard in resolving the employee or independent contractor question.

4. Conclusion regarding suffer or permit to work definition * * *

In our view, this interpretation of the suffer or permit to work standard is faithful to its history and to the fundamental purpose of the wage orders and will provide greater clarity and consistency, and less opportunity for manipulation, than a test or standard that invariably requires the consideration and weighing of a significant number of disparate factors on a case-by-case basis. * * *

We now turn to application of the suffer or permit to work standard in this case. * * *

First, with respect to part B of the ABC test, it is quite clear that there is a sufficient commonality of interest with regard to the question whether the work provided by the delivery drivers within the certified class is outside the usual course of the hiring entity's business to permit plaintiffs' claim of misclassification to be resolved on a class basis. In the present case, Dynamex's entire business is that of a delivery service. Unlike other types of businesses in which the delivery of a product may or may not be viewed as within the usual course of the hiring company's business, here the hiring entity is a delivery company and the question whether the work performed by the delivery drivers within the certified class is outside the usual course of its business is clearly amenable to determination on a class basis. As a general matter, Dynamex obtains the customers for its deliveries, sets the rate that the customers will be charged, notifies the drivers where to pick up and deliver the packages, tracks the packages, and requires the drivers to utilize its tracking and recordkeeping system. As such, there is a sufficient commonality of interest regarding whether the work performed by the certified class of drivers who pick up and deliver packages and documents from and to Dynamex customers on an ongoing basis is outside the usual course of Dynamex's business to permit that question to be resolved on a class basis.

Because each part of the ABC test may be independently determinative of the employee or independent contractor question, our conclusion that there is a sufficient commonality of interest under part B of the ABC test is sufficient in itself to support the trial court's class certification order. Nonetheless, for guidance we go on to discuss whether there is a sufficient commonality of interest under part C of the ABC test to support class treatment of the relevant question under that part of the ABC test as well.

Second, with regard to part C of the ABC test, it is equally clear from the record that there is a sufficient commonality of interest as to whether the drivers in the certified class are customarily engaged in an independently established trade, occupation, or business to permit resolution of that issue on a class basis As discussed above, prior to 2004 Dynamex classified the drivers who picked up and delivered the packages and documents from Dynamex customers as employees rather than independent contractors. In 2004, Dynamex adopted a new business structure under which it required all of its drivers to enter into a contractual agreement that specified the driver's status as an independent contractor. Here the class of drivers certified by the trial court is limited to drivers who, during the relevant time periods, performed delivery services only for Dynamex. The class excludes drivers who performed delivery services for another delivery service or for the driver's own personal customers; the class also excludes drivers who had employees of their own. With respect to the class of included drivers, there is no indication in the record that there is a lack of commonality of interest regarding the question whether these drivers are customarily engaged in an independently established trade, occupation, or business. For this class of drivers, the pertinent question under part C of the ABC test is amenable to resolution on a class basis.[35]

For the foregoing reasons, we conclude that under a proper understanding of the suffer or permit to work standard there is, as a matter of law, a sufficient commonality of interest within the certified class to permit the question whether such drivers are employees or independent contractors for purposes of the wage order to be litigated on a class basis. Accordingly, we conclude that with respect to the causes of action that are based on alleged violations of the obligations imposed by the wage order, the trial court did not abuse its discretion in certifying the class and in denying Dynamex's motion to decertify the class.

[35] Because the certified class excludes drivers who hired other drivers, or who performed delivery services for other delivery companies or for their own independent delivery business, we have no occasion to address the question whether there is a sufficient commonality of interest regarding whether these other drivers are customarily engaged in an independently established trade, occupation, or business within the meaning of part C of the ABC test.

Add at end of page 32 in Chapter 1 of EDEL, and end of page 30 in Chapter 1 of EL:

2020 DOL FINAL RULE ON JOINT EMPLOYMENT

Determining Joint Employer Status under the FLSA.

There are two joint employer scenarios under the FLSA.

(a)(1) In the first joint employer scenario, the employee has an employer who suffers, permits, or otherwise employs the employee to work, *see* 29 U.S.C. 203(e)(1), (g), but another person simultaneously benefits from that work. The other person is the employee's joint employer only if that person is acting directly or indirectly in the interest of the employer in relation to the employee. *See* 29 U.S.C. 203(d). In this situation, the following four factors are relevant to the determination. Those four factors are whether the other person:

(i) Hires or fires the employee;

(ii) Supervises and controls the employee's work schedule or conditions of employment to a substantial degree;

(iii) Determines the employee's rate and method of payment; and

(iv) Maintains the employee's employment records.

(2) As used in this section, “employment records” means records, such as payroll records, that reflect, relate to, or otherwise record information pertaining to the hiring or firing, supervision and control of the work schedules or conditions of employment, or determining the rate and method of payment of the employee. Except to the extent they reflect, relate to, or otherwise record that information, records maintained by the potential joint employer related to the employer's compliance with the contractual agreements identified in paragraphs (d)(3) and (4) of this section do not make joint employer status more or less likely under the Act and are not considered employment records under this section. Satisfaction of the maintenance of employment records factor alone will not lead to a finding of joint employer status.

(3)(i) The potential joint employer must actually exercise—directly or indirectly—one or more of these indicia of control to be jointly liable under the Act. *See* 29 U.S.C. 203(d). The potential joint employer's ability, power, or reserved right to act in relation to the employee may be relevant for determining joint employer status, but such ability, power, or right alone does not demonstrate joint employer status without some actual exercise of control. Standard contractual language reserving a right to act, for example, is alone insufficient for demonstrating joint employer status. No single factor is dispositive in determining joint employer status under the Act. Whether a person is a joint employer under the Act will depend on how all the facts in a particular case relate to these factors, and the appropriate weight to give each factor will vary depending on the circumstances of how that factor does or does not suggest control in the particular case.

(ii) Indirect control is exercised by the potential joint employer through mandatory directions to another employer that directly controls the employee. But the direct employer's voluntary decision to grant the potential joint employer's request, recommendation, or suggestion does not constitute indirect control that can demonstrate joint employer status. Acts that incidentally impact the employee also do not indicate joint employer status.

(b) Additional factors may be relevant for determining joint employer status in this scenario, but only if they are indicia of whether the potential joint employer exercises significant control over the terms and conditions of the employee's work.

(c) Whether the employee is economically dependent on the potential joint employer is not relevant for determining the potential joint employer's liability under the Act. Accordingly, to determine joint employer status, no factors should be used to assess economic dependence. Examples of factors that are not relevant because they assess economic dependence include, but are not limited to:

(1) Whether the employee is in a specialty job or a job that otherwise requires special skill, initiative, judgment, or foresight;

(2) Whether the employee has the opportunity for profit or loss based on his or her managerial skill;

(3) Whether the employee invests in equipment or materials required for work or the employment of helpers; and

(4) The number of contractual relationships, other than with the employer, that the potential joint employer has entered into to receive similar services.

(d)(1) A joint employer may be an individual, partnership, association, corporation, business trust, legal representative, public agency, or any organized group of persons, excluding any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such a labor organization. *See* 29 U.S.C. 203(a), (d).

(2) Operating as a franchisor or entering into a brand and supply agreement, or using a similar business model does not make joint employer status more likely under the Act.

(3) The potential joint employer's contractual agreements with the employer requiring the employer to comply with specific legal obligations or to meet certain standards to protect the health or safety of its employees or the public do not make joint employer status more or less likely under the Act. Similarly, the monitoring and enforcement of such contractual agreements against the employer does not make joint employer status more or less likely under the Act. Such contractual agreements include, but are not limited to, mandating that employers comply with their obligations under the FLSA or other similar laws; or institute sexual harassment policies; requiring background checks; or requiring employers to establish workplace safety practices and protocols or to provide workers training regarding matters such as health, safety, or legal compliance. Requiring the inclusion of such standards, policies, or procedures in an employee handbook does not make joint employer status more or less likely under the Act.

(4) The potential joint employer's contractual agreements with the employer requiring quality control standards to ensure the consistent quality of the work product, brand, or business reputation do not make joint employer status more or less likely under the Act. Similarly, the monitoring and enforcement of such agreements against the employer does not make joint employer status more or less likely under the Act. Such contractual agreements include, but are not limited to, specifying the size or scope of the work project, requiring the employer to meet quantity and quality standards and deadlines, requiring morality clauses, or requiring the use of standardized products, services, or advertising to maintain brand standards.

(5) The potential joint employer's practice of providing the employer a sample employee handbook, or other forms, to the employer; allowing the employer to operate a business on its premises (including “store within a store” arrangements); offering an association health plan or association retirement plan to the employer or participating in such a plan with the employer; jointly participating in an apprenticeship program with the employer; or any other similar business practice, does not make joint employer status more or less likely under the Act.

(e)(1) In the second joint employer scenario, one employer employs a worker for one set of hours in a workweek, and another employer employs the same worker for a separate set of hours in the same workweek. The jobs and the hours worked for each employer are separate, but if the employers are joint employers, both employers are jointly and severally liable for all of the hours the employee worked for them in the workweek.

(2) In this second scenario, if the employers are acting independently of each other and are disassociated with respect to the employment of the employee, each employer may disregard all work performed by the employee for the other employer in determining its own responsibilities under the Act. However, if the employers are sufficiently associated with respect to the employment of the employee, they are joint employers and must aggregate the hours worked for each for purposes of determining compliance with the Act. The employers will generally be sufficiently associated if:

(i) There is an arrangement between them to share the employee's services;

(ii) One employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or

(iii) They share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer. Such a determination depends on all of the facts and circumstances. Certain business relationships, for example, which have little to do with the employment of specific workers—such as sharing a vendor or being franchisees of the same franchisor—are alone insufficient to establish that two employers are sufficiently associated to be joint employers.

(f) For each workweek that a person is a joint employer of an employee, that joint employer is jointly and severally liable with the employer and any other joint employers for compliance with all of the applicable provisions of the Act, including the overtime provisions, for all of the hours worked by the employee in that workweek. In discharging this joint obligation in a particular workweek, the employer and joint employers may take credit toward minimum wage and overtime requirements for all payments made to the employee by the employer and any joint employers.

(g) The following illustrative examples demonstrate the application of the principles described in paragraphs (a) through (f) of this section under the facts presented and are limited to substantially similar factual situations:

(1)(i) *Example.* An individual works 30 hours per week as a cook at one restaurant establishment, and 15 hours per week as a cook at a different restaurant establishment affiliated with the same nationwide franchise. These establishments are locally owned and managed by different franchisees that do not coordinate in any way with respect to the employee. Are they joint employers of the cook?

(ii) *Application.* Under these facts, the restaurant establishments are not joint employers of the cook because they are not associated in any meaningful way with respect to the cook's employment. The similarity of the cook's work at each restaurant, and the fact that both restaurants are part of the same nationwide franchise, are not relevant to the joint employer analysis, because those facts have no bearing on the question whether the restaurants are acting directly or indirectly in each other's interest in relation to the cook.

(2)(i) *Example.* An individual works 30 hours per week as a cook at one restaurant establishment, and 15 hours per week as a cook at a different restaurant establishment owned by the same person. Each week, the restaurants coordinate and set the cook's schedule of hours at each location, and the cook works interchangeably at both restaurants. The restaurants decided together to pay the cook the same hourly rate. Are they joint employers of the cook?

(ii) *Application.* Under these facts, the restaurant establishments are joint employers of the cook because they share common ownership, coordinate the cook's schedule of hours at the restaurants, and jointly decide the cook's terms and conditions of employment, such as the pay rate. Because the restaurants are sufficiently associated with respect to the cook's employment, they must aggregate the cook's hours worked across the two restaurants for purposes of complying with the Act.

(3)(i) *Example.* An office park company hires a janitorial services company to clean the office park building after-hours. According to a contractual agreement between the office park and the janitorial company, the office park agrees to pay the janitorial company a fixed fee for these services and reserves the

right to supervise the janitorial employees in their performance of those cleaning services. However, office park personnel do not set the janitorial employees' pay rates or individual schedules and do not in fact supervise the workers' performance of their work in any way. Is the office park a joint employer of the janitorial employees?

(ii) *Application.* Under these facts, the office park is not a joint employer of the janitorial employees because it does not hire or fire the employees, determine their rate or method of payment, or exercise control over their conditions of employment. The office park's reserved contractual right to control the employee's conditions of employment is not enough to establish that it is a joint employer.

(4)(i) *Example.* A restaurant contracts with a cleaning company to provide cleaning services. The contract does not give the restaurant authority to hire or fire the cleaning company's employees or to supervise their work on the restaurant's premises. A restaurant official provides general instructions to the team leader from the cleaning company regarding the tasks that need to be completed each workday, monitors the performance of the company's work, and keeps records tracking the cleaning company's completed assignments. The team leader from the cleaning company provides detailed supervision. At the restaurant's request, the cleaning company decides to terminate an individual worker for failure to follow the restaurant's instructions regarding customer safety. Is the restaurant a joint employer of the cleaning company's employees?

(ii) *Application.* Under these facts, the restaurant is not a joint employer of the cleaning company's employees because the restaurant does not exercise significant direct or indirect control over the terms and conditions of their employment. The restaurant's daily instructions and monitoring of the cleaning work is limited and does not demonstrate that the restaurant is a joint employer. Records of the cleaning team's work are not employment records under paragraph (a)(1)(iv) of this section, and therefore, are not relevant in determining joint employer status. While the restaurant requested the termination of a cleaning company employee for not following safety instructions, the decision to terminate was made voluntarily by the cleaning company and therefore is not indicative of indirect control.

(5)(i) *Example.* A restaurant contracts with a cleaning company to provide cleaning services. The contract does not give the restaurant authority to hire or fire the cleaning company's employees or to supervise their work on the restaurant's premises. However, in practice a restaurant official oversees the work of employees of the cleaning company by assigning them specific tasks throughout each day, providing them with hands-on instructions, and keeping records tracking the work hours of each employee. On several occasions, the restaurant requested that the cleaning company hire or terminate individual workers, and the cleaning company agreed without question each time. Is the restaurant a joint employer of the cleaning company's employees?

(ii) *Application.* Under these facts, the restaurant is a joint employer of the cleaning company's employees because the restaurant exercises sufficient control, both direct and indirect, over the terms and conditions of their employment. The restaurant directly supervises the cleaning company's employees' work on a regular basis and keeps employment records. And the cleaning company's repeated and unquestioned acquiescence to the restaurant's hiring and firing requests Start Printed Page 2861indicates that the restaurant exercised indirect control over the cleaning company's hiring and firing decisions.

(6)(i) *Example.* A packaging company requests workers on a daily basis from a staffing agency. Although the staffing agency determines each worker's hourly rate of pay, the packaging company closely supervises their work, providing hands-on instruction on a regular and routine basis. The packaging company also uses sophisticated analysis of expected customer demand to continuously adjust the number of workers it requests and the specific hours for each worker, sending workers home depending on workload. Is the packaging company a joint employer of the staffing agency's employees?

(ii) *Application.* Under these facts, the packaging company is a joint employer of the staffing agency's employees because it exercises sufficient control over their terms and conditions of employment by closely supervising their work and controlling their work schedules.

(7)(i) *Example.* A packaging company has unfilled shifts and requests a staffing agency to identify and assign workers to fill those shifts. Like other clients, the packaging company pays the staffing agency a fixed fee to obtain each worker for an 8-hour shift. The staffing agency determines the hourly rate of pay for each worker, restricts all of its workers from performing more than five shifts in a week, and retains complete discretion over which workers to assign to fill a particular shift. Workers perform their shifts for the packaging company at the company's warehouse under limited supervision from the packaging company to ensure that minimal quantity, quality, and workplace safety standards are satisfied, and under more strict supervision from a staffing agency supervisor who is on site at the packaging company. Is the packaging company a joint employer?

(ii) *Application.* Under these facts, the packaging company is not a joint employer of the staffing agency's employees because the staffing agency exclusively determines the pay and work schedule for each employee. Although the packaging company exercises some control over the workers by exercising limited supervision over their work, such supervision, especially considering the staffing agency's supervision, is alone insufficient to establish that the packaging company is a joint employer without additional facts to support such a conclusion.

(8)(i) *Example.* An Association, whose membership is subject to certain criteria such as geography or type of business, provides optional group health coverage and an optional pension plan to its members to offer to their employees. Employer B and Employer C both meet the Association's specified criteria, become members, and provide the Association's optional group health coverage and pension plan to their respective employees. The employees of both B and C choose to opt in to the health and pension plans. Does the participation of B and C in the Association's health and pension plans make the Association a joint employer of B's and C's employees, or B and C joint employers of each other's employees?

(ii) *Application.* Under these facts, the Association is not a joint employer of B's or C's employees, and B and C are not joint employers of each other's employees. Participation in the Association's optional plans does not involve any control by the Association, direct or indirect, over B's or C's employees. And while B and C independently offer the same plans to their respective employees, there is no indication that B and C are coordinating, directly or indirectly, to control the other's employees. B and C are therefore not acting directly or indirectly in the interest of the other in relation to any employee.

(9)(i) *Example.* Entity A, a large national company, contracts with multiple other businesses in its supply chain. Entity A does not hire, fire, or supervise the employees of its suppliers, and the supply agreements do not grant Entity A the authority to do so. Entity A also does not maintain any employment records of suppliers' employees. As a precondition of doing business with A, all contracting businesses must agree to comply with a code of conduct, which includes a minimum hourly wage higher than the federal minimum wage, as well as a promise to comply with all applicable federal, state, and local laws. Employer B contracts with A and signs the code of conduct. Does A qualify as a joint employer of B's employees?

(ii) *Application.* Under these facts, A is not a joint employer of B's employees. Entity A is not acting directly or indirectly in the interest of B in relation to B's employees—hiring, firing, maintaining records, or supervising or controlling work schedules or conditions of employment. Nor is A exercising significant control over Employer B's rate or method of pay—although A requires B to maintain a wage floor, B retains control over how and how much to pay its employees, and the example does not indicate that the wage floor is accompanied by any other indicia of control. Finally, because there is no indication that A's requirement that B commit to comply with all applicable federal, state, and local law exerts any direct or indirect control over B's employees, this requirement has no bearing on the joint employer analysis.

(10)(i) *Example.* Franchisor A is a global organization representing a hospitality brand with several thousand hotels under franchise agreements. Franchisee B owns one of these hotels and is a licensee of A's brand, which gives Franchisee B access to certain proprietary software for business operation or payroll processing. In addition, A provides B with a sample employment application, a sample employee handbook, and other forms and documents for use in operating the franchise, such as sample operational plans, business plans, and marketing materials. The licensing agreement is an industry-standard document explaining that B is solely responsible for all day-to-day operations, including hiring and firing of employees, setting the rate and method of pay, maintaining records, and supervising and controlling conditions of employment. Is A a joint employer of B's employees?

(ii) *Application.* Under these facts, A is not a joint employer of B's employees. A does not exercise direct or indirect control over B's employees. Providing optional samples, forms, and documents that relate to staffing and employment does not amount to direct or indirect control over B's employees that would establish joint liability.

(11)(i) *Example.* A retail company owns and operates a large store. The retail company contracts with a cell phone repair company, allowing the repair company to run its business operations inside the building in an open space near one of the building entrances. As part of the arrangement, the retail company requires the repair company to establish a policy of wearing specific shirts and to provide shirts to its employees that look substantially similar to the shirts worn by employees of the retail company. Additionally, the contract requires the repair company to institute a code of conduct for its employees stating that the employees must act professionally in their interactions with all customers on the premises. Is the retail company a joint employer of the repair company's employees?

(ii) *Application.* Under these facts, the retail company is not a joint employer of the cell phone repair company's employees. The retail company's requirement that the repair company provide specific shirts to its employees and establish a policy that its employees Start Printed Page 2862to wear those shirts does not, on its own, demonstrate substantial control over the repair company's employees' terms and conditions of employment. Moreover, requiring the repair company to institute a code of conduct or allowing the repair company to operate on its premises does not make joint employer status more or less likely under the Act. There is no indication that the retail company hires or fires the repair company's employees, controls any other terms and conditions of their employment, determines their rate and method of payment, or maintains their employment records.

FREY v. COLEMAN
903 F.3d 671 (7th Cir. 2018)

Rovner, Circuit Judge.

Before we can attend to any other issues in an employment discrimination case, we must first determine who, in fact, employed the plaintiff. This question, which seems as though it ought to be simple on its face, continues to confound litigants and courts. This case presents issues regarding the employer/employee relationship that arise in the not-so-uncommon scenario where one employer hires another entity to manage the day-to-day operations of an enterprise. In such a case, one entity provides the paycheck but another entity does all of the other tasks one ordinarily associates with an employer—hiring, firing, training, supervising, evaluating, assigning, et cetera.

In this case, Hotel Coleman, Inc. owned a Holiday Inn Express franchise in Algonquin, Illinois (the Hotel). Hotel Coleman hired Vaughn Hospitality, Inc. to run the daily operations of the Hotel. According to the terms of the hotel management agreement between the two entities, Vaughn Hospitality was responsible for hiring, supervising, directing, and discharging employees, and determining the compensation, benefits and terms and conditions of their

employment. Hotel Coleman agreed that it would "not give direct instructions to any employee of [Hotel Coleman] or to [Vaughn Hospitality] employees whose instructions may interfere, undermine, conflict with or affect in any manner the authority and chain of command as established by [Vaughn Hospitality]." Frey and the other staff members who worked at the Hotel were on Hotel Coleman's payroll, and the management agreement stated that all personnel "are in the employ of" the Hotel. Michael Vaughn (Vaughn) and his wife owned Vaughn Hospitality. Michael Vaughn served as its president and was the only person on its payroll with the exception of a bookkeeper who worked for eight weeks in 2008 and sixteen weeks in 2009. Other than the hotel management agreement between the two entities, there was no affiliation between Vaughn Hospitality and Hotel Coleman. They were distinct and unrelated legal entities that maintained separate financial records, filed separate tax returns, and did not share bank accounts or common ownership.

Vaughn hired the plaintiff, Bogustawa Frey, in August 2008, to work in the Hotel's guest services department. Frey alleged that, shortly after Vaughn hired her, he began to subject her to unwelcome and inappropriate sexual comments and advances. Because this is an appeal of a ruling on summary judgment that Vaughn Hospitality was not Frey's employer, and a jury verdict for Frey on a retaliation claim, we report Frey's allegations and the remaining facts in the light most favorable to Frey and in a manner that is consistent with the jury verdict. . . .

According to Frey, Vaughn subjected her to comments such as the following: he could have any woman he wanted; she should put a penny in a jar every time she had sex with her husband; she had a sexy body. He also asked her if he could touch her stomach, invited her to join him in a hotel room, and told her he wanted to have phone sex with her. . . . Frey objected to the comments and complained to the housekeeping manager, but when that manager informed Vaughn, he laughed off the complaints and the behavior went unchecked.

After Frey informed Vaughn that she was pregnant (in June 2009), Vaughn reduced her hours on the schedule, rescinded a promise he had made to promote her to a sales manager position with a much higher salary, assigned her to work the night shift without paying her the extra amount normally associated with that position, failed to consider her for a front desk position which would have paid an additional $3 per hour, and asked her to perform duties that she complained were difficult for her due to her pregnancy. He also told her that her pregnancy would ruin her sexy body and that her sex life with her husband was over. During Frey's maternity leave, which began in March 2010, she filed a charge with the Equal Employment Opportunity Commission (EEOC) and the Illinois Department of Human Rights based on Vaughn's conduct. One week after she returned from maternity leave, Vaughn fired her for allegedly stealing another employee's cell phone. Frey filed a claim of retaliatory discharge with the EEOC and the Illinois Department of Human Rights against the Hotel, Holiday Inn Express, Vaughn Hospitality, Michael Vaughn and another Hotel employee.

Hotel Coleman sold the Hotel in August 2010, and the new owners did not retain Vaughn Hospitality to manage the Hotel. Two employees who worked in guest services or at the Hotel's front desk continued working for the Hotel, but both left within a year.

Frey filed a claim in the Circuit Court of Cook County pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq., and the Illinois Human Rights Act, 775 ILCS § 5/1-101 et. seq., alleging sexual harassment, hostile work environment, pregnancy discrimination, and retaliatory discharge against the Holiday Inn Express, Intercontinental Hotels Group Resources, Inc., Hotel Coleman, and Vaughn Hospitality. Intercontinental Hotels successfully removed the case to federal court, and then successfully moved to be dismissed from the case.

In the federal district court, Frey moved for summary judgment against Hotel Coleman as to all counts and Vaughn Hospitality moved for summary judgment asserting that it was not an employer as defined under Title VII and the Illinois Human Rights Act. The district court granted Frey's motion against Hotel Coleman in full. The court, accepting Vaughn Hospitality's argument that it was not an employer, granted it summary judgment with respect to Frey's sexual harassment and pregnancy discrimination claims and her retaliation claim under Title VII, but allowed Frey's state claim for retaliation to proceed. Under the Illinois Human Rights Act, a retaliation claim does not require an employer/employee relationship between the plaintiff and defendant. 775 ILCS § 5/6-101(A).

The case then advanced to trial on Frey's claim under the Illinois Human Rights Act that Vaughn Hospitality had retaliated against her for filing a charge of discrimination. The jury found in favor of Frey and awarded her $45,000 in compensatory damages, and the district court awarded her $13,520 in back pay damages—the amount she had

claimed in the Joint Pre-trial Memorandum. The district court also awarded prejudgment interest at the average prime rate from May 2010 to May 2017, compounded monthly for a total judgment on Frey's IHRA retaliatory discharge claim of $73,699.51 for which Hotel Coleman and Vaughn Hospitality are jointly and severally liable. The district court also entered judgment against Hotel Coleman for $142,930.51.

On appeal, Frey asks us to find that the district court erred in determining that Vaughn Hospitality was not Frey's employer. It is undisputed that Hotel Coleman employed Frey. It signed and funded her paychecks, issued her a W-2 for each year of employment, and owned the Hotel where she worked. For Title VII purposes, however, a plaintiff can have more than one employer. Given the complexities of Title VII, it is easy to get sidetracked down the incorrect path of the Title VII maze when looking at employer/employee relationships.

The place to begin when evaluating the existence vel non of a joint employment relationship is *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 378–79 (7th Cir. 1991). *Knight* instructs that a court in this circuit must employ an "economic realities" test which is, in its essence, an application of general principles of agency law to the facts of the case. *Id.* at 378; In doing so, a court must consider the following:

> (1) the extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work, (2) the kind of occupation and nature of skill required, including whether skills are obtained in the workplace, (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operations, (4) method and form of payment and benefits, and (5) length of job commitment and/or expectations.

Knight, 950 F.2d at 378–79. Of these factors, "the employer's right to control is the most important," and a court must give it the most weight. *Id.* at 378.

Although the *Knight* test began as a way to differentiate between employees and independent contractors, it soon came to be used in this circuit to determine which entity or entities should be considered to be an employer for purposes of Title VII liability where there was more than one putative employer. See, e.g., *Nischan v. Stratosphere Quality, LLC*, 865 F.3d 922, 928 (7th Cir. 2017) (using *Knight* test to consider whether a client of an inspection and quality control company for whom the plaintiff provided services was a joint employer for purposes of Title VII); *Bridge v. New Holland Logansport, Inc.*, 815 F.3d 356, 361 (7th Cir. 2016) (using *Knight* test to determine whether commonly-owned entities could be considered joint employers for the purposes of counting employees for Title VII coverage . . . . And we know our case law is on the right track because the Supreme Court has articulated a similar test for determining whether an employer-employee relationship exists for purposes of ERISA—a statute which contains the same definition of "employee" as Title VII. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992). We have held that our *Knight* five-factor test is the essential equivalent of the Supreme Court's *Darden* test. *Mazzei v. Rock N Around Trucking, Inc.*, 246 F.3d 956, 963 (7th Cir. 2001).

As we explore later, there are different tests a court might rely on to determine if a particular entity is an employer for Title VII purposes in other scenarios—for example, if a corporate veil between related business entities should be pierced because of the actions of those entities, or to determine if certain managers and supervisors are employees or employers for purposes of determining if a business has met the fifteen-employee threshold—but none of these tests applies here. Instead, we have before us two otherwise unrelated business entities—one owns a hotel and the other manages the employees of that hotel—and we must determine whether one, the other, or both qualify as Frey's employer for purposes of Title VII. In this case, the parties agree that Hotel Coleman was an employer of Frey. The only question then is whether Vaughn Hospitality was as well. For such a task a court must employ the five-factor test set forth in *Knight*. The district court erred by not doing so.

Instead of looking to the *Knight* factors, the district court became distracted by our holding in *Smith v. Castaways Family Diner*, 453 F.3d 971 (7th Cir. 2006). In *Smith* we were called upon to count heads to determine whether the employer, Castaways Diner, had fifteen or more employees. In order for a business to fall within the scope of Title VII, it must employ a minimum of fifteen employees for at least twenty weeks during the calendar year. 42 U.S.C. § 2000e(b). The Illinois Human Rights Act requires the same. 775 ILCS § 5/2-101(B)(1)(a). The *Smith* case required the court to determine whether two managers of the diner should be counted as employees or as employers. Those managers had the absolute power to hire, discipline, and fire the other workers without securing the owner's approval.

Smith, 453 F.3d at 978. They managed all aspects of the day-to-day operations, including establishing policies, setting their own hours, creating the menu, ordering supplies, and bookkeeping. *Id.* The managers, however, did not own any part of the business and retained authority only by delegation from the owner. Had she changed her mind and reassumed those responsibilities, the managers would have had no recourse. *Id.* at 984. The panel in *Smith* looked at various tests courts have used to determine whether any individual is an employee of the sued entity. In one line of case law to which the district court looked, courts distinguish independent contractors from employees. *Darden*, 503 U.S. at 322–24, 112 S.Ct. 1344. In another, courts differentiate between owners or partners of a business with meaningful authority to run the business (who can be classified as employers) and nominal owners and partners who have no such meaningful authority and thus are employees. *Clackamas Gastroenterology Assocs., P. C. v. Wells*, 538 U.S. 440, 449–51, 123 S.Ct. 1673, 155 L.Ed.2d 615 (2003) (enunciating a test to determine whether a shareholder-director is an employee). And this court uses yet another test to determine whether we can aggregate employees (to reach the fifteen-employee minimum) where an employer is affiliated with other corporations. *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 939 (7th Cir. 1999). The *Smith* court rejected the *Darden* and *Clackamus*-derived tests as not well-suited to the situation at issue in the case before it—where managers who have no office or equity in the business had near total managerial discretion merely by delegation from someone who did have both the office and equity. *Smith*, 453 F.3d at 976–79. In other words, when evaluating whether a particular worker is an employee or an employer, the status and role of the person in question matters when selecting the appropriate lens or test with which to view the question. The *Smith* court stated that, "Given that [the managers] have no apparent ownership interest or office in Castaways, the test that the Supreme Court and the EEOC have articulated for owners, partners, directors and the like would seem to be inapposite." *Id.* at 981. Likewise, the court noted that the defendants did not need to show that the managers were "*independent contractors* rather than employees ... [it needed] to show that they exercise so much authority as to be *employers* rather than employees." *Id.* at 976 (emphasis in original). * * *

And therein lies the key problem here. The district court equated Vaughn Hospitality with the managers in *Smith* and determined that "As the hired manager, [Vaughn Hospitality] wasn't an employer of the hotel staff—it was part of the hotel staff. [Vaughn Hospitality] was an agent, not a principal, and the fact that one agent [Vaughn Hospitality] exercises authority over another agent (Frey) does not render the senior agent the junior's employer."

But we cannot evaluate the status of the individual we are trying to sort into either the employer basket or employee basket in the case before us as there is no such individual; there is only a company—Vaughn Hospitality. Just as the *Clackamus* test was misapplied in *Smith*, the *Smith* test has been misapplied in this case. We are not considering whether a particular manager, partner, shareholder, or director is an employee or an employer, or whether a particular person exercised control and authority by right (as an employer) or by delegation at the pleasure of another (as an employee). Nor are we trying to determine whether the employees of smaller affiliated business entities should be aggregated for purposes of determining whether an employer has fifteen or more employees. Instead, we are looking at two different unrelated corporate entities—Hotel Coleman and Vaughn Hospitality—and trying to determine if one or both were Frey's employer. The *Knight* test is the one a court must use for such purposes.

And it is not simply that the *Knight* test is best designed for this purpose, although, of the ones articulated above, it certainly is. Recall that the *Knight* test simply reflects an "economic realities" test which looks to see whether the putative employer exercised sufficient control. But when we look to the precedent in *Smith*, it becomes clear why it is not applicable here. In *Smith*, our task was to count workers to see if the employer had at least fifteen employees such that it could be liable for the discrimination alleged. And we cannot count a corporation toward the fifteen employee minimum because it is not an employee at all. Title VII defines "employee" as "an *individual* employed by an employer." 42 U.S.C. § 2000e(f) (emphasis ours). * * *

In this case, not only has Congress failed to give any indication that "individual," as used to define an employee in Title VII, could include a corporation, but the statute gives all indications to the contrary. The purpose of the statute, after all, is to make it unlawful to discriminate "with respect to [an employee's] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. Corporations do not have races, colors, religions, genders or national origins. Individual humans do. Although corporations may have some rights as "persons" because the Dictionary Act includes corporations, associations etcetera as "persons" (See *Burwell v. Hobby Lobby Stores, Inc.*, —— U.S. ——, 134 S.Ct. 2751, 2768, 189 L.Ed.2d 675 (2014)), a corporation is not an "individual" that could, for example, file a law suit for discrimination based on race. The test utilized in *Smith*, therefore, simply does not answer the question we have before us. The *Knight* test, however, does, and should have been the one used below. On remand, the district court should apply the facts of

this case to the factors articulated in *Knight*.

The factors articulated in *Knight*, will also apply to an evaluation of whether Vaughn Hospitality can be considered an employer under the Illinois Human Rights Act. Illinois courts often look to federal Title VII law to guide them. *Carter Coal Co. v. Human Rights Comm'n*, 261 Ill. App. 3d 1, 14, 198 Ill.Dec. 740, 633 N.E.2d 202, 211 (1994). And the test for determining an employer-employee relationship under Illinois law is fairly similar:

> Common-law factors to consider in examining a worker's potential status as an employee include the amount of control and supervision, the right of discharge, the method of payment, the skill required in the work to be done, the source of tools, material or equipment, and the work schedule. Of these, control of the manner in which work is done is considered the most important. When analyzing claims of discrimination under the Act, we may look to the standards applicable to analogous federal claims.

Mitchell v. Dep't of Corr., 367 Ill. App. 3d 807, 811, 305 Ill.Dec. 788, 856 N.E.2d 593, 598 (2006) (citations omitted).

Based on the record as set forth in the district court, it seems likely that the district court, applying the *Knight* factors, would conclude that Vaughn Hospitality was indeed Frey's employer, but that decision is for the district court to make on remand. Nevertheless, we note how those factors appear from our appellate perch.

Knight instructs that the putative employer's degree of control is the most important and deserving of the most weight. Vaughn Hospitality had control over every aspect of Frey's work environment. It hired and fired her, determined her compensation and other benefits, supervised, scheduled, and trained her, and evaluated her work. In a contract with Vaughn Hospitality, Hotel Coleman stated that it would not interfere with Vaughn Hospitality's control in all matters of import, noting in particular that it would "not give any direct instructions to any employee of [the Hotel] or to [Vaughn Hospitality] whose instructions may interfere, undermine, conflict with or affect in any manner the authority and chain of command as established by [Vaughn Hospitality]." There is no question that Vaughn Hospitality had absolute control of Frey's employment and its conditions. The first, and most important, factor unquestionably points to Vaughn Hospitality as employer.

As dictated by the second *Knight* factor, we look at the type of occupation and the nature of the skills required for the position, including whether those skills were obtained in the workplace. *Knight*, 950 F.2d at 378. We do not know how much skill was required for Frey's position, and where she obtained those skills, as the record is light on these details, but it does not appear that Frey had significant specialized skills that she brought with her to the job. We do know, however, that Vaughn Hospitality provided all of the training at the Hotel and that each employee, including Frey, received a "Vaughn Hospitality Employee Handbook," which set forth employment policies, benefit programs, and other procedures. Consequently, this factor also points to Vaughn Hospitality as employer.

As for the third and fourth factors—responsibility for the costs of operation and payment of salary and benefits—the point goes to Hotel Coleman for this one. Hotel Coleman owned the property and covered the operating expenses, including the payment of Frey's salary and benefits.

The fifth factor requires the district court to grapple with a number of "what if" factors. The court must look at the length of the job commitment and/or expectations. As far as the record reflects, Vaughn hired Frey as a long-term, at-will employee. The Employee Handbook stated, "we hope your employment relationship with us will be long term." This was not a temporary assignment or a contract job that would end at the completion of some task. . . . Frey worked for the Hotel for two years before Vaughn terminated her. Hotel Coleman sold the Hotel in August 2010, and the new owners did not retain Vaughn Hospitality to manage the Hotel. Two employees who worked in positions similar to Frey's, however, continued working for the new owner and there is no reason why Frey might not have as well. Vaughn Hospitality argues that had she not been fired, Frey might have been able to continue working for the Hotel, but under new management, and thus her employment was tied to the Hotel and not Vaughn Hospitality. But on the flip side of that coin, Vaughn Hospitality was a hotel management company, and therefore it is also a possibility that had she not been fired, Frey may have moved on with Vaughn Hospitality to an assignment at a new hotel. Vaughn Hospitality's argument, therefore, is of no help either way. Vaughn hired Frey as a permanent, long-term employee. The balance on this factor weighs in favor of finding that Vaughn Hospitality was Frey's employer along with the Hotel Coleman.

Although it is true that not every factor points toward Vaughn Hospitality as Frey's employer, the test is a balancing one with different weights added to each side of the scale—the heaviest of which is the degree of control. A plaintiff need not establish that every *Knight* factor falls in her favor in order to prevail. In sum, it was legal error for the district court to fail to apply the *Knight* factors. Had it done so, it seems likely that it would have come to a different conclusion about Vaughn Hospitality as Frey's employer for purposes of Title VII enforcement.

Moreover, and for the same reasons, if Vaughn Hospitality is deemed to be Frey's employer, it is also the joint employer of the other employees in the Hotel. It is undisputed that more than fifteen individuals worked at the Hotel under Vaughn Hospitality's control, therefore we conclude that if Vaughn Hospitality was one of Frey's employers it had a sufficient number of other employees to be a covered employer under Title VII. See 42 U.S.C. § 2000e(b).

* * *

We vacate the district court's ruling on summary judgment that Vaughn Hospitality was not a joint employer of Frey and remand to the district court for further proceedings that reflect these conclusions.

Add to Note 2 on page 187 in Chapter 3 of EDEL, and end of page 117 in Chapter 2 of ED:

2. *42 U.S.C. § 1981.* In *Comcast Corp. v. National Ass'n of African American-Owned Media,* 140 S. Ct. 1009 (2020), the Supreme Court held that plaintiffs must prove but-for causation in Section 1981 claims.

Add at end of page 224 in Chapter 4 of EDEL, and end of page 156 in Chapter 3 of ED:

JONES v. CITY OF BOSTON

752 F.3d 38 (1st Cir. 2014)

KAYATTA, Circuit Judge.

In this racial discrimination case, ten black plaintiffs challenge the Boston Police Department's drug testing program. Seven of the plaintiffs are former officers fired by the department after testing positive for cocaine; the eighth is a former cadet in the same situation; the ninth continues to work as an officer after testing positive and undergoing rehabilitation as an alternative to termination; and the tenth is a former applicant to the department whose contingent job offer was revoked after a positive test. The plaintiffs' principal claim is that the department's program, which used hair samples to test for illegal drug use, caused a disparate impact on the basis of race in violation of Title VII of the Civil Rights Act of 1964. During the eight years for which the plaintiffs present data, black officers and cadets tested positive for cocaine approximately 1.3% of the time, while white officers and cadets tested positive just under 0.3% of the time. The plaintiffs deny that they used cocaine, arguing that the hair test employed by the department generated false-positive results in processing the type of hair common to many black individuals. The plaintiffs also press claims under the United States Constitution, via 42 U.S.C. § 1983, and under the Americans with Disabilities Act (ADA).[1]

The district court granted summary judgment to the department on all claims. We vacate the grant of summary judgment with respect to the plaintiffs' Title VII claim, and we also reverse the district court's denial of their motion for partial summary judgment on that claim, finding no genuine issue of material fact that could preclude them from making a threshold, prima facie showing of disparate impact. We otherwise affirm the district court's decision.

I. Background

The facts described in this opinion are not genuinely disputed, except where otherwise noted.

A. The Department's Drug Testing Program

Since 1999, officers and cadets in the Boston Police Department have been subject to annual drug tests using samples of their hair.[2] Under a provision of a collective bargaining agreement between the department and the police officers' union known as Rule 111, the department selected a private company, Psychemedics Corporation, to analyze employees' hair for the presence of chemicals indicating exposure to five substances: cocaine, marijuana, opiates, PCP, and amphetamines.

When Psychemedics reported that an individual's test results indicated exposure to cocaine, a licensed physician selected by the department checked to see whether the individual had been administered "cocaine hydrochloride ... during a medical procedure." As an additional exculpatory safeguard, the individual could elect to have a "safety-net" test of a different hair sample. During much of the period in which the plaintiffs tested positive, the safety-net tests were significantly more sensitive than the initial tests in detecting the presence of cocaine and its chemical by-products.

If an employee tested positive, and was not exonerated by either the medical review or the safety-net test, the department terminated the employee unless he or she agreed to seek rehabilitation for drug abuse and to accept an unpaid suspension of 45 work days while undergoing treatment. Before a termination became final, however, Massachusetts law required the department to provide a written notice of reasons, followed by an evidentiary hearing

at which an employee could argue that there was no just cause for termination. Mass. Gen. Laws Ann. ch. 31, § 41. A police administrator customarily presided over the pre-termination hearings. If the hearing officer found just cause, the department fired the employee, who could then mount a post-termination appeal to the Massachusetts Civil Service Commission.[3] Mass. Gen. Laws Ann. ch. 31, § 42.

The department also used the hair test to screen job applicants. After an applicant received a conditional offer of employment, the applicant was required to pass the hair test before the offer would become final.

B. Drug Test Results for Officers and Cadets

A very small percentage of officers and cadets, either white or black, tested positive for cocaine during the period covered by this lawsuit. Of those who did test positive, however, there were more black employees than white employees even though over two-thirds of the officers and cadets tested were white. As an example, in 2003, an average year during the period: 6 of 529 black officers and cadets tested positive, or 1.1% of that group, while 3 of 1260 white officers and cadets tested positive, or 0.2% of that group.[4]

The small absolute number of positive tests relative to the total number of tests presents opportunities for markedly different characterizations of any correlation between test results and the races of the individuals tested. One could say that black officers and cadets were more likely than their white colleagues to test positive by just one percentage point. Or one could say that black officers and cadets were five times more likely to test positive. Perhaps trying to prove correct Mark Twain's quip about statistics, the parties wage battle in their briefs with these unhelpful types of competing characterizations of the numbers.

Statisticians, by contrast, customarily approach data such as this more precisely. They ask whether the outcomes of an employment practice are correlated with a specified characteristic, such as race, and, if so, whether the correlation can reasonably be attributed to random chance. The customary yardstick for making this latter determination is called "statistical significance." * * *

Essentially, a finding of statistical significance means that the data casts serious doubt on the assumption that the disparity was caused by chance. When statisticians find a disparity between racial groups to be statistically significant, they are willing to reject the hypothesis that members of the groups truly had an equal chance of receiving the outcome at issue. *Id.*

Statistical significance and p-value are often connected with a third concept, "standard deviation."[6] In disparate impact cases, standard deviation serves as another way of measuring the amount by which the observed disparity in outcomes differs from the average expected result given equal opportunity, e.g., equal rates of promotion for black and white employees. A difference of 1.96 standard deviations generally corresponds to a p-value of five percent, while a difference of three standard deviations generally corresponds to a p-value of approximately 0.5%. *FJC Reference Manual* at 251 n. 101 As the Supreme Court observed in a case involving allegations of discriminatory jury selection, "[a]s a general rule ..., if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist." *Castaneda v. Partida*, 430 U.S. 482, 496 n. 17, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977).[7]

In this case, the parties work with a large sample of thousands of test results from which calculations of deviations from an expected random distribution can be made with a high degree of statistical power. The parties also appear to have no material dispute regarding the raw numbers underlying the analysis: the plaintiffs' brief relies on a table created by the plaintiffs labeled "Comparison of African–American and White Positive Hair Test Results Under Four–Fifths Rule," which adopts counts offered by the department's experts, and the department's brief makes no effort to disavow those numbers. The plaintiffs further cite the department's calculations of the standard deviations associated with those counts, and the plaintiffs do not appear to challenge those calculations. We therefore deem these numbers and calculations to be undisputed, except to the limited extent that the department raises methodological objections to the analysis of the undisputed data, which we address below.

The undisputed data and calculations are as follows:

Year	# Tested/# Positive		Standard Deviation
	Black	White	
1999	521/15	1491/10	3.43
2000	537/4	1467/3	1.35
2001	530/3	1404/3	0.81
2002	532/15	1375/4	4.41
2003	529/6	1260/3	2.01
2004	522/4	1260/4	1.92
2005	529/3	1289/1	1.43
2006	522/5	1289/2	1.95
1999 to 2006	4222/55	10,835/30	7.14[8]

This evidence does not establish that the differences in outcomes were large. It shows, instead, the extent to which we can be confident that the differences in outcomes, whether large or small, were not random. To the extent the facts make it appropriate to consider the eight-year aggregate data as a single sample, we can be almost certain that the difference in outcomes associated with race over that period cannot be attributed to chance alone. Nor can randomness be viewed as other than a very unlikely explanation for results in at least three of the years viewed in isolation. * * *

III. Analysis

A. Disparate Impact Racial Discrimination * * *

1. There is no genuine dispute that there is a statistically significant correlation between outcomes of the department's drug testing program and race.

In the district court, and in their opening brief on appeal, the plaintiffs made clear that the employment practice they challenge is "the Hair Test," defined by the common elements of the drug tests used by the department between 1999 and 2006, inclusive. The department does not dispute that this practice constitutes a "particular employment practice" as required by the statute. 42 U.S.C. § 2000e–2 (k)(1)(A)(i).

Having identified the challenged employment practice, the plaintiffs presented evidence that the results of this practice had a statistically significant correlation with race. As their threshold for statistical significance, the plaintiffs chose a p-value of five percent, or 1.96 standard deviations, the threshold most commonly used by social scientists. Most federal courts have also settled on this threshold in analyzing statistical showings of disparate impact.[9] Because the department does not challenge this convention, we accept it here without ruling on its general applicability.

Using the five percent threshold, the plaintiffs showed that, in at least three of the eight years during the relevant period, the differential between positive results for black and white employees was statistically significant. Moreover, when the data from the eight years is aggregated, the distribution in test results for black employees deviated by more than seven standard deviations from the expected norm. The department does not meaningfully challenge the raw

math behind these calculations of statistical significance. Instead, * * *

the department's lawyers claim that the employees who opted to avoid termination in the wake of a positive test result by undergoing drug rehabilitation or resigning were "correctly identified as using illicit drugs" and therefore must be excluded from the plaintiffs' statistical analysis. The department's own experts provide no support for this argument penned by counsel, nor do counsel venture to explain how altering the raw numbers in this way would produce any material difference in the plaintiffs' ultimate statistical results. This argument also lacks any logical foundation that we can identify without the benefit of expert testimony. The plaintiffs identify as the challenged employment practice, and therefore subject to statistical analysis, the test used to identify which officers have used drugs, i.e., the test used to identify which officers will have to choose between termination and a suspension/ rehabilitation regimen. The plaintiffs must show, then, that this selection process produces identifications that are not randomly distributed by race. The accuracy of that identification process, as determined ex post, is a different matter, perhaps relevant to the business necessity defense as discussed below, but not relevant to the statistical showing of a disparate impact in the identifications themselves.[10] * * *

[T]he department's rebuttal to the plaintiffs' prima facie showing rests on the argument adopted by the district court: even a showing of a statistically significant disparity is insufficient if the size of the impact is not sufficiently large, or "practically significant," as measured by the so-called four-fifths rule. We discuss that argument in the next section of this opinion.

2. Title VII does not require plaintiffs to prove that the observed differential is "practically significant" in order to establish a prima facie case of disparate impact.

We turn now to the department's argument, adopted by the district court, that even a statistically significant racial skew in outcomes does not constitute a disparate impact unless the racial differential is also sufficiently large, or "practically significant." The department correctly points out that, with a large enough set of data, even very small differences can be statistically significant. *See FJC Reference Manual* at 252. For example, if you were to flip a coin a million times, and the coin were to land on tails exactly 50.1% of the time, the deviation from the expected result of 50% tails and 50% heads would be statistically significant, even though it amounts to just one flip per thousand. Recognizing this possibility, statisticians acknowledge that not all statistically significant results are practically significant, meaning "practically meaningful or important." *E.g.*, Xitao Fan, *Statistical Significance and Effect Size in Education Research: Two Sides of a Coin*, 94 J. Educ. Res. 275, 277 (2001). According to the Federal Judicial Center's reference manual on scientific evidence, "[w]hen practical significance is lacking—when the size of a disparity is negligible—there is no reason to worry about statistical significance." *FJC Reference Manual* at 252.

The department therefore argues that courts in disparate impact cases should ask not simply whether a disparity is nonrandom, but also whether it is sufficiently large. Under this view, liability may not be justified, for example, where a program grants promotions to 9.1% of black employees and 9.9% of white employees, even if the imbalance is statistically significant. *Cf. Waisome v. Port Auth. of N.Y. & N.J.*, 948 F.2d 1370, 1376 (2d Cir.1991) (finding no disparate impact where, "though the disparity was found to be statistically significant, it was of limited magnitude").

As a gauge for measuring practical significance, the department proposes the "four-fifths rule," a rule of thumb developed by the Equal Employment Opportunity Commission (EEOC). The four-fifths rule provides that where an employment practice results in a "selection rate" for any racial group less than four-fifths of the "selection rate" for another group, these statistics "will generally be regarded by [f]ederal enforcement agencies as evidence of" disparate impact. 29 C.F.R. § 1607.4(D).[12] For example, if an employer hires 14% of black applicants and 20% of white applicants, the four-fifths rule would indicate a disparate impact, because fourteen is less than four-fifths of twenty.

The district court largely adopted the department's position. The court concluded that a statistically significant imbalance does not automatically constitute disparate impact where practical significance is lacking, relying on the four-fifths rule as a measure of practical significance. * * *

Several factors . . . do favor the district court's conclusion that the size of a race-based differential in outcomes matters, in some manner, in assessing disparate impact claims. Of understandable importance to the district court, the EEOC's guidelines are reasonably read as interpreting Title VII to include a practical significance requirement.[14] While the agency's four-fifths rule itself has several significant weaknesses, which we discuss below, the regulation establishing the rule shows that the commission views practical significance, along with statistical significance, as relevant in

identifying a disparate impact. 29 C.F.R. § 1607.4(D). Similarly, the regulation provides that disparities failing to satisfy the four-fifths rule may nevertheless constitute disparate impact "where they are significant in both statistical and practical terms." *Id.*

Second, very small impacts are unlikely to be the product of intentional discrimination. While proof of a disparate impact claim requires no proof of intentional discrimination, the disparate impact theory nevertheless serves, in part, to root out hidden intentional discrimination. *See* Richard Primus, *Equal Protection and Disparate Impact*, 117 Harv. L.Rev. 493, 498–99, 520–21 (2003). In a case in which a racial disparity is so small as to be nearly imperceptible without detailed statistical analysis, the likelihood that the disparity reveals a hidden intent to discriminate is correspondingly small. Moreover, efforts to eliminate small impacts may prove counterproductive due to the difficulty of concluding with confidence that an alternative practice will truly lessen the already small effect.

Acknowledging the foregoing arguments favoring a requirement that a difference in results associated with race be practically significant and not only statistically significant, we also confront powerful pragmatic arguments against adopting such a requirement. To begin, the concept of practical significance is impossible to define in even a remotely precise manner. We are aware of no test generally accepted by statisticians that we might employ to gauge practical significance (as we employ, for example, the notion that a p-value less than five percent provides good reason to presume that a difference in outcomes is not the result of chance). With no objective measure of practical significance, the label may mean that simply the person applying it views a disparity as substantial enough that a plaintiff ought to be able to sue over it. Courts would find it difficult to apply such an elusive, know-it-when-you-see-it standard, let alone instruct a jury on how to do so, and parties may find it impossible to predict results.

This case illustrates these difficulties. In trying to find a measure of practical significance, the district court turned to the four-fifths rule. * * *

The four-fifths rule can lead to anomalous results. As an illustration, imagine that a police department demographically similar to the Boston Police Department—with approximately 500 black officers and 1200 white officers—implements a policy leading to the termination of 90 black officers and no white officers. If the "selection rate" is taken to be the rate at which employees survived termination, *cf. EEOC v. Joint Apprenticeship Comm. of Joint Bd. of Elec. Indus.*, 164 F.3d 89, 97 (2d Cir.1998) (selection rate is the rate at which applicants pass a hiring requirement), the four-fifths rule detects no disparate impact: 82% of black employees survived, which is more than four-fifths of 100%, the rate at which white employees survived. Yet the policy in this hypothetical illustration undoubtedly has a very significant and disproportionate effect on black officers.

This illustration highlights several flaws in the four-fifths rule. First, to apply the rule in cases involving the selection of current employees for employment consequences such as termination, courts must resolve the rule's ambiguity regarding whether the "selection rate" is the rate at which employees were selected for termination or the rate at which employees survived termination.[15] This choice can be decisive. In the above example, if a court took the "selection rate" as the rate at which employees were fired, the four-fifths rule would indicate a disparate impact, because the 0% firing rate for white employees is less than four-fifths of the 18% firing rate for black employees. Construing the four-fifths rule in this manner, however, would lead to a different problem: the rule would detect a disparate impact even if just one employee were fired (a 0/1200 firing rate for white employees would be less than four-fifths of a 1/500 firing rate for black employees), a result that seems clearly incorrect.

Second, and relatedly, the consequences of the four-fifths rule vary in a seemingly arbitrary way depending on the magnitude of the selection rates at issue. In the example above, the policy leads to the firing of 90 black officers, or 18% of the population of black employees, but this disparity is not actionable under the four-fifths rule. Yet, if the police department provided a raise to just 1% of its white employees (12 of 1200 employees) and 0.6% of its black employees (3 of 500 black employees), this would qualify as actionable disparate impact under the four-fifths rule, even though vastly fewer black employees were affected (and less severely) than in the original scenario.

Conversely, the four-fifths rule makes no distinction between an employment practice that leads to the firing of one of nine black employees and a practice that leads to the firing of 100 of 900 black employees. In either case, the same percentage of black employees is affected. Yet, the larger sample permits a much stronger inference that a disparity is non-random and can be expected to persist through future uses of the practice.

Notwithstanding these limitations, the four-fifths rule may serve important needs in guiding the exercise of agency discretion, or in serving as a helpful rule of thumb for employers not wanting to perform more expansive statistical examinations.[16] The rule itself has some practical utility. There is simply nothing in that utility, however, to justify affording decisive weight to the rule to negate or establish proof of disparate impact in a Title VII case. Having previously rejected a plaintiff's reliance on the four-fifths rule where a small sample size precluded a showing of statistical significance, *Fudge,* 766 F.2d at 658 n. 10, we reject here the defendant's reliance on the four-fifths rule to parry a proper statistical proof of a nonrandom distribution in a case with a large sample size. * * *

Ultimately, we find any theoretical benefits of inquiring as to practical significance outweighed by the difficulty of doing so in practice in any principled and predictable manner. We therefore conclude that a plaintiff's failure to demonstrate practical significance cannot preclude that plaintiff from relying on competent evidence of statistical significance to establish a prima facie case of disparate impact.

Our confidence in rejecting a practical significance requirement is bolstered by the fact that two other requirements to be met by a plaintiff in a Title VII disparate impact case indirectly secure most of the advantages that might be gained were it possible to fashion a principled and predictable direct test of practical significance. First, the very need to show statistical significance will eliminate small impacts as fodder for litigation in many instances because proving that a small impact is statistically significant generally requires large sample sizes, which are often unavailable. *See, e.g., Fudge,* 766 F.2d at 657–59. Second, even in cases like this one, in which the data is available, the subsequent steps required to successfully recover on a disparate impact theory offer an additional safeguard. An employer may rebut a prima facie case of disparate impact by showing that its use of the challenged practice is "job related for the position in question and consistent with business necessity," 42 U.S.C. § 2000e–2(k)(1)(A)(i), and a plaintiff can prevail in the face of demonstrated business necessity only by proving a failure to adopt an alternative practice that would satisfy the department's legitimate business needs "without a similarly undesirable racial effect." *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). *See* 42 U.S.C. § 2000e–2(k)(1)(c) (adopting case law prior to June 4, 1989, "with respect to the concept of 'alternative employment practice' ").

Proving that an alternative practice will not have the impact identified by a plaintiff when that impact is small leaves little margin for error and will often require extensive data. A plaintiff who subjects a defendant's job-related practice to the sensitivity of a large sample analysis can fairly be required to show through statistical evidence, and with equal confidence, that the proffered alternative practice will have a smaller impact, except where the alternative is self-evidently incapable of causing a differential (e.g., a random selection tool).

In this manner, the statute as designed by Congress effectively assigns case-specific practical significance to the size of the impact: as the size of the impact increases, so too does the ease of demonstrating an alternative practice that reduces the impact. And it is fitting that this relationship exists most robustly only where the challenged practice can be justified by business necessity. Where such necessity does not exist, most of the reasons favoring some requirement of practical significance disappear. In other words, if a practice fails to serve a sufficient business need, why retain it merely because the number of people harmed is small?

Because we have rejected both the department's limited challenge to the plaintiffs' showing of statistical significance and the department's advocacy of a practical significance requirement, we see no remaining issue of fact that could permit a reasonable jury to reject the plaintiffs' prima facie proof of disparate impact. We therefore reverse the district court's decision to deny partial summary judgment to the plaintiffs on that component of their Title VII disparate impact case.

3. We decline to decide in the first instance whether the drug testing program is "job-related ... and consistent with business necessity" and whether the plaintiffs have offered an adequate alternative. * * *

The department invites us to consider on this appeal whether it has established that its hair testing program satisfies the business necessity defense under the disparate impact provisions of Title VII. Supreme Court decisions illustrate that the defense has two main components.[17] First, the department must show that its program aims to measure a characteristic that constitutes an "important element[ ] of work behavior." * * *

Here, the plaintiffs have not disputed that abstention from illegal drug use is an important element of police officer behavior. They have admitted that the department has a "legitimate purpose of ensuring a drug-free workplace." What

remains to be determined, then, is whether the results of the department's drug testing regime are "predictive of or significantly correlated with" drug use. The plaintiffs have asserted that hair testing is not "sufficiently reliable to be job-related and justified by business necessity." But they have presented little if any evidence that could allow a jury to conclude that the drug test is so unreliable that its results have no significant correlation with drug use. Indeed, even their own evidence, if believed, would offer cause to question the accuracy of only some of the reported results, without indicating that there is a relatively large number of false positives compared to the size of the police force. On the other hand, the department, not the plaintiffs, carries the burden to prove that the program's results are significantly correlated with actual drug use. * * *

Given that this case has already spanned many years (as did the post-termination administrative process), we are tempted to accept the department's invitation to assess whether genuine issues of material fact remain concerning its business necessity defense. In view of the size of the record, though, and the fact that the district court judge who has presided over this case has not yet parsed that record to assess business necessity or its rejoinder, we decline to do so in the first instance. * * *

With the business necessity question left open for further consideration, we have no occasion to consider whether the plaintiffs' evidence will prove sufficient to show that "the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs." *Ricci v. DeStefano*, 557 U.S. 557, 578, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009) (citing 42 U.S.C. §§ 2000e–2(k)(1)(A)(ii) and (C)). We reiterate, however, our statement above concerning the manner in which the plaintiffs must prove that any such alternative practice would produce a smaller racial disparity in outcomes than does the department's current system.

* * *

IV. Conclusion

The plaintiffs have proven beyond reasonable dispute a prima facie case of disparate impact under Title VII, while the department has proffered an uncontested legitimate need to identify those few of its members who use illegal drugs. What remains to be assessed by the district court is whether the department's drug testing program advances that goal and, if so, whether the plaintiffs can carry their burden of proving a failure to adopt an available alternative that meets the department's legitimate needs while reducing the disparate impact on black employees of the department. * * *

Add at end of page 224 in Chapter 4 of EDEL, and end of page 156 in Chapter 3 of ED:

MALDONADO v. CITY OF ALTUS
433 F.3d 1294 (10th Cir. 2006)

HARTZ, Circuit Judge.

Plaintiffs are employees of the City of Altus, Oklahoma (City). They appeal the district court's grant of summary judgment dismissing all their claims against the City, the City Administrator, and the Street Commissioner (collectively referred to as Defendants). All claims arise out of the City's English-only policy for its employees. Asserting claims of both disparate-impact and disparate-treatment, Plaintiffs contend that the English-only policy discriminates against them on the basis of race and national origin in violation of Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000e. They also claim intentional discrimination under the Civil Rights Act of 1866, 42 U.S.C. § 1981. Finally, Plaintiffs bring claims under the Civil Rights Act of 1871, 42 U.S.C. § 1983, arguing that the policy deprives them of equal protection and freedom of speech. The Equal Employment Opportunity Commission (EEOC) and the American Civil Liberties Union of Oklahoma Foundation each filed amicus briefs in support of Plaintiffs. We have jurisdiction under 28 U.S.C. § 1291. We reverse and remand with respect to Plaintiffs' claims against the City alleging disparate impact and disparate treatment under Title VII; intentional discrimination under § 1981; and violation of equal protection under 42 U.S.C. § 1983. We affirm summary judgment for Defendants on all other claims.

I. BACKGROUND

A. Factual Background

Plaintiffs' claims stem from the City's promulgation of an English-only policy. Approximately 29 City employees are Hispanic, the only significant national-origin minority group affected by the policy. All Plaintiffs are Hispanic and bilingual, each speaking fluent English and Spanish. * * *

In July 2002 the City promulgated the following official policy signed by Nettles:

> To insure effective communications among and between employees and various departments of the City, to prevent misunderstandings and to promote and enhance safe work practices, *all work related and business communications during the work day shall be conducted in the English language with the exception of those circumstances where it is necessary or prudent to communicate with a citizen,* business owner, organization or criminal suspect *in his or her native language due to the person or entity's limited English language skills.* The use of the English language during work hours and while engaged in City business includes face to face communication of work orders and directions as well as communications utilizing telephones, mobile telephones, cellular telephones, radios, computer or e-mail transmissions and all written forms of communications. *If an employee or applicant for employment believes that he or she cannot understand communications due to limited English language skills, the employee is to discuss the situation with the department head* and the Human Resources Director to determine what accommodation is required and feasible. *This policy does not apply to strictly private communications between co-workers while they are on approved lunch hours or breaks or before or after work hours* while the employees are still on City property *if City property is not being used for the communication.* Further, *this policy does not apply to strictly private communication between an employee and a family member* so long as the communications are limited in time and are not disruptive to the work environment. Employees are encouraged to be sensitive to the feelings of their fellow

> employees, including a possible feeling of exclusion if a co-worker cannot understand what is being said in his or her presence when a language other than English is being utilized.

Pls.' Ex. L., R. Vol. II at 560–61 (emphasis added).

Defendants state three primary reasons for adopting the policy:

> 1) workers and supervisors could not understand what was being said over the City's radios ...; 2) non-Spanish speaking employees, both before and after the adoption of the Policy, informed management that they felt uncomfortable when their co-workers were speaking in front of them in a language they could not understand because they did not know if their co-workers were speaking about them; and 3) there were safety concerns with a non-common language being used around heavy equipment.

City/Nettles Br. at 42. Although the district court observed "that there was no written record of any communication problems, morale problems or safety problems resulting from the use of languages other than English prior to implementation of the policy," Dist. Ct. Order at 6, R. Vol. III at 875, it noted that Willis had testified that at least one employee complained about the use of Spanish by his co-workers before implementation of the policy and other non-Spanish speaking employees subsequently made similar complaints. Those city officials who were deposed could recount no incidents of safety problems caused by the use of a language other than English, but the district court found that some Plaintiffs were aware "that employee safety was one reason for the adoption of the policy." *Id.* at 7. The court also stated that "it does not seem necessary that the City await an accident before acting." *Id.* at 18 n. 20.

Defendants offered evidence that the restrictions in the written policy were actually relaxed to allow workers to speak Spanish during work hours and on City property if everyone present understood Spanish. But Plaintiffs offered evidence that employees were told that the restrictions went beyond the written policy and prohibited all use of Spanish if a non-Spanish speaker was present, even during breaks, lunch hours, and private telephone conversations. Plaintiff Lloyd Lopez stated in his deposition that "we were told that the only time we could speak Spanish is when two of us are in a break room by ourselves, and if anybody other than Hispanic comes in, we are to change our language." R. Vol. II at 631. In addition he said, "We no longer can speak about anything in general in Spanish around anybody. Even if we were on the phone talking to our wives and we were having a private conversation with them and somebody happened to walk by, we were to change our language because it would offend whoever was walking by." *Id.* Lopez understood, however, that the policy permitted him to speak Spanish if he was alone in a truck with another Spanish-speaking co-worker. Plaintiff Ruben Rios testified in his deposition that he similarly understood the policy to exclude the use of Spanish during breaks and the lunch hour if non-Hispanic co-workers were present. When asked specifically whether he understood that the policy allowed Spanish to be spoken between co-workers during lunch or other breaks, he stated that "[a]s long as there was another Hispanic person, we could speak in Spanish but away from other individuals, non-Hispanic people." R. Vol. III at 805–06. And Plaintiff Tommy Sanchez testified that he was told that he could not speak Spanish at all, but added that Richardson explained to him that "[t]hat's not the way [the City] meant it." R. Vol. I at 127. The City has not disciplined anyone for violating the English-only policy.

Plaintiffs allege that the policy created a hostile environment for Hispanic employees, causing them "fear and uncertainty in their employment," R. Vol. II at 456–57, and subjecting them to racial and ethnic taunting. They contend "that the English-only rule created a hostile environment because it pervasively—every hour of every work day—burdened, threatened and demeaned the [Plaintiffs] because of their Hispanic origin." * * *

Evidence of ethnic taunting included Plaintiffs' affidavits stating that they had "personally been teased and made the subject of jokes directly because of the English-only policy[,]" and that they were "aware of other Hispanic co-workers being teased and made the subject of jokes because of the English-only policy." *Id.* * * *

C. Court Proceedings

In district court Plaintiffs brought (1) disparate-treatment, disparate-impact, and retaliation claims under Title VII, raising a hostile-work-environment theory as part of their disparate-treatment and disparate-impact claims; (2) disparate-treatment and disparate-impact claims under Title VI; (3) equal-protection and First Amendment claims under 42 U.S.C. § 1983; and (4) intentional discrimination claims under 42 U.S.C. § 1981. The district court granted summary judgment in favor of Defendants on all claims.

II. DISCUSSION * * *

Disparate–Impact Claims

Plaintiffs remaining disparate-impact claims arise under Title VII. * * *

1. Prima-facie case

The district court, relying principally on *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir.1993), concluded that Plaintiffs had "not shown that requiring them to use the English language in the workplace imposed significant, adverse effects on the terms, conditions or privileges of their employment, so as to create a prima facie case of disparate impact discrimination under Title VII." Dist. Ct. Order at 15. Even under *Spun Steak*, however, English-only policies are not always permissible; each case turns on its facts. 998 F.2d at 1489. Here, Plaintiffs have produced evidence that the English-only policy created a hostile atmosphere for Hispanics in their workplace. As previously set forth, all the Plaintiffs stated that they had experienced ethnic taunting as a result of the policy and that the policy made them feel like second-class citizens. Tommy Sanchez testified to instances of taunting by an Altus Police officer, Street Department employees, and other non-Hispanic employees of the City. As evidence that such harassment would be an expected consequence of the policy, Lloyd Lopez testified that Street Commissioner Willis told him that he was notifying him of the policy in private because of concern that other employees would tease Hispanic employees about the policy if they learned of it. * * *

Our task in this appeal is not to determine whether Plaintiffs have established that they were subjected to a hostile work environment. Rather, in reviewing the grant of summary judgment to Defendants, we are to decide only whether a rational juror could find on this record that the impact of the English-only policy on Hispanic workers was "sufficiently severe or persuasive to alter the conditions of [their] employment and create an abusive working environment."

It is in this context that we consider the EEOC guideline on English-only workplace rules, 29 C.F.R. § 1606.7. Under the relevant provisions of the guideline: (1) an English-only rule that applies at all times is considered "a burdensome term and condition of employment," § 1606.7(a), presumptively constituting a Title VII violation; and (2) an English-only rule that applies only at certain times does not violate Title VII if the employer can justify the rule by showing business necessity, § 1606.7(b). The EEOC rationales for the guideline are: (1) English-only policies "may 'create an atmosphere of inferiority, isolation, and intimidation' that could make a 'discriminatory working environment,' " EEOC Br. at 13 (quoting § 1606.7(a)); (2) "English-only rules adversely impact employees with limited or no English skills ... by denying them a privilege enjoyed by native English speakers: the opportunity to speak at work," *id.* at 14; (3) "English-only rules create barriers to employment for employees with limited or no English skills," *id.;* (4) "English-only rules prevent bilingual employees whose first language is not English from speaking in their most effective language," *id.* at 15; and (5) "the risk of discipline and termination for violating English-only rules falls disproportionately on bilingual employees as well as persons with limited English skills," *id.* at 16.

* * * In *Spun Steak* the Ninth Circuit rejected the English-only guideline outright because, in its view, nothing in the plain text or the legislative history of Title VII supported the guideline's presumption of a disparate impact. *See* 998 F.2d at 1489–90. But we need not resolve the validity of that presumption. For our purposes, it is enough that the EEOC, based on its expertise and experience, has consistently concluded that an English-only policy, at least when no business need for the policy is shown, is likely in itself to "create an atmosphere of inferiority, isolation, and intimidation" that constitutes a "discriminatory working

environment." § 1606.7(a). (We recognize that several of the EEOC's other grounds for its guideline do not apply here. For example, there is no evidence that the policy prevented any of the Plaintiffs from speaking at work, because all are bilingual.) We believe that these conclusions are entitled to respect, not as interpretations of the governing law, but as an indication of what a reasonable, informed person may think about the impact of an English-only work rule on minority employees, even if we might not draw the same inference. Assuming the reasonableness of the EEOC on the matter, we cannot say that on the record before us it would be unreasonable for a juror to agree that the City's English-only policy created a hostile work environment for its Hispanic employees. We are not suggesting that the guideline is evidence admissible at trial or should be incorporated in a jury instruction. What we are saying is only that a juror presented with the evidence presently on the record in this case would not be unreasonable in finding that a hostile work environment existed.

2. Business Necessity

As an alternative ground for granting summary judgment on the disparate-impact claim, the district court held that Defendants "offered sufficient proof of business justification." Dist. Ct. Order at 17. It found "that city officials had received complaints that some employees could not understand what was being said on the City's radio frequency because other employees were speaking Spanish ... [and] that city officials received complaints from non-Spanish speaking employees who felt uncomfortable when their co-workers spoke Spanish in front of them." R. Vol. III at 886–87. Based on these justifications, it concluded that "Defendants have met any burden they may have to demonstrate that the City's English-only policy was supported by an adequate business justification." *Id.* at 887.

We disagree. One of Congress's stated purposes in passing the 1991 amendments to the Civil Rights Act was "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989)." Civil Rights Act of 1991, Pub.L. No. 102–166, Sec. 3, 105 Stat. 1071 (1991). In *Griggs* the Supreme Court held that "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S. at 432, 91 S.Ct. 849. The Court stressed that "[t]he touchstone is business necessity. If an employment practice which operates to [discriminate against a protected minority] cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431, 91 S.Ct. 849.

Defendants' evidence of business necessity in this case is scant. As observed by the district court, "[T]here was no written record of any communication problems, morale problems or safety problems resulting from the use of languages other than English prior to implementation of the policy." Dist. Ct. Order at 6. And there was little undocumented evidence. Defendants cited only one example of an employee's complaining about the use of Spanish prior to implementation of the policy. Mr. Willis admitted that he had no knowledge of City business being disrupted or delayed because Spanish was used on the radio. In addition, "city officials who were deposed could give no specific examples of safety problems resulting from the use of languages other than English...." *Id.* at 7. Moreover, Plaintiffs produced evidence that the policy encompassed lunch hours, breaks, and private phone conversations; and Defendants conceded that there would be no business reason for such a restriction.

On this record we are not able to affirm summary judgment based on a business necessity for the English-only policy. A reasonable person could find from this evidence that Defendants had failed to establish a business necessity for the English-only rule.

C. Disparate–Treatment

1. Discrimination

Plaintiffs allege that the City engaged in intentional discrimination in violation of several statutes: Title VII, 42 U.S.C. § 1981, and 42 U.S.C. § 1983. As previously noted, Title VII bars discrimination in employment on the basis of race or national origin. Section 1981 provides equal rights to make and enforce contracts and to the benefits of laws for the security of persons and property. Section 1983 prohibits those acting under color of state law from depriving others of their federal rights; the right invoked by Plaintiffs is the right to

equal protection of the laws under the Fourteenth Amendment.

The same analytical framework is applicable to all Plaintiffs' theories of intentional discrimination. "[I]n [disparate-treatment] discrimination suits, the elements of a plaintiff's case are the same ... whether that case is brought under §§ 1981 or 1983 or Title VII." *Drake v. City of Fort Collins*, 927 F.2d 1156, 1162 (10th Cir.1991). To prevail under a disparate-treatment theory, "a plaintiff must show, through either direct or indirect evidence, that the discrimination complained of was intentional." *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1191 (10th Cir.2000).

Plaintiffs contend that they were intentionally discriminated against by the creation of a hostile work environment. We have already held that there is sufficient evidence to support a finding of a hostile work environment. The issue remaining, therefore, is whether those who established the English-only policy did so with the intent to create a hostile work environment.

To begin with, the disparate impact of the English-only rule (creation of a hostile work environment) is in itself evidence of intent. * * *

Here, Plaintiffs can rely on more than just that inference. First, there is evidence that management realized that the English-only policy would likely lead to taunting of Hispanic employees: Street Commissioner Willis allegedly told two Hispanic employees about the policy in private because of concern that non-Hispanic employees would tease them if they learned of it. Also, a jury could find that there were no substantial work-related reasons for the policy (particularly if it believed Plaintiffs' evidence that the policy extended to nonwork periods), suggesting that the true reason was illegitimate. Further, the policy was adopted without prior consultation with Hispanic employees, or even prior disclosure to a consultant to the City who was conducting an investigation of alleged anti-Hispanic discrimination during the period when the English-only policy was under consideration. Finally, there is evidence that during a news interview the Mayor referred to the Spanish language as "garbage." R. Vol. II at 621.

In our view, the record contains sufficient evidence of intent to create a hostile environment that the summary judgment on those claims must be set aside. * * *

D. Section 1983 First Amendment Claims

(omitted)

Insert at page 395 in Chapter 6 of EDEL and at page 333 of Chapter 5 of ED:

8. *MeToo Movement*. The MeToo movement was founded by activist Tarana Burke, who urged women to share their stores of sexual assault as an expression of solidarity with other women. The movement went global in the fall of 2017, after the New York Times publishes accusations of assault and sexual misconduct against Hollywood mogul Harvey Weinstein. Over the ensuing weeks and months, the #metoo hashtag went viral on Twitter and Facebook, as women and men shared their experiences of harassment and assault. The MeToo movement also produced substantial reporting and investigation in the mainstream media, exposing multiple accusations of harassment against high profile figures in entertainment, media, politics and business.

The MeToo movement has thus far produced little in the way of federal legislation, beyond legislation addressing Congress' internal process for handling harassment complaints. See Congressional Accountability Act of 1995 Reform Act, SB 3749, 115th Cong. (2018). However, a number of states have passed MeToo-related legislation. California passed a number of laws that limit the circumstances in which employers can restrict employees or former employees from disclosing sex-based harassment or discrimination. Cal. S. 820, Cal. A.B. 3080, Cal. S. 1300. See also N.Y.S. S. 7507-C. Some states have adopted or expanded harassment training mandates. Cal. S. 1343, N.Y.S. S. 7507-C, Del. HB 360.

Because the MeToo movement has become a substantial business risk for employers -- in terms of the reputational harm it can present -- companies can be expected to alter their practices in ways that reduce or mitigate potential public scandals. Companies have been using broader definitions of "cause" in their executive employment agreements. See Jena McGregor, "How #MeToo is reshaping employment contracts for executives," Washington Post, October 31, 2018. Some high profile companies, including Facebook, Google and Microsoft, have also announced they will waive employee arbitration agreements for sex-based harassment claims.

For more analysis of the implications of the MeToo movement in the employment context, see #MeToo and the Future of Sexual Harassment Law, Online Symposium, Stanford Law Review & Yale Law Review. See also, Elizabeth C. Tippett, 103 The Legal Implications of the MeToo Movement, Minnesota L. Rev. 228 (2019); Samuel Estreicher, "How to Stop the Next Harvey Weinstein," Bloomberg, November 12, 2017 (arguing that the EEOC should "require employers to provide data on the number of settlement agreements they have entered into involving allegations against particular employees.").

NEW YORK CIVIL PRACTICE LAW & RULES
§ 5003-b NONDISCLOSURE AGREEMENTS

Notwithstanding any other law to the contrary, for any claim or cause of action, whether arising under common law, equity, or any provision of law, the factual foundation for which involves discrimination, in violation of laws prohibiting discrimination, including but not limited to, article fifteen of the executive law, in resolving, by agreed judgment, stipulation, decree, agreement to settle, assurance of discontinuance or otherwise, no employer, its officer or employee shall have the authority to include or agree to include in such resolution any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action unless the condition of confidentiality is the plaintiff's preference. Any such term or condition must be provided to all parties, and the plaintiff shall have twenty-one days to consider such term or condition. If after twenty-one days such term or condition is the plaintiff's preference, such preference shall be memorialized in an agreement signed by all parties. For a period of at least seven days following the execution of such agreement, the plaintiff may revoke the agreement, and the agreement shall not become effective or be enforceable until such revocation period has expired.

Add at end of page 414 in Chapter 6 of EDEL, and end of page 352 in Chapter 5 of ED:

RIZO v. YOVINO
887 F.3d 453 (9th Cir. 2018)

REINHARDT, Circuit Judge:

* * *

Prior to this decision, our law was unclear whether an employer could consider prior salary, either alone or in combination with other factors, when setting its employees' salaries. We took this case *en banc* in order to clarify the law, and we now hold that prior salary alone or in combination with other factors cannot justify a wage differential. To hold otherwise—to allow employers to capitalize on the persistence of the wage gap and perpetuate that gap *ad infinitum*—would be contrary to the text and history of the Equal Pay Act, and would vitiate the very purpose for which the Act stands.

Fresno County Office of Education ("the County")[2] does not dispute that it pays Aileen Rizo ("Rizo") less than comparable male employees for the same work. However, it argues that this wage differential is lawful under the Equal Pay Act.

* * *

The County contends that that the wage differential is based on the fourth exception—the catchall exception: a "factor other than sex." It argues that an employee's prior salary can constitute a "factor other than sex" within the meaning of the catchall exception. However, this would allow the County to defend a sex-based salary differential on the basis of the very sex-based salary differentials the Equal Pay Act was designed to cure. Because we conclude that prior salary does not constitute a "factor other than sex," the County fails as a matter of law to set forth an affirmative defense. We affirm the district court's denial of summary judgment to the County and remand for proceedings consistent with this opinion.

Aileen Rizo was hired as a math consultant by the Fresno County Office of Education in October 2009. Previously, she was employed in Maricopa County, Arizona as a middle and high school math teacher. In her prior position, Rizo earned an annual salary of $50,630 for 206 working days. She also received an educational stipend of $1,200 per year for her master's degrees in educational technology and mathematics education.

Rizo's new salary upon joining the County was determined in accordance with the County's Standard Operating Procedure 1440 ("SOP 1440"), informally adopted in 1998 and formally adopted in 2004. The County's hiring schedule consists of 10 stepped salary levels, each level containing 10 salary steps within it. SOP 1440 dictates that a new hire's salary is to be determined by taking the hired individual's prior salary, adding 5%, and placing the new employee on the corresponding step of the salary schedule. Unlike the County's previous hiring schedule, SOP 1440 does not rely on experience to set an employee's initial salary. SOP 1440 dictated that Rizo be placed at step 1 of level 1 of the hiring schedule, corresponding to a salary of $62,133 for 196 days of work plus a master's degree stipend of $600.

During a lunch with colleagues in 2012, Rizo learned that her male colleagues had been subsequently hired as math consultants at higher salary steps. In August 2012, she filed a complaint about the pay disparity with the County, which responded that all salaries had been set in accordance with SOP 1440. The County claimed to have reviewed salary-step placements of male and female management employees for the past 25 years (so including before the policy was even informally adopted), finding that SOP 1440 placed more women at higher compensation steps than males. Rizo disputes this analysis and claims that the data show men were placed at a higher average salary step.

Rizo sued Jim Yovino in his official capacity as the Superintendent of the Fresno County Office of Education in February 2014. She claimed a violation of the Equal Pay Act, 29 U.S.C. § 206(d); sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"); sex discrimination under California Government Code § 12940(a); and failure to prevent discrimination under California Government Code § 12940(k).

. . .

In June 2015, the County moved for summary judgment. It asserted that, although Rizo was paid less than her male counterparts for the same work, the discrepancy was based on Rizo's prior salary. The County contended that her prior salary was a permissible affirmative defense to her concededly lower salary than her male counterparts under the fourth, catchall clause, a "factor other than sex." . . . The district court denied summary judgment, reasoning that SOP 1440 "necessarily and unavoidably conflicts with the EPA" because "a pay structure based exclusively on prior wages is so inherently fraught with the risk—indeed, here, the virtual certainty—that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand." . . .

This Court granted the County's petition for permission to file an interlocutory appeal. The three-judge panel vacated the denial of summary judgment and remanded. . . . The panel concluded that *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982) was controlling and that it permits prior salary alone to constitute a "factor other than sex" under the Equal Pay Act. In *Kouba*, the employer considered prior salary along with other factors, "including 'ability, education, [and] experience,' " in setting employees' salaries. . . . The panel concluded, however, that because *Kouba* "did not attribute any significance to Allstate's use of these other factors," that case permits consideration of prior salary alone, as long as use of that factor "was reasonable and effectuated some business policy." Because it believed it was compelled to follow *Kouba*, the panel directed the district court on remand to consider the reasonableness of the County's proffered business reasons for its reliance on prior salary.

We granted the petition for rehearing *en banc* in order to clarify the law, including the vitality and effect of *Kouba*.

* * *

Congress enacted the Equal Pay Act in 1963 to put an end to the "serious and endemic problem of employment discrimination in private industry" and to carry out a broad mandate of equal pay for equal work regardless of sex. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195, 94 S.Ct. 2223 (1974). It set forth a simple structure to carry out this simple principle. *See* 29 U.S.C. § 206(d)(1). A plaintiff must show that her employer has paid male and female employees different wages for substantially equal work. Not all differentials in pay for equal work violate the Equal Pay Act, however. The Act includes four statutory exceptions—"(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex"—which operate as affirmative defenses. *Id.*; *Corning*, 417 U.S. at 196, 94 S.Ct. 2223; *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986). "[A]n employer [must] submit evidence from which a reasonable factfinder could conclude not simply that the employer's proffered reasons *could* explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity." *EEOC v. Md. Ins. Admin.*, 879 F.3d 114, 121 (4th Cir. 2018) (first citing *Stanziale v. Jargowsky*, 200 F.3d 101, 107-08 (3d Cir. 2000); and then citing *Mickelson v. N.Y. Life Ins. Co.*, 460 F.3d 1304, 1312 (10th Cir. 2006)); *see also* 29 U.S.C. § 206(d)(1) (exempting from liability wage differentials only where payment of which was "*made pursuant to*" an enumerated exception (emphasis added)).

The Equal Pay Act "creates a type of strict liability" for employers who pay men and women different wages for the same work: once a plaintiff demonstrates a wage disparity, she is *not* required to prove discriminatory intent. *Maxwell*, 803 F.2d at 446 (quoting *Strecker v. Grand Forks Cty. Social Serv. Bd.*, 640 F.2d 96, 99 n.1 (8th Cir. 1980) (en banc)). The County and Amicus Center for Workplace Compliance contend that the Supreme Court in *Washington County v. Gunther*, 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981), infused into Equal Pay Act law Title VII's disparate treatment analysis. This is clearly wrong. In *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, the Supreme Court stated, "the EPA does not require ... proof of intentional discrimination." 550 U.S. 618, 641, 127 S.Ct. 2162, 167 L.Ed.2d 982 (2007).[5] More recently, the Fourth Circuit reaffirmed that "[a]n EPA plaintiff need not prove that the employer acted with discriminatory intent to obtain a remedy under the statute." *Md. Ins. Admin.*, 879 F.3d at 120 (collecting cases). Accordingly, pretext as it is understood in the Title VII context plays no role in Equal Pay Act claims.

* * *

The question in this case is the meaning of the catchall exception. This is purely a question of law. We conclude, unhesitatingly, that "any other factor other than sex" is limited to legitimate, job-related such as a prospective employee's experience, educational background, ability, or prior job performance. It is inconceivable that Congress, in an Act the primary purpose of which was to eliminate long-existing "endemic" sex-based wage disparities, would

create an exception for basing new hires' salaries on those very disparities—disparities that Congress declared are not only related to sex but caused by sex. To accept the County's argument would be to perpetuate rather than eliminate the pervasive discrimination at which the Act was aimed. As explained later in this opinion, the language, legislative history, and purpose of the Act make it clear that Congress was not so benighted. Prior salary, whether considered alone or with other factors, is not job related and thus does not fall within an exception to the Act that allows employers to pay disparate wages. Reflecting the very essence of the Act, we hold that by relying on prior salary, the County fails as a matter of law to set forth an affirmative defense.

*** * ***

In light of the clear intent and purpose of the Equal Pay Act, it is equally clear that we cannot construe the catchall exception as justifying setting employees' starting salaries on the basis of their prior pay. At the time of the passage of the Act, an employee's prior pay would have reflected a discriminatory marketplace that valued the equal work of one sex over the other. Congress simply could not have intended to allow employers to rely on these discriminatory wages as a justification for continuing to perpetuate wage differentials.

Today we express a general rule and do not attempt to resolve its applications under all circumstances. We do not decide, for example, whether or under what circumstances, past salary may play a role in the course of an individualized salary negotiation. We prefer to reserve all questions relating to individualized negotiations for decision in subsequent cases. Our opinion should in no way be taken as barring or posing any obstacle to whatever resolution future panels may reach regarding questions relating to such negotiations.[10]

Basic principles of statutory interpretation also establish that prior salary is not a permissible "factor other than sex" within the meaning of the Equal Pay Act. The County maintains that the catchall exception unambiguously provides that any facially neutral factor constitutes an affirmative defense to liability under the Equal Pay Act. It is incorrect. The Supreme Court in *Corning* did not find the Act clear on its face. Rather, that decision applied an analytical framework similar to the one we use here by looking to the history of the legislative process of the Equal Pay Act as well as the context in which the Act was adopted. 417 U.S. at 198–203, 94 S.Ct. 2223. Following a similar method of analysis, it is clear that when the catchall exception is read in light of its surrounding context and legislative history, a legitimate "factor other than sex" must be job related and that prior salary cannot justify paying one gender less if equal work is performed.

* * *

The canon *noscitur a sociis*—"a word is known by the company it keeps"—provides that words grouped together should be given related meaning. *Id.* at 1085 (plurality opinion). Here, the catchall phrase is grouped with three specific exceptions based on systems of seniority, merit, and productivity. These specific systems share more in common than mere gender neutrality; all three relate to job qualifications, performance, and/or experience. It follows that the more general exception should be limited to legitimate, job-related reasons as well.

A related canon, *ejusdem generis*, likewise supports our interpretation of the catchall term. We apply this canon when interpreting general terms at the end of a list of more specific ones. *Id.* at 1086. In such a case, "the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 114–15, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001) (quoting 2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 47.17 (1991)). The inclusion of the word "other" before the general provision in the Equal Pay Act makes its meaning all the more clear: "[T]he principle of *ejusdem generis* ... implies the addition of *similar* after the word *other*." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012). Here, we read the statutory exceptions as: "(i) a seniority system, (ii) a merit system, (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other [*similar*] factor other than sex." 29 U.S.C. § 206(d)(1). A similar factor would have to be one similar to the other legitimate, job-related reasons.

The presence of the word "any"—which the County contends indicates the expansive reach of the fourth statutory exception—does not counsel against our interpretation. In *Circuit City Stores*, for example, the Supreme Court interpreted § 1 of the Federal Arbitration Act, which lists "seamen, railroad employees, or *any other* class of workers engaged in foreign or interstate commerce" to include only transportation workers, not workers in literally any

industry. 532 U.S. at 109, 114-15, 121 S.Ct. 1302 (emphasis added) (quoting 9 U.S.C. § 1). . . .

. . . In *Corning*, the Supreme Court relied heavily on the history of the legislative process in interpreting the term "similar working conditions," a factor in determining whether employees perform "equal work" under the Equal Pay Act. *Id.* at 199-201, 94 S.Ct. 2223. The Court explained that "[a]s originally introduced," the Equal Pay bills considered in the House and Senate "required equal pay for 'equal work on jobs the performance of which requires equal skills' " and included "only two exceptions—for differentials 'made pursuant to a seniority or merit increase system which does not discriminate on the basis of sex.' " *Id.* at 199, 94 S.Ct. 2223; S. 882, 88th Cong. § 4 (1963); S. 910, 88th Cong. § 4(a) (1963); H.R. 3861, 88th Cong. § 4(a) (1963); H.R. 4269, 88th Cong. § 4(a) (1963). Industry representatives during the House and Senate hearings were "highly critical of the Act's definition of equal work and of its exemptions." *Corning*, 417 U.S. at 199, 94 S.Ct. 2223. The *Corning* Court compared the original language in the House and Senate bills to that in the final Act and thought "it plain that in amending the bill's definition of equal work to its present form, the Congress acted in direct response to these pleas" for a more definite standard for equal work based on bona fide job evaluation plans. *Id.* at 200, 94 S.Ct. 2223. The Court then used that context to interpret "similar working conditions." *Id.* at 200-01, 94 S.Ct. 2223.

We, too, look to the history of the legislative process and draw a similar conclusion that the inclusion of the catchall provision in the final bill was in direct response to the entreaties of industry witnesses. Industry representatives testified at the congressional subcommittee hearings that the two exceptions in the bills that had been introduced in the House and Senate were too specific and under inclusive, and "evidence[d] ... a lack of understanding of industrial reality." *Equal Pay Act: Hearings Before the H. Special Subcomm. on Labor of the H. Comm. on Educ. & Labor on H.R. 3861, 4269, and Related Bills*, 88th Cong. 135 (1963) [hereinafter *House Hearing*] (statement of the American Retail Federation). The witnesses were concerned that companies would no longer be able to rely on the wide variety of factors used across industries to measure the value of a particular job. Accordingly, the witnesses proposed a series of job-related exceptions in addition to the two original exceptions that had covered only seniority and merit systems.

Chief among those was an exception for job classification programs. * * *

Most of the other exceptions urged by industry witnesses were also job related. Mr. Owen, for example, explained that there are "countless reasons for wage variations ... which are not discriminatory in nature," including differences in "the shift or time of day worked, in the regularity of performing duties, [and] in training." *Id.* at 100. The statement of the American Retail Federation likewise explained: "It is a wholly justifiable fact that in retailing there are many situations where there are differentials in wage scales based on experience, hours worked (day or evening), job hazards, physical requirements, and the like." *Id.* at 135.

We think it plain that the catchall exception was added to the final Equal Pay Act in direct response to these employers' concerns that their legitimate, job-related means of setting pay would not be covered under the two exceptions already included in the bill. Following the hearings, Representative Edith Green introduced H.R. 6060, which added the exceptions for "a differential based on any other factor other than sex" as well as "a system which measures earnings by quantity or quality of production." H.R. 6060, 88th Cong. § 2(d)(1) (1963). In its report discussing H.R. 6060, the House Committee explained that "a bona fide job classification program that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination." H.R. Rep. No. 88-309, at 3 (1963), *as reprinted in* 1963 U.S.C.C.A.N. 687, 689. The Committee also provided an illustrative list of other factors in addition to job classification programs which would be covered under the fourth exception, the catchall provision: "[A]mong other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded." *Id.* In the end, Representative Robert Griffin, author of the Landrum-Griffin Act, the landmark labor-relations legislation, put it best. Describing the catchall exception, he said, "Roman numeral iv is a broad principle, and those preceding it are really examples."

The Senate Committee Report likewise confirms that Congress intended the catchall exception to cover factors other ;than sex only insofar as they were job related. Following the hearings, Senator Patrick McNamara introduced S. 1409, which removed reference to seniority and merit systems and instead included just one statutory exception that was virtually identical to the Act's catchall exception. S. 1409, 88th Cong. § 2(d)(1) (1963). That exception read, "except where such a wage differential is based on any factor or factors other than sex." *Id.* In its report, the Senate Committee provided illustrative examples of what this general exception would cover: "seniority systems ... based on tenure,"

"merit system[s]," "piecework system[s] which measure[ ] either the quantity or quality of production or performance," and "[w]ithout question," "other valid classification programs...." S. Rep. No. 88-176, at 4S. Rep. No. 88-176, at 4 (1963). Ultimately, the House version of the bill prevailed, with the House passing H.R. 6060 on May 23, 1963, *see* 109 Cong. Rec. 9217, and the Senate agreeing by a voice vote to the House amendments on May 28, 1963, *see id.* at 9761-62. In other words, the Senate contemplated from the start that the factors ultimately exempted by the House bill would be covered by a catchall provision identical in substance to the fourth exception and that it would cover only job-related factors.

Contrary to the County's assertion, *Washington County v. Gunther*, 452 U.S. 161, 101 S.Ct. 2242 (1981), supports the concept of a catchall provision limited to job-related factors. The Court commented in *Gunther* that "courts and administrative agencies are not permitted to 'substitute their judgment for the judgment of the employer ... who [has] established and applied a bona fide job rating system....' "[13] The predicate for this dictum is that the employer must both establish a bona fide work-related system and apply it in good faith. The Court went on to reiterate its earlier conclusion in *Corning* that "the Equal Pay bill [was] amended ... to add the fourth affirmative defense because of a concern that bona fide job-evaluation systems used by American businesses would otherwise be disrupted." *Id.* at 170 n.11, 101 S.Ct. 2242 (citing *Corning*, 417 U.S. at 199-201, 94 S.Ct. 2223). In sum, so long as the employer proves that it is using a bona fide job classification system or otherwise relying on bona fide job-related factors to set pay, courts will not second guess the merits of the particular method used. Courts have followed the *Gunther* mandate. They have not held, for example, that it would be more appropriate to value educational background over years of experience when setting salaries or that job training should outweigh demonstrated ability to do the job. *Gunther* thus implicitly endorsed the bargain struck in the Equal Pay Act: employers may continue to use their legitimate, job-related means of setting pay but may not use sex directly or indirectly as a basis for establishing employees' wages.

* * *

In *Corning*, the Supreme Court readily dismissed the notion that an employer may pay women less under the catchall exception because women cost less to employ, thus saving the employer money. The Court explained that the "market forces theory"—that women will be willing to accept lower salaries because they will not find higher salaries elsewhere—did not constitute a factor other than sex even though such a method of setting salaries could have saved the company a considerable amount and so would have constituted a good "business" reason. *Corning*, 417 U.S. at 205, 94 S.Ct. 2223. The Court explained that "Congress declared it to be the policy of the Act to correct" the "unfair employer exploitation of this source of cheap labor." *Id.* at 206, 94 S.Ct. 2223 (quoting *Hodgson v. Corning Glass Works*, 474 F.2d 226, 234 (2d Cir. 1973)). "That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work." *Id.* at 205, 94 S.Ct. 2223.

* * *

Prior salary does not fit within the catchall exception because it is not a legitimate measure of work experience, ability, performance, or any other job-related quality. It may bear a rough relationship to legitimate factors other than sex, such as training, education, ability, or experience, but the relationship is attenuated. More important, it may well operate to perpetuate the wage disparities prohibited under the Act. Rather than use a second-rate surrogate that likely masks continuing inequities, the employer must instead point directly to the underlying factors for which prior salary is a rough proxy, at best, if it is to prove its wage differential is justified under the catchall exception.

* * *

Because *Kouba*, however construed, is inconsistent with the rule that we have announced in this opinion, it must be overruled. First, a factor other than sex *must* be one that is job related, rather than one that "effectuates some business policy." Second, it is impermissible to rely on prior salary to set initial wages. Prior salary is not job related and it perpetuates the very gender-based assumptions about the value of work that the Equal Pay Act was designed to end. This is true whether prior salary is the sole factor or one of several factors considered in establishing employees' wages. . . . Although Judges McKeown and Callahan correctly acknowledge in their concurrences that basing initial salary on an employee's prior salary alone violates the Equal Pay Act, neither offers a rational explanation for their incompatible conclusion that relying on prior salary in addition to one or more other factors somehow is consistent with the Act . . . . Reliance on past wages simply perpetuates the past pervasive discrimination that the Equal Pay Act seeks to eradicate. Therefore, we readily reach the conclusion that past salary may not be used as a factor in initial

wage setting, alone or in conjunction with less invidious factors.

McKEOWN, Circuit Judge, with whom MURGUIA, Circuit Judge, joins, concurring:

I agree with most of the majority opinion—particularly its observation that past salary can reflect historical sex discrimination. But the majority goes too far in holding that any consideration of prior pay is "impermissible" under the Equal Pay Act, even when it is assessed with other job-related factors, such as experience, education, past performance and training. In my view, prior salary alone is not a defense to unequal pay for equal work. If an employer's only justification for paying men and women unequally is that the men had higher prior salaries, odds are that the one-and-only "factor" causing the difference is sex. However, employers do not necessarily violate the Equal Pay Act when they consider prior salary among other factors when setting initial wages. To the extent salary is considered with other factors, the burden is on the employer to show that any pay differential is based on a valid job-related factor other than sex.

To be sure, the majority correctly decides the only issue squarely before the court: whether the Fresno County Office of Education was permitted to base Aileen Rizo's starting salary solely on her prior salary. The answer is no. But regrettably, the majority goes further and effectively bars any consideration of prior salary in setting a new salary. Not only does Rizo's case not present this issue, but this approach is unsupported by the statute, is unrealistic, and may work to women's disadvantage.

* * *

My views align with those of the Equal Employment Opportunity Commission ("EEOC"), the agency charged with administering the Act, and most of our sister circuits that have addressed the question. The EEOC's Compliance Manual states:

> [A]n employer may consider prior salary as part of a mix of factors—as, for example, where the employer also considers education and experience and concludes that the employee's prior salary accurately reflects ability, based on job-related qualifications. But because "prior salaries of job candidates can reflect sex-based compensation discrimination," "[p]rior salary cannot, by itself, justify a compensation disparity."

EEOC Amicus Br. 7 (quoting EEOC Compliance Manual, Compensation Discrimination § 10-IV.F.2.g (Dec. 5, 2000), *available at* https://www.eeoc.gov/policy/docs/compensation.html).

The Tenth and Eleventh Circuits reached the same conclusion, holding that prior pay alone cannot justify a compensation disparity. *See Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015) (an employer may decide to pay an elevated salary to an applicant who rejects a lower offer, but the Act "precludes an employer from relying solely upon a prior salary to justify pay disparity"); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995) ("This court has not held that prior salary can never be used by an employer to establish pay, just that such a justification cannot solely carry the affirmative defense."). . . . The Second Circuit likewise allows the prior-salary defense, but places the burden on an employer to prove that a "bona fide business-related reason exists" for a wage differential—i.e., one that is "rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue." *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 525–26 (1992).

Only the Seventh Circuit has veered far off course, holding that prior salary is *always* a "factor other than sex." *See Wernsing v. Dep't of Human Servs., State of Illinois*, 427 F.3d 466, 468–70 (2005). . . .

. . . states have begun passing statutes that prohibit employers from asking employees about their prior salaries.[3] California's statute just went into effect. *See* Cal. Labor Code § 432.3. Those laws represent creative efforts to narrow the gender wage gap. But they also provide important exemptions for employees who wish to disclose prior salaries as part of a salary negotiation. *See, e.g.*, Cal. Labor Code § 432.3(g). Although the majority professes that its decision does not relate to negotiated salaries, the principle of the majority's holding may reach beyond these state statutes by making it a violation of federal antidiscrimination law to consider prior salary, even when an employee chooses to provide it as a bargaining chip for higher wages. I am concerned about chilling such voluntary discussions. Indeed, the result may disadvantage rather than advantage women.

To avoid those consequences, the majority endeavors to limit its decision by announcing that it "express[es] a general rule and do[es] not attempt to resolve its applications under all circumstances." The majority disclaims, for example, deciding "whether or under what circumstances, past salary may play a role in the course of an individualized salary negotiation." *See* The majority's disclaimer hardly cushions the practical effect of its "general rule." Because the majority makes it "impermissible to rely on prior salary to set initial wages" under the Act, it has left little daylight for arguing that negotiated starting salaries should be treated differently than established pay scales. In the real world, an employer "rel[ies] on prior salary to set initial wages" when it takes the prior salary offered voluntarily by an employee in negotiations and sets a starting salary above those past wages, even if there is an established pay scale.

* * *

CALLAHAN, Circuit Judge, with whom TALLMAN, Circuit Judge, joins, concurring:

* * *

The factual fallacies of the majority opinion are, first, that prior salary is not generally job-related, and second, that prior salary inherently reflects wage discrepancies based on gender. In fact, prior salary is a prominent consideration for both a job applicant and the potential employer. The applicant presumably seeks a job that will pay her more and the potential employer recognizes that it will have to pay her more if it wants to hire her. Of course, a prior salary might reflect a wage discrepancy based on gender, but this does not justify the majority's absolute position.

Prior salary serves, in combination with other factors, to allow employers to set a competitive salary that will entice potential employees to take the job. The majority's approach ignores these economic incentives and appears to demand a lockstep pay system such as is often used in government service. We allow private industry more flexibility. In the private sector, basing initial salary upon previous salary, plus other factors such as experience and education, encourages hard work and rewards applicants who have stellar credentials. The majority opinion stifles these economic incentives with a flat prohibition on ever considering prior salary, no matter how enlightened or non-discriminatory it may have been.

Second, the assumption that prior salary inherently reflects gender bias is not true. The majority opinion completely ignores economic disparity in pay for the same jobs performed in different parts of the country, where costs of living are lower and demand for available jobs may exceed the supply of available and highly competitive positions. While there is no question that prior salary in some instances may well reflect gender discrimination, this is not always the case. Historically, differences in prior salaries may simply reflect the differing costs of living in various parts of the country. And the flat prohibition ignores the fact that when the prior salary was set there may well have been more qualified job seekers than there were available jobs to fill.

* * *

[T]he majority's insistence that the fourth exception is limited to specific job-related qualities is contrary to the Supreme Court's statement that the fourth exception "was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination." *Washington Cty. v. Gunther*, 452 U.S. 161, 170, 101 S.Ct. 2242 (1981). Thus, the Equal Pay Act's fourth exception for any "differential based on any other factor other than sex" allows for reasonable business reasons that extend beyond the narrow definition of job-related.

More importantly, the limitation of "any other factor other than sex" to specific job-related qualities is contrary to the Supreme Court's approach in *Washington County*. The Court explained that Equal Pay Act litigation "has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of 'other factors other than sex' " 452 U.S. at 170, 101 S.Ct. 2242. The Court went on to hold that courts and administrative agencies were not permitted to substitute their judgment for the judgment of the employer "so long as it does not discriminate on the basis of sex." *Id.* at 171, 101 S.Ct. 2242. Thus, we are directed not to look to whether a differential is specifically job-related, but whether regardless of its "job-relatedness," it is attributable to sex discrimination.

I agree that based on the history of pay discrimination and the broad purpose of the Equal Pay Act, prior salary by

itself is not inherently a "factor other than sex." As the Eleventh Circuit noted, "if prior salary alone were a justification, the exception would swallow up the rule and inequality in pay among genders would be perpetuated." *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995). However, the Eleventh Circuit continued:

> An Equal Pay Act defendant may successfully raise the affirmative defense of "any other factor other than sex" if he proves that he relied on prior salary and experience in setting a "new" employee's salary. While an employer may not overcome the burden of proof on the affirmative defense of relying on "any other factor other than sex" by resting on prior pay alone, as the district court correctly found, there is no prohibition on utilizing prior pay as part of a mixed-motive, such as prior pay and more experience. This court has not held that prior salary can never be used by an employer to establish pay, just that such a justification cannot solely carry the affirmative defense.

Id.

* * *

In sum, I note that "prior pay" is not inherently a reflection of gender discrimination. Differences in prior pay may well be based on other factors such as the cost of living in different parts of our country. Also, it is possible, and we hope in this day probable, that the prior employer had adjusted its pay system to be gender neutral. Nonetheless, consistent with the intent of the EPA, I agree that where prior pay is the exclusive determinant of pay, the employer cannot carry its burden of showing that it is a "factor other than sex."[9] However, neither Congress's intent, nor the language of the Equal Pay Act, nor logic, requires, or justifies, the conclusion that a pay system that includes prior pay as one of several ingredients can never be a "factor other than sex," and thus fails to come within the fourth exception to the Equal Pay Act.

In this case, the County based pay only on prior salary, and accordingly the district court properly denied it summary judgment. Nonetheless, the majority unnecessarily, incorrectly, and contrary to Supreme Court precedent, insists that prior salary can never be a factor in a pay system that falls within the fourth exception to the Equal Pay Act.

WATFORD, Circuit Judge, concurring in the judgment:

I agree with the result the majority reaches, but I arrive there through a somewhat different reading of the statute. * * *

I think the same analysis should govern even when an employer's prior pay practices are not overtly discriminatory, as they were in *Corning Glass*. If an employer seeks to justify paying women less than men by relying on past pay, it bears the burden of proving that its female employees' past pay is not tainted by sex discrimination, including discriminatory pay differentials attributable to prevailing market forces. *See id*. at 205, 94 S.Ct. 2223. Unfortunately, even today, in most instances that will be exceedingly difficult to do. Despite progress in closing the wage gap, gender pay disparities persist in virtually every sector of the American economy, with women today earning on average only about 82% of what men make, even after controlling for education, work experience, and other factors. *See* Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations*, 55 J. Econ. Literature 789, 797–800 (2017). It therefore remains highly likely that a woman's past pay will reflect, at least in part, some form of sex discrimination. As a result, an employer will rarely be able to justify a gender pay disparity by relying on the fact that a female employee made less than her male counterparts at her prior job.

The employer in this case failed to prove that Aileen Rizo's past pay is not tainted by sex discrimination. Her prior salary thus cannot be deemed a "factor other than sex" For that reason, I agree that the district court properly denied the County's motion for summary judgment.

NOTES AND QUESTIONS

1. *Subsequent Case History*. *Rizo v. Yovino* was appealed to the United States Supreme Court, which vacated the judgment on the basis that a Ninth Circuit judge who had voted in favor of the ruling died before the decision was issued. Rizo v. Yovino, 139 S.Ct. 706 (2019). The Ninth Circuit again took up the Rizo v. Yovino case and reached the same result as the original Ninth Circuit decision. Rizo v. Yovino, 950 F.3d 1217 (2020).

2017 OREGON HOUSE BILL NO. 2005, OREGON SEVENTY-NINTH LEGISLATIVE ASSEMBLY

TITLE: Relating to pay equity; and prescribing an effective date.

SECTION 2. ORS 652.220 is amended to read:

652.220. (1) It is an unlawful employment practice under ORS chapter 659A for an employer to:

(a) In any manner discriminate between employees on the basis of a protected class in the payment of wages or other compensation for work of comparable character.

(b) Pay wages or other compensation to any employee at a rate greater than that at which the employer pays wages or other compensation to employees of a protected class for work of comparable character.

(c) Screen job applicants based on current or past compensation.

(d) Determine compensation for a position based on current or past compensation of a prospective employee. This paragraph is not intended to prevent an employer from considering the compensation of a current employee of the employer during a transfer, move or hire of the employee to a new position with the same employer.

(2) Notwithstanding subsection (1) of this section, an employer may pay employees for work of comparable character at different compensation levels if all of the difference in compensation levels is based on a bona fide factor that is related to the position in question and is based on:

(a) A seniority system;

(b) A merit system;

(c) A system that measures earnings by quantity or quality of production, including piece-rate work;

(d) Workplace locations;

(e) Travel, if travel is necessary and regular for the employee;

(f) Education;

(g) Training;

(h) Experience; or

(i) Any combination of the factors described in this subsection, if the combination of factors accounts for the entire compensation differential.

(3) An employer may not in any manner discriminate in the payment of wages or other compensation against any employee because the employee has filed a complaint under ORS 659A.820 or in a proceeding under ORS 652.210 to 652.230 or 659A.885 or has testified, or is about to testify, or because the employer believes that the employee may testify, in any investigation or proceedings pursuant to ORS 652.210 to 652.230, 659A.830 or 659A.885 or in a criminal action pursuant to ORS 652.210 to 652.230.

(4) An employer may not reduce the compensation level of an employee to comply with the provisions of this section.

(5) Amounts owed to an employee because of the failure of the employer to comply with the requirements of this section are unpaid wages.

(6) An employee who asserts a violation under this section may file a complaint with the Commissioner of the Bureau of Labor and Industries under ORS 659A.820, a civil action under ORS 652.230 or a civil action under 659A.885.

(7) An employer shall post a notice of the requirements of this section in every establishment where employees work. The Bureau of Labor and Industries shall make available to employers a template that meets the required notice provisions of this section.

* * *

SECTION 4. It is an unlawful practice under ORS chapter 659A for an employer or prospective employer to seek the salary history of an applicant or employee from the applicant or employee or a current or former employer of the applicant or employee. This section is not intended to prevent an employer from requesting from a prospective employee written authorization to confirm prior compensation after the employer makes an offer of employment to the prospective employee that includes an amount of compensation.

* * *

SECTION 11. Section 12 of this 2017 Act is added to and made a part of ORS 652.210 to 652.230.

SECTION 12. (1) In a civil action under ORS 652.230 or 659A.885 (1) alleging a violation of ORS 652.220, the employer may file a motion to disallow an award of compensatory and punitive damages. The court shall grant the motion if the employer demonstrates, by a preponderance of the evidence, that the employer:

> (a) Completed, within three years before the date that the employee filed the action, an equal-pay analysis of the employer's pay practices in good faith that was:
>
> > (A) Reasonable in detail and in scope in light of the size of the employer; and
> >
> > (B) Related to the protected class asserted by the plaintiff in the action; and
>
> (b) Eliminated the wage differentials for the plaintiff and has made reasonable and substantial progress toward eliminating wage differentials for the protected class asserted by the plaintiff.

(2) If the court grants the motion filed under this section, the court may award back pay only for the two-year period immediately preceding the filing of the action and may allow the prevailing plaintiff costs and reasonable attorney fees, but may not award compensatory or punitive damages.

(3) Evidence of an equal-pay analysis undertaken in accordance with subsection (1) of this section is inadmissible in any other proceeding.

(4) Information that an employer has not completed an equal-pay analysis may not be used as evidence of a violation of ORS 652.220 in an action under ORS 652.230 or 659A.885 alleging a violation of ORS 652.220.

Add at end of page 430 in Chapter 7 of EDEL, and end of page 372 in Chapter 6 of ED:

BOSTOCK v. CLAYTON COUNTY, GEORGIA
(Supreme Court - June 15, 2020)

Justice GORSUCH delivered the opinion of the Court.

Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

I

Few facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status.

Gerald Bostock worked for Clayton County, Georgia, as a child welfare advocate. Under his leadership, the county won national awards for its work. After a decade with the county, Mr. Bostock began participating in a gay recreational softball league. Not long after that, influential members of the community allegedly made disparaging comments about Mr. Bostock's sexual orientation and participation in the league. Soon, he was fired for conduct "unbecoming" a county employee.

Donald Zarda worked as a skydiving instructor at Altitude Express in New York. After several seasons with the company, Mr. Zarda mentioned that he was gay and, days later, was fired.

Aimee Stephens worked at R.G. & G.R. Harris Funeral Homes in Garden City, Michigan. When she got the job, Ms. Stephens presented as a male. But two years into her service with the company, she began treatment for despair and loneliness. Ultimately, clinicians diagnosed her with gender dysphoria and recommended that she begin living as a woman. In her sixth year with the company, Ms. Stephens wrote a letter to her employer explaining that she planned to "live and work full-time as a woman" after she returned from an upcoming vacation. The funeral home fired her before she left, telling her "this is not going to work out."

While these cases began the same way, they ended differently. Each employee brought suit under Title VII alleging unlawful discrimination on the basis of sex. 78 Stat. 255, 42 U.S.C. § 2000e–2(a)(1). In Mr. Bostock's case, the Eleventh Circuit held that the law does not prohibit employers from firing employees for being gay and so his suit could be dismissed as a matter of law. 723 Fed.Appx. 964 (2018). Meanwhile, in Mr. Zarda's case, the Second Circuit concluded that sexual orientation discrimination does violate Title VII and allowed his case to proceed.

(2018). Ms. Stephens's case has a more complex procedural history, but in the end the Sixth Circuit reached a decision along the same lines as the Second Circuit's, holding that Title VII bars employers from firing employees because of their transgender status. 884 F.3d 560 (2018). During the course of the proceedings in these long-running disputes, both Mr. Zarda and Ms. Stephens have passed away. But their estates continue to press their causes for the benefit of their heirs. And we granted certiorari in these matters to resolve at last the disagreement among the courts of appeals over the scope of Title VII's protections for homosexual and transgender persons. 587 U.S. ——, 139 S.Ct. 1599, 203 L.Ed.2d 754 (2019).

II

* * *

A

The only statutorily protected characteristic at issue in today's cases is "sex"—and that is also the primary term in Title VII whose meaning the parties dispute. Appealing to roughly contemporaneous dictionaries, the employers say that, as used here, the term "sex" in 1964 referred to "status as either male or female [as] determined by reproductive biology." The employees counter by submitting that, even in 1964, the term bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation. But because nothing in our approach to these cases turns on the outcome of the parties' debate, and because the employees concede the point for argument's sake, we proceed on the assumption that "sex" signified what the employers suggest, referring only to biological distinctions between male and female.

Still, that's just a starting point. The question isn't just what "sex" meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions "because of" sex. And, as this Court has previously explained, "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.' " *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. 338, 350, 133 S.Ct. 2517, 186 L.Ed.2d 503 (2013) (citing *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009); quotation altered). In the language of law, this means that Title VII's "because of" test incorporates the "'simple'" and "traditional" standard of but-for causation. *Nassar*, 570 U.S. at 346, 360, 133 S.Ct. 2517. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. See *Gross*, 557 U.S. at 176, 129 S.Ct. 2343. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.

This can be a sweeping standard. Often, events have multiple but-for causes. So, for example, if a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. Cf. *Burrage v. United States*, 571 U.S. 204, 211–212, 134 S.Ct. 881, 187 L.Ed.2d 715 (2014). When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law. See *ibid.*; *Nassar*, 570 U.S. at 350, 133 S.Ct. 2517.

* * *

The consequences of the law's focus on individuals rather than groups are anything but academic. Suppose an employer fires a woman for refusing his sexual advances. It's no defense for the employer to note that, while he treated that individual woman worse than he would have treated a man, he gives preferential treatment to female employees overall. The employer is liable for treating *this* woman worse in part because of her sex. Nor is it a defense for an employer to say it discriminates against both men and women because of sex. This statute works to protect individuals of both sexes from discrimination, and does so equally. So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in *both* cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it.

B

From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff"s sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred. Title VII's message is "simple but momentous": An individual employee's sex is "not relevant to the selection, evaluation, or compensation of employees." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion).

The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

* * *

Reframing the additional causes in today's cases as additional intentions can do no more to insulate the employers from liability. Intentionally burning down a neighbor's house is arson, even if the perpetrator's ultimate intention (or motivation) is only to improve the view. No less, intentional discrimination based on sex violates Title VII, even if it is intended only as a means to achieving the employer's ultimate goal of discriminating against homosexual or transgender employees. There is simply no escaping the role intent plays here: Just as sex is necessarily a but-for *cause* when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably *intends* to rely on sex in its decisionmaking. Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman. To be sure, that employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex.

An employer musters no better a defense by responding that it is equally happy to fire male *and* female employees who are homosexual or transgender. Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women. Instead, the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII. So just as an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability, an employer who fires both Hannah and Bob for being gay or transgender does the same.

* * *

III

What do the employers have to say in reply? * * *

A

Maybe most intuitively, the employers assert that discrimination on the basis of homosexuality and transgender status aren't referred to as sex discrimination in ordinary conversation. If asked by a friend (rather than a judge) why they were fired, even today's plaintiffs would likely respond that it was because they were gay or transgender, not because of sex. According to the employers, that conversational answer, not the statute's strict terms, should guide our thinking and suffice to defeat any suggestion that the employees now before us were fired because of sex. Cf. *post*, at —— (ALITO, J., dissenting); *post*, at —— – —— (KAVANAUGH, J., dissenting).

But this submission rests on a mistaken understanding of what kind of cause the law is looking for in a Title VII case. In conversation, a speaker is likely to focus on what seems most relevant or informative to the listener. So an employee who has just been fired is likely to identify the primary or most direct cause rather than list literally every but-for cause. To do otherwise would be tiring at best. But these conversational conventions do not control Title VII's legal analysis, which asks simply whether sex was a but-for cause. * * *

Aren't these cases different, the employers ask, given that an employer could refuse to hire a gay or transgender individual without ever learning the applicant's sex? Suppose an employer asked homosexual or transgender applicants to tick a box on its application form. The employer then had someone else redact any information that could be used to discern sex. The resulting applications would disclose which individuals are homosexual or transgender without revealing whether they also happen to be men or women. Doesn't that possibility indicate that the employer's discrimination against homosexual or transgender persons cannot be sex discrimination?

No, it doesn't. Even in this example, the individual applicant's sex still weighs as a factor in the employer's decision. Change the hypothetical ever so slightly and its flaws become apparent. Suppose an employer's application form offered a single box to check if the applicant is either black or Catholic. If the employer refuses to hire anyone who checks that box, would we conclude the employer has complied with Title VII, so long as it studiously avoids learning any particular applicant's race or religion? Of course not: By intentionally setting out a rule that makes hiring turn on race or religion, the employer violates the law, whatever he might know or not know about individual applicants.

The same holds here. There is no way for an applicant to decide whether to check the homosexual or transgender box without considering sex. To see why, imagine an applicant doesn't know what the words homosexual or transgender mean. Then try writing out instructions for who should check the box without using the words man, woman, or sex (or some synonym). It can't be done. Likewise, there is no way an employer can discriminate against those who check the homosexual or transgender box without discriminating in part because of an applicant's sex. By discriminating against homosexuals, the employer intentionally penalizes men for being attracted to men and women for being attracted to women. By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today. Any way you slice it, the employer intentionally refuses to hire applicants in part because of the affected individuals' sex, even if it never learns any applicant's sex.

. . . We agree that homosexuality and transgender status are distinct concepts from sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.

* * *

That leaves the employers to seek a different sort of exception. Maybe the traditional and simple but-for causation test should apply in all other Title VII cases, but it just doesn't work when it comes to cases involving homosexual and transgender employees. The test is too blunt to capture the nuances here. The employers illustrate their concern with an example. When we apply the simple test to Mr. Bostock—asking whether Mr. Bostock, a man attracted to other men, would have been fired had he been a woman—we don't just change his sex. Along the way, we change his sexual orientation too (from homosexual to heterosexual). If the aim is to isolate whether a plaintiff 's sex caused the dismissal, the employers stress, we must hold sexual orientation constant—meaning we need to change both his sex

and the sex to which he is attracted. So for Mr. Bostock, the question should be whether he would've been fired if he were a woman attracted to women. And because his employer would have been as quick to fire a lesbian as it was a gay man, the employers conclude, no Title VII violation has occurred.

While the explanation is new, the mistakes are the same. The employers might be onto something if Title VII only ensured equal treatment between groups of men and women or if the statute applied only when sex is the sole or primary reason for an employer's challenged adverse employment action. But both of these premises are mistaken. * * *

At bottom, the employers' argument unavoidably comes down to a suggestion that sex must be the sole or primary cause of an adverse employment action for Title VII liability to follow. * * *

[S]o the employers must scramble to justify deploying a stricter causation test for use only in cases involving discrimination based on sexual orientation or transgender status. Such a rule would create a curious discontinuity in our case law, to put it mildly. Employer hires based on sexual stereotypes? Simple test. Employer sets pension contributions based on sex? Simple test. Employer fires men who do not behave in a sufficiently masculine way around the office? Simple test. But when that same employer discriminates against women who are attracted to women, or persons identified at birth as women who later identify as men, we suddenly roll out a new and more rigorous standard? Why are *these* reasons for taking sex into account different from all the rest? Title VII's text can offer no answer.

* * *

The judgments of the Second and Sixth Circuits in Nos. 17–1623 and 18–107 are affirmed. The judgment of the Eleventh Circuit in No. 17–1618 is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice ALITO, with whom Justice THOMAS joins, dissenting.

There is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on any of five specified grounds: "race, color, religion, sex, [and] national origin." 42 U.S.C. § 2000e–2(a)(1). Neither "sexual orientation" nor "gender identity" appears on that list. For the past 45 years, bills have been introduced in Congress to add "sexual orientation" to the list,[1] and in recent years, bills have included "gender identity" as well. But to date, none has passed both Houses.

Last year, the House of Representatives passed a bill that would amend Title VII by defining sex discrimination to include both "sexual orientation" and "gender identity," H.R. 5, 116th Cong., 1st Sess. (2019), but the bill has stalled in the Senate. An alternative bill, H.R. 5331, 116th Cong., 1st Sess. (2019), would add similar prohibitions but contains provisions to protect religious liberty.[3] This bill remains before a House Subcommittee.

Because no such amendment of Title VII has been enacted in accordance with the requirements in the Constitution (passage in both Houses and presentment to the President, Art. I, § 7, cl. 2), Title VII's prohibition of discrimination because of "sex" still means what it has always meant. But the Court is not deterred by these constitutional niceties. Usurping the constitutional authority of the other branches, the Court has essentially taken H.R. 5's provision on employment discrimination and issued it under the guise of statutory interpretation. A more brazen abuse of our authority to interpret statutes is hard to recall.

The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous. Even as understood today, the concept of discrimination because of "sex" is different from discrimination because of "sexual orientation" or "gender identity." And in any event, our duty is to interpret statutory terms to "mean what they conveyed to reasonable people *at the time they were written*." A. Scalia & B. Garner, Reading Law: The Interpretation

of Legal Texts 16 (2012) (emphasis added). If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time.

The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should "update" old statutes so that they better reflect the current values of society. See A. Scalia, A Matter of Interpretation 22 (1997). If the Court finds it appropriate to adopt this theory, it should own up to what it is doing.

Many will applaud today's decision because they agree on policy grounds with the Court's updating of Title VII. But the question in these cases is not whether discrimination because of sexual orientation or gender identity *should be* outlawed. The question is *whether Congress did that in 1964.*

It indisputably did not. * * *

The Court tries to cloud the issue by spending many pages discussing matters that are beside the point. The Court observes that a Title VII plaintiff need not show that "sex" was the sole or primary motive for a challenged employment decision or its sole or primary cause; that Title VII is limited to discrimination with respect to a list of specified actions (such as hiring, firing, etc.); and that Title VII protects individual rights, not group rights. See *ante*, at —— – ——, – ——.

All that is true, but so what? In cases like those before us, a plaintiff must show that sex was a "motivating factor" in the challenged employment action, 42 U.S.C. § 2000e–2(m), so the question we must decide comes down to this: if an individual employee or applicant for employment shows that his or her sexual orientation or gender identity was a "motivating factor" in a hiring or discharge decision, for example, is that enough to establish that the employer discriminated "because of ... sex"? Or, to put the same question in different terms, if an employer takes an employment action solely because of the sexual orientation or gender identity of an employee or applicant, has that employer necessarily discriminated because of biological sex?

The answers to those questions must be no, unless discrimination because of sexual orientation or gender identity inherently constitutes discrimination because of sex. The Court attempts to prove that point, and it argues, not merely that the terms of Title VII *can* be interpreted that way but that they *cannot reasonably be interpreted any other way*. According to the Court, the text is unambiguous. See *ante*, at ——, ——, ——.

The arrogance of this argument is breathtaking. As I will show, there is not a shred of evidence that any Member of Congress interpreted the statutory text that way when Title VII was enacted. See Part III–B, *infra*. But the Court apparently thinks that this was because the Members were not "smart enough to realize" what its language means. *Hively v. Ivy Tech Community College of Ind.*, 853 F.3d 339, 357 (CA7 2017) (Posner, J., concurring). The Court seemingly has the same opinion about our colleagues on the Courts of Appeals, because until 2017, every single Court of Appeals to consider the question interpreted Title VII's prohibition against sex discrimination to mean discrimination on the basis of biological sex. See Part III–C, *infra*. And for good measure, the Court's conclusion that Title VII unambiguously reaches discrimination on the basis of sexual orientation and gender identity necessarily means that the EEOC failed to see the obvious for the first 48 years after Title VII became law.[7] Day in and day out, the Commission enforced Title VII but did not grasp what discrimination "because of ... sex" unambiguously means. See Part III–C, *infra*.

The Court's argument is not only arrogant, it is wrong. It fails on its own terms. "Sex," "sexual orientation," and "gender identity" are different concepts, as the Court concedes. *Ante*, at —— ("homosexuality and transgender status are distinct concepts from sex"). And neither "sexual orientation" nor "gender identity" is tied to either of the two biological sexes. See *ante*, at —— (recognizing that "discrimination on these bases" does not have "some disparate impact on one sex or another").

* * *

Contrary to the Court's contention, discrimination because of sexual orientation or gender identity does not in and of itself entail discrimination because of sex. We can see this because it is quite possible for an employer to discriminate on those grounds without taking the sex of an individual applicant or employee into account. An employer can have a policy that says: "We do not hire gays, lesbians, or transgender individuals." And an employer can implement this policy without paying any attention to or even knowing the biological sex of gay, lesbian, and transgender applicants. In fact, at the time of the enactment of Title VII, the United States military had a blanket policy of refusing to enlist gays or lesbians, and under this policy for years thereafter, applicants for enlistment were required to complete a form that asked whether they were "homosexual." Appendix D, *infra*, at ——, ——.

At oral argument, the attorney representing the employees, a prominent professor of constitutional law, was asked if there would be discrimination because of sex if an employer with a blanket policy against hiring gays, lesbians, and transgender individuals implemented that policy without knowing the biological sex of any job applicants. Her candid answer was that this would "not" be sex discrimination. And she was right.

The attorney's concession was necessary, but it is fatal to the Court's interpretation, for if an employer discriminates against individual applicants or employees without even knowing whether they are male or female, it is impossible to argue that the employer intentionally discriminated because of sex. Contra, *ante*, at ——. An employer cannot intentionally discriminate on the basis of a characteristic of which the employer has no knowledge. And if an employer does not violate Title VII by discriminating on the basis of sexual orientation or gender identity without knowing the sex of the affected individuals, there is no reason why the same employer could not lawfully implement the same policy even if it knows the sex of these individuals. If an employer takes an adverse employment action for a perfectly legitimate reason—for example, because an employee stole company property—that action is not converted into sex discrimination simply because the employer knows the employee's sex. As explained, a disparate treatment case requires proof of intent—*i.e.*, that the employee's sex motivated the firing. In short, what this example shows is that discrimination because of sexual orientation or gender identity does not inherently or necessarily entail discrimination because of sex, and for that reason, the Court's chief argument collapses.

Trying to escape the consequences of the attorney's concession, the Court offers its own hypothetical:

> "Suppose an employer's application form offered a single box to check if the applicant is either black or Catholic. If the employer refuses to hire anyone who checks that box, would we conclude the employer has complied with Title VII, so long as it studiously avoids learning any particular applicant's race or religion? Of course not." *Ante,* at ——.

How this hypothetical proves the Court's point is a mystery. A person who checked that box would presumably be black, Catholic, or both, and refusing to hire an applicant because of race or religion is prohibited by Title VII. Rejecting applicants who checked a box indicating that they are homosexual is entirely different because it is impossible to tell from that answer whether an applicant is male or female.

The Court follows this strange hypothetical with an even stranger argument. The Court argues that an applicant could not answer the question whether he or she is homosexual without knowing something about sex. If the applicant was unfamiliar with the term "homosexual," the applicant would have to look it up or ask what the term means. And because this applicant would have to take into account his or her sex and that of the persons to whom he or she is sexually attracted to answer the question, it follows, the Court reasons, that an employer could not reject this applicant without taking the applicant's sex into account. See *ante,* at —— – ——.

This is illogical. Just because an applicant cannot say whether he or she is homosexual without knowing his or her own sex and that of the persons to whom the applicant is attracted, it does not follow that an employer cannot reject an applicant based on homosexuality without knowing the applicant's sex.

While the Court's imagined application form proves nothing, another hypothetical case offered by the Court is telling. But what it proves is not what the Court thinks. The Court posits:

> "Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a

> manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman." *Ante*, at ——.

This example disproves the Court's argument because it is perfectly clear that the employer's motivation in firing the female employee had nothing to do with that employee's sex. The employer presumably knew that this employee was a woman before she was invited to the fateful party. Yet the employer, far from holding her biological sex against her, rated her a "model employee." At the party, the employer learned something new, her sexual orientation, and it was this new information that motivated her discharge. So this is another example showing that discrimination because of sexual orientation does not inherently involve discrimination because of sex.

* * *

The Court's remaining argument is based on a hypothetical that the Court finds instructive. In this hypothetical, an employer has two employees who are "attracted to men," and "*to the employer's mind*" the two employees are "materially identical" except that one is a man and the other is a woman. *Ante*, at —— (emphasis added). The Court reasons that if the employer fires the man but not the woman, the employer is necessarily motivated by the man's biological sex. *Ante*, at —— – ——. After all, if two employees are identical in every respect but sex, and the employer fires only one, what other reason could there be?

The problem with this argument is that the Court loads the dice. That is so because in the mind of an employer who does not want to employ individuals who are attracted to members of the same sex, these two employees are not materially identical in every respect but sex. On the contrary, they differ in another way that the employer thinks is quite material. And until Title VII is amended to add sexual orientation as a prohibited ground, this is a view that an employer is permitted to implement. . . .

Once this is recognized, what we have in the Court's hypothetical case are two employees who differ in *two* ways—sex and sexual orientation—and if the employer fires one and keeps the other, all that can be inferred is that the employer was motivated either entirely by sexual orientation, entirely by sex, or in part by both. We cannot infer with any certainty, as the hypothetical is apparently meant to suggest, that the employer was motivated even in part by sex. The Court harps on the fact that under Title VII a prohibited ground need not be the sole motivation for an adverse employment action, see *ante*, at —— – ——, —— – ——, ——, but its example does not show that sex necessarily played *any* part in the employer's thinking.

The Court tries to avoid this inescapable conclusion by arguing that sex is really the only difference between the two employees. This is so, the Court maintains, because both employees "are attracted to men." *Ante*, at —— – ——. Of course, the employer would couch its objection to the man differently. It would say that its objection was his sexual orientation. So this may appear to leave us with a battle of labels. If the employer's objection to the male employee is characterized as attraction to men, it seems that he is just like the woman in all respects except sex and that the employer's disparate treatment must be based on that one difference. On the other hand, if the employer's objection is sexual orientation or homosexuality, the two employees differ in two respects, and it cannot be inferred that the disparate treatment was due even in part to sex.

The Court insists that its label is the right one, and that presumably is why it makes such a point of arguing that an employer cannot escape liability under Title VII by giving sex discrimination some other name. See *ante*, at ——, ——. That is certainly true, but so is the opposite. Something that is *not* sex discrimination cannot be converted into sex discrimination by slapping on that label. So the Court cannot prove its point simply by labeling the employer's objection as "attract[ion] to men." *Ante*, at —— – ——. Rather, the Court needs to show that its label is the correct one.

And a labeling standoff would not help the Court because that would mean that the bare text of Title VII does not unambiguously show that its interpretation is right. The Court would have no justification for its stubborn refusal to look any further.

As it turns out, however, there is no standoff. It can easily be shown that the employer's real objection is not "attract[ion] to men" but homosexual orientation.

In an effort to prove its point, the Court carefully includes in its example just two employees, a homosexual man and a heterosexual woman, but suppose we add two more individuals, a woman who is attracted to women and a man who is attracted to women. (A large employer will likely have applicants and employees who fall into all four categories, and a small employer can potentially have all four as well.) We now have the four exemplars listed below, with the discharged employees crossed out:

~~Man attracted to men~~

Woman attracted to men

~~Woman attracted to women~~

Man attracted to women

The discharged employees have one thing in common. It is not biological sex, attraction to men, or attraction to women. It is attraction to members of their own sex—in a word, sexual orientation. And that, we can infer, is the employer's real motive.

In sum, the Court's textual arguments fail on their own terms. The Court tries to prove that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex," *ante*, at ——, but as has been shown, it is entirely possible for an employer to do just that. "[H]omosexuality and transgender status are distinct concepts from sex," *ante*, at ——, and discrimination because of sexual orientation or transgender status does not inherently or necessarily constitute discrimination because of sex. The Court's arguments are squarely contrary to the statutory text.

But even if the words of Title VII did not definitively refute the Court's interpretation, that would not justify the Court's refusal to consider alternative interpretations. The Court's excuse for ignoring everything other than the bare statutory text is that the text is unambiguous and therefore no one can reasonably interpret the text in any way other than the Court does. Unless the Court has met that high standard, it has no justification for its blinkered approach. And to say that the Court's interpretation is the only possible reading is indefensible.

* * *

The updating desire to which the Court succumbs no doubt arises from humane and generous impulses. Today, many Americans know individuals who are gay, lesbian, or transgender and want them to be treated with the dignity, consideration, and fairness that everyone deserves. But the authority of this Court is limited to saying what the law *is*.

* * *

I respectfully dissent.

Justice KAVANAUGH, dissenting.

* * *

The policy arguments for amending Title VII are very weighty. The Court has previously stated, and I fully agree, that gay and lesbian Americans "cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U.S. ——, ——, 138 S.Ct. 1719, 1727, 201 L.Ed.2d 35 (2018).

But we are judges, not Members of Congress. And in Alexander Hamilton's words, federal judges exercise "neither Force nor Will, but merely judgment." The Federalist No. 78, p. 523 (J. Cooke ed. 1961). Under the Constitution's separation of powers, our role as judges is to interpret and follow the law as written, regardless of whether we like the result. Cf. *Texas v. Johnson*, 491 U.S. 397, 420–421, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (Kennedy, J., concurring). Our role is not to make or amend the law. As written, Title VII does not prohibit employment discrimination because of sexual orientation.

* * *

In the face of the unsuccessful legislative efforts (so far) to prohibit sexual orientation discrimination, judges may not rewrite the law simply because of their own policy views. Judges may not update the law merely because they think that Congress does not have the votes or the fortitude. Judges may not predictively amend the law just because they believe that Congress is likely to do it soon anyway.

If judges could rewrite laws based on their own policy views, or based on their own assessments of likely future legislative action, the critical distinction between legislative authority and judicial authority that undergirds the Constitution's separation of powers would collapse, thereby threatening the impartial rule of law and individual liberty. As James Madison stated: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul, for *the judge* would then be *the legislator*." The Federalist No. 47, at 326 (citing Montesquieu). If judges could, for example, rewrite or update securities laws or healthcare laws or gun laws or environmental laws simply based on their own policy views, the Judiciary would become a democratically illegitimate super-legislature—unelected, and hijacking the important policy decisions reserved by the Constitution to the people's elected representatives.

Because judges interpret the law as written, not as they might wish it were written, the first 10 U.S. Courts of Appeals to consider whether Title VII prohibits sexual orientation discrimination all said no. Some 30 federal judges considered the question. All 30 judges said no, based on the text of the statute. 30 out of 30.

But in the last few years, a new theory has emerged. To end-run the bedrock separation-of-powers principle that courts may not unilaterally rewrite statutes, the plaintiffs here (and, recently, two Courts of Appeals) have advanced a novel and creative argument. They contend that discrimination "because of sexual orientation" and discrimination "because of sex" are actually not separate categories of discrimination after all. Instead, the theory goes, discrimination because of sexual orientation always qualifies as discrimination because of sex: When a gay man is fired because he is gay, he is fired because he is attracted to men, even though a similarly situated woman would not be fired just because she is attracted to men. According to this theory, it follows that the man has been fired, at least as a literal matter, because of his sex.

Under this literalist approach, sexual orientation discrimination automatically qualifies as sex discrimination, and Title VII's prohibition against sex discrimination therefore also prohibits sexual orientation discrimination—and actually has done so since 1964, unbeknownst to everyone. Surprisingly, the Court today buys into this approach. *Ante*, at ——— – ———.

For the sake of argument, I will assume that firing someone because of their sexual orientation may, as a very literal matter, entail making a distinction based on sex. But to prevail in this case with their literalist approach, the plaintiffs must *also* establish one of two other points. The plaintiffs must establish that courts, when interpreting a statute, adhere to literal meaning rather than ordinary meaning. Or alternatively, the plaintiffs must establish that the ordinary meaning of "discriminate because of sex"—not just the literal meaning—encompasses sexual orientation discrimination. The plaintiffs fall short on both counts.

First, courts must follow ordinary meaning, not literal meaning. And courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.

There is no serious debate about the foundational interpretive principle that courts adhere to ordinary meaning, not literal meaning, when interpreting statutes. * * *

Judges adhere to ordinary meaning for two main reasons: rule of law and democratic accountability. A society governed by the rule of law must have laws that are known and understandable to the citizenry. And judicial adherence to ordinary meaning facilitates the democratic accountability of America's elected representatives for the laws they enact. Citizens and legislators must be able to ascertain the law by reading the words of the statute. Both the rule of law and democratic accountability badly suffer when a court adopts a hidden or obscure interpretation of the law, and not its ordinary meaning.

* * *

Second, in light of the bedrock principle that we must adhere to the ordinary meaning of a phrase, the question in this case boils down to the ordinary meaning of the phrase "discriminate because of sex." Does the ordinary meaning of that phrase encompass discrimination because of sexual orientation? The answer is plainly no.

On occasion, it can be difficult for judges to assess ordinary meaning. Not here. Both common parlance and common legal usage treat sex discrimination and sexual orientation discrimination as two distinct categories of discrimination—back in 1964 and still today.

* * *

As to common parlance, few in 1964 (or today) would describe a firing because of sexual orientation as a firing because of sex. As commonly understood, sexual orientation discrimination is distinct from, and not a form of, sex discrimination. The majority opinion acknowledges the common understanding, noting that the plaintiffs here probably did not tell their friends that they were fired because of their sex. *Ante*, at ——. That observation is clearly correct. In common parlance, Bostock and Zarda were fired because they were gay, not because they were men.

* * *

Consider the employer who has four employees but must fire two of them for financial reasons. Suppose the four employees are a straight man, a straight woman, a gay man, and a lesbian. The employer with animosity against women (animosity based on sex) will fire the two women. The employer with animosity against gays (animosity based on sexual orientation) will fire the gay man and the lesbian. Those are two distinct harms caused by two distinct biases that have two different outcomes. To treat one as a form of the other—as the majority opinion does—misapprehends common language, human psychology, and real life.

* * *

Importantly, an overwhelming body of federal law reflects and reinforces the ordinary meaning and demonstrates that sexual orientation discrimination is distinct from, and not a form of, sex discrimination. Since enacting Title VII in 1964, Congress has *never* treated sexual orientation discrimination the same as, or as a form of, sex discrimination. Instead, Congress has consistently treated sex discrimination and sexual orientation discrimination as legally distinct categories of discrimination.

Many federal statutes prohibit sex discrimination, and many federal statutes also prohibit sexual orientation discrimination. But those sexual orientation statutes expressly prohibit sexual orientation discrimination in addition to expressly prohibiting sex discrimination. *Every single one.* To this day, Congress has never defined sex discrimination to encompass sexual orientation discrimination. Instead, when Congress wants to prohibit sexual orientation discrimination in addition to sex discrimination, Congress explicitly refers to sexual orientation discrimination.

* * *

The story is the same with bills proposed in Congress. Since the 1970s, Members of Congress have introduced many bills to prohibit sexual orientation discrimination in the workplace. Until very recently, all of those bills would have expressly established sexual orientation as a separately proscribed category of discrimination. The bills did not define sex discrimination to encompass sexual orientation discrimination.

The proposed bills are telling not because they are relevant to congressional intent regarding Title VII. . . . Rather, the proposed bills are telling because they, like the enacted laws, further demonstrate the widespread usage of the English language in the United States: Sexual orientation discrimination is distinct from, and not a form of, sex discrimination.

Presidential Executive Orders reflect that same common understanding. * * *

Federal regulations likewise reflect that same understanding. * * *

The States have proceeded in the same fashion. * * *

That common usage in the States underscores that sexual orientation discrimination is commonly understood as a legal concept distinct from sex discrimination.

And it is the common understanding in this Court as well. Since 1971, the Court has employed rigorous or heightened constitutional scrutiny of laws that classify on the basis of sex. See *United States v. Virginia*, 518 U.S. 515, 531–533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996); *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 136–137, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994); *Craig v. Boren*, 429 U.S. 190, 197–199, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 682–684, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) (plurality opinion); *Reed v. Reed*, 404 U.S. 71, 75–77, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). Over the last several decades, the Court has also decided many cases involving sexual orientation. But in those cases, the Court never suggested that sexual orientation discrimination is just a form of sex discrimination. All of the Court's cases from *Bowers* to *Romer* to *Lawrence* to *Windsor* to *Obergefell* would have been far easier to analyze and decide if sexual orientation discrimination were just a form of sex discrimination and therefore received the same heightened scrutiny as sex discrimination under the Equal Protection Clause. See *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986); *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996); *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); *United States v. Windsor*, 570 U.S. 744, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013); *Obergefell* v. *Hodges*, 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015).

Did the Court in all of those sexual orientation cases just miss that obvious answer—and overlook the fact that sexual orientation discrimination is actually a form of sex discrimination? That seems implausible. Nineteen Justices have participated in those cases. Not a single Justice stated or even hinted that sexual orientation discrimination was just a form of sex discrimination and therefore entitled to the same heightened scrutiny under the Equal Protection Clause. The opinions in those five cases contain no trace of such reasoning. That is presumably because everyone on this Court, too, has long understood that sexual orientation discrimination is distinct from, and not a form of, sex discrimination.

In sum, all of the usual indicators of ordinary meaning—common parlance, common usage by Congress, the practice in the Executive Branch, the laws in the States, and the decisions of this Court—overwhelmingly establish that sexual orientation discrimination is distinct from, and not a form of, sex discrimination. The usage has been consistent across decades, in both the federal and state contexts.

* * *

To tie it all together, the plaintiffs have only two routes to succeed here. Either they can say that literal meaning overrides ordinary meaning when the two conflict. Or they can say that the ordinary meaning of the phrase "discriminate because of sex" encompasses sexual orientation discrimination. But the first flouts long-settled principles of statutory interpretation. And the second contradicts the widespread ordinary use of the English language in America.

* * *

I have the greatest, and unyielding, respect for my colleagues and for their good faith. But when this Court usurps the role of Congress, as it does today, the public understandably becomes confused about who the policymakers really are in our system of separated powers, and inevitably becomes cynical about the oft-repeated aspiration that judges base their decisions on law rather than on personal preference. The best way for judges to demonstrate that we are deciding cases based on the ordinary meaning of the law is to walk the walk, even in the hard cases when we might prefer a different policy outcome.

* * *

Notwithstanding my concern about the Court's transgression of the Constitution's separation of powers, it is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans. Millions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law. They have exhibited extraordinary vision, tenacity, and grit—battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives. They have advanced powerful policy arguments and can take pride in today's result. Under the Constitution's separation of powers, however, I believe that it was Congress's role, not this Court's, to

amend Title VII. I therefore must respectfully dissent from the Court's judgment.

Add to page 453 in Chapter 8 of EDEL and at the bottom of page 395 in Chapter 7 of ED:

5. *Causation Standard for Federal Employees under the ADEA.* Section 633a(a) of the ADEA provides for a different causation standard for federal employees, who are entitled to "personnel actions" "free from any discrimination based on age." In *Babb v. Wilkie*, 140 S.Ct. 1168 (2020), the Supreme Court opined that federal workers can establish liability under the ADEA where the decision was tainted by any consideration of age. However, to obtain reinstatement, damages or other relief related to the end result of the personnel action, a plaintiff must still prove 'but for' causation.

Add at end of page 482 in Chapter 9 of EDEL, and end of page 424 in Chapter 8 of ED:

United States Court of Appeals, Seventh Circuit.
Dale E. KLEBER, Plaintiff-Appellant,
v.
CAREFUSION CORPORATION, Defendant-Appellee.
No. 17-1206
Argued September 6, 2018
Decided January 23, 2019

Before Wood, Chief Judge, and Bauer, Flaum, Easterbrook, Kanne, Rovner, Sykes, Hamilton, Barrett, Brennan, Scudder, and St. Eve, Circuit Judges.
Opinion
Scudder, Circuit Judge.

After Dale Kleber unsuccessfully applied for a job at CareFusion Corporation, he sued for age discrimination on a theory of disparate impact liability. The district court dismissed his claim, concluding that § 4(a)(2) of the Age Discrimination in Employment Act did not authorize job applicants like Kleber to bring a disparate impact claim against a prospective employer. A divided panel of this court reversed. We granted en banc review and, affirming the district court, now hold that the plain language of § 4(a)(2) makes clear that Congress, while protecting employees from disparate impact age discrimination, did not extend that same protection to outside job applicants. While our conclusion is grounded in § 4(a)(2)'s plain language, it is reinforced by the ADEA's broader structure and history.

I

In March 2014, Kleber, an attorney, applied for a senior in-house position in CareFusion's law department. The job description required applicants to have "3 to 7 years (no more than 7 years) of relevant legal experience." Kleber was 58 at the time he applied and had more than seven years of pertinent experience. CareFusion passed over Kleber and instead hired a 29-year-old applicant who met but did not exceed the prescribed experience requirement. Kleber responded by bringing this action and pursuing claims for both disparate treatment and disparate impact under § 4(a)(1) and § 4(a)(2) of the ADEA. Relying on our prior decision in EEOC v. Francis W. Parker School, 41 F.3d 1073 (7th Cir. 1994), the district court granted CareFusion's motion to dismiss Kleber's disparate impact claim, reasoning that the text of § 4(a)(2) did not extend to outside job applicants. Kleber then voluntarily dismissed his separate claim for disparate treatment liability under § 4(a)(1). This appeal followed.

II

We begin with the plain language of § 4(a)(2). "If the statutory language is plain, we must enforce it according to its terms." King v. Burwell, —— U.S. ——, 135 S.Ct. 2480, 2489, 192 L.Ed.2d 483 (2015). This precept reinforces the constitutional principle of separation of powers, for our role is to interpret the words Congress enacts into law without altering a statute's clear limits. See Puerto Rico v. Franklin Cal. Tax-Free Trust, —— U.S. ——, 136 S.Ct. 1938, 1949, 195 L.Ed.2d 298 (2016).

Section 4(a)(2) makes it unlawful for an employer

> to limit, segregate, or classify his employees 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 age.

29 U.S.C. § 623(a)(2).

By its terms, § 4(a)(2) proscribes certain conduct by employers and limits its protection to employees. The prohibited conduct entails an employer acting in any way to limit, segregate, or classify its employees based on age. The language of § 4(a)(2) then goes on to make clear that its proscriptions apply only if an employer's actions have a particular impact—"depriv[ing] or tend[ing] to deprive any individual of employment opportunities or otherwise adversely affect[ing] his status as an employee." This language plainly demonstrates that the requisite impact must befall an individual with "status as an employee." Put most simply, the reach of § 4(a)(2) does not extend to applicants for employment, as common dictionary definitions confirm that an applicant has no "status as an employee." See Merriam-Webster's Collegiate Dictionary 60, 408 (11th ed. 2003) (defining "applicant" as "one who applies," including, for example, "a job [applicant]," while defining "employee" as "one employed by another usu[ally] for wages or salary and in a position below the executive level").

Subjecting the language of § 4(a)(2) to even closer scrutiny reinforces our conclusion. Congress did not prohibit just conduct that "would deprive or tend to deprive any individual of employment opportunities." It went further. Section 4(a)(2) employs a catchall formulation—"or otherwise adversely affect his status as an employee"—to extend the proscribed conduct. Congress's word choice is significant and has a unifying effect: the use of "or otherwise" serves to stitch the prohibitions and scope of § 4(a)(2) into a whole, first by making clear that the proscribed acts cover all conduct "otherwise affect[ing] his status as an employee," and, second, by limiting the reach of the statutory protection to an individual with "status as an employee." See Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 964 (11th Cir. 2016) (en banc) (interpreting § 4(a)(2) the same way and explaining that the "or otherwise" language "operates as a catchall: the specific items that precede it are meant to be subsumed by what comes after the 'or otherwise' ").

Kleber begs to differ, arguing that § 4(a)(2)'s coverage extends beyond employees to applicants for employment. He gets there by focusing on the language in the middle of § 4(a)(2)—"deprive or tend to deprive any individual of employment opportunities"—and contends that the use of the expansive term "any individual" shows that Congress wished to cover outside job applicants. If the only question were whether a job applicant counts as "any individual," Kleber would be right. But time and again the Supreme Court has instructed that statutory interpretation requires reading a text as a whole, and here that requires that we refrain from isolating two words when the language surrounding those two words supplies essential meaning and resolves the question before us. See, e.g., United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988) (describing statutory construction as a "holistic endeavor"); see also K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988) (directing courts to consider "the language and design of the statute as a whole"); Trustees of Chicago Truck Drivers v. Leaseway Transp. Corp., 76 F.3d 824, 828 (7th Cir. 1996) (emphasizing the same points and explaining that the meaning of statutory text comes from reading language in context and not words in insolation).

Reading § 4(a)(2) in its entirety shows that Congress employed the term "any individual" as a shorthand reference to someone with "status as an employee." This construction is clear from Congress's use of language telling us that the provision covers "any individual" deprived of an employment opportunity because such conduct "adversely affects his status as an employee." Put differently, ordinary principles of grammatical construction require connecting "any individual" (the antecedent) with the subsequent personal possessive pronoun "his," and upon doing so we naturally read "any individual" as referring and limited to someone with "status as an employee." See Flora v. United States, 362 U.S. 145, 150, 80 S.Ct. 630, 4 L.Ed.2d 623 (1960) ("This Court naturally does not review congressional enactments as a panel of grammarians; but neither do we regard ordinary principles of English prose as irrelevant to a construction of those enactments."). The clear takeaway is that a covered individual must be an employee.
Our conclusion becomes ironclad the moment we look beyond § 4(a)(2) and ask whether other provisions of the ADEA distinguish between employees and applicants. See Mount Lemmon Fire Dist. v. Guido, —— U.S. ——, 139

S.Ct. 22, 24, 202 L.Ed.2d 262 (2018) (endorsing this same approach when interpreting the ADEA's various definitions of "employer"). We do not have to look far to see that the answer is yes.

Right next door to § 4(a)(2) is § 4(a)(1), the ADEA's disparate treatment provision. In § 4(a)(1), Congress made it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added). All agree that § 4(a)(1), by its terms, covers both employees and applicants. See, e.g., Kralman v. Ill. Dep't of Veterans' Affairs, 23 F.3d 150, 152–53 (7th Cir. 1994) (treating an applicant's right to bring a claim under § 4(a)(1) as unquestioned). Compelling this consensus is § 4(a)(1)'s use of the words "to fail or refuse to hire or to discharge," which make clear that "any individual" includes someone seeking to be hired. 29 U.S.C. § 623(a)(1).

Yet a side-by-side comparison of § 4(a)(1) with § 4(a)(2) shows that the language in the former plainly covering applicants is conspicuously absent from the latter. Section 4(a)(2) says nothing about an employer's decision "to fail or refuse to hire ... any individual" and instead speaks only in terms of an employer's actions that "adversely affect his status as an employee." We cannot conclude this difference means nothing: "when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—the Court presumes that Congress intended a difference in meaning." Loughrin v. United States, 573 U.S. 351, 358, 134 S.Ct. 2384, 189 L.Ed.2d 411 (2014) (quoting Russello v. United States, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983)).
There is even more. A short distance away from § 4(a)(2) is § 4(c)(2), which disallows labor organizations from engaging in particular conduct. Section 4(c)(2), in pertinent part, makes it unlawful for a labor organization

> to limit, segregate, or classify its membership ... in any way which would deprive or tend to deprive any individual of employment opportunities ... or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age.

29 U.S.C. § 623(c)(2) (emphasis added).

The parallel with § 4(a)(2) is striking: both provisions define the prohibited conduct in terms of action that "would deprive or tend to deprive any individual of employment opportunities," only then to include the "or otherwise adversely affect" catchall language. But there is a big difference between the two provisions: § 4(c)(2)'s protection extends to any individual with "status as an employee or as an applicant for employment," whereas Congress limited § 4(a)(2)'s reach only to someone with "status as an employee."

Consider yet another example. In § 4(d), Congress addressed employer retaliation by making it "unlawful for an employer to discriminate against any of his employees or applicants for employment" because such an individual has opposed certain unlawful practices of age discrimination. 29 U.S.C. § 623(d) (emphasis added). Here, too, the distinction between "employees" and "applicants" jumps off the page.

Each of these provisions distinguishes between employees and applicants. It is implausible that Congress intended no such distinction in § 4(a)(2), however, and instead used the term employees to cover both employees and applicants. To conclude otherwise runs afoul of the Supreme Court's admonition to take statutes as we find them by giving effect to differences in meaning evidenced by differences in language. See Mount Lemmon Fire Dist., 139 S.Ct. at 26 (declining the defendant's invitation to take language from one part of a sentence and then "reimpose it for the portion" of the sentence in which Congress omitted the same language); see also Dep't of Homeland Sec. v. MacLean, —— U.S. ——, 135 S.Ct. 913, 919, 190 L.Ed.2d 771 (2015) (explaining that "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another").

In the end, the plain language of § 4(a)(2) leaves room for only one interpretation: Congress authorized only employees to bring disparate impact claims.

Kleber urges a different conclusion in no small part on the basis of the Supreme Court's 1971 decision in Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, where the Court interpreted § 703(a)(2) of Title VII and held that disparate impact was a viable theory of liability. Indeed, Kleber goes so far as to say Griggs—a case where the

Court considered language in Title VII that at the time paralleled the language we consider here—controls and mandates a decision in his favor. We disagree.

A commonsense observation is warranted at the outset. If Kleber is right that Griggs, a Title VII case, compels the conclusion that § 4(a)(2) of the ADEA authorizes outside job applicants to bring a disparate impact claim, we find it very difficult to explain why it took the Supreme Court 34 years to resolve whether anyone—employee or applicant—could sue on a disparate impact theory under the ADEA, as it did in Smith v. City of Jackson, 544 U.S. 228, 125 S.Ct. 1536, 161 L.Ed.2d 410 (2005). There was no need for the Court to decide Smith if (all or part of) the answer came in Griggs. And when the Court did decide Smith the Justices' separate opinions recognized the imperative of showing impact to an individual's "status as an employee" when discerning the reach of § 4(a)(2). See id. at 235–36, 236 n.6, 125 S.Ct. 1536 (plurality opinion); see id. at 266, 125 S.Ct. 1536 (O'Connor, J., concurring, joined by Kennedy & Thomas, JJ.).

Kleber's position fares no better within the four corners of Griggs itself. Several African-American employees of Duke Power challenged the company's practice of conditioning certain job transfers and promotions on graduating from high school and passing a standardized aptitude test. See 401 U.S. at 426, 91 S.Ct. 849. The employees sued under § 703(a) of Title VII, a provision that in 1971 mirrored the present language of § 4(a)(2) of the ADEA. See id. at 426 n.1, 91 S.Ct. 849. The Court held that § 703(a)(2) prohibits disparate impact discrimination by proscribing "practices that are fair in form, but discriminatory in operation" unless an employer can show that the challenged practice is "related to job performance" and thus a "business necessity." Id. at 431, 91 S.Ct. 849.

Kleber would have us read Griggs beyond its facts by focusing on language in a couple of places in the Court's opinion that he sees as covering employees and applicants alike. We decline the invitation. Nowhere in Griggs did the Court state that its holding extended to job applicants. And that makes perfect sense because nothing about the case, brought as it was by employees of Duke Power and not outside applicants, required the Court to answer that question. The language that Kleber insists on reading in isolation must be read in context, and the totality of the Griggs opinion makes clear that the Court answered whether Duke Power's African-American employees could bring a claim for disparate impact liability based on practices that kept them from pursuing different, higher-paying jobs within the company.

What happened a year after Griggs cements our conclusion. In 1972, Congress amended § 703(a)(2) of Title VII—the provision at issue in Griggs—by adding language to expressly include "applicants for employment." Pub. L. No. 92-261, § 8(a), 86 Stat. 109 (1972). This amendment occurred in the immediate wake of Griggs and, in this way, reflected Congress's swift and clear desire to extend Title VII's disparate impact protection to job applicants. There was no need for Congress to amend § 703(a)(2) if the provision had always covered job applicants and especially if the Supreme Court had just said so in Griggs. To conclude otherwise renders the 1972 amendment a meaningless act of the 92nd Congress, and we are reluctant to conclude that substantive changes to statutes reflect idle acts.
The Supreme Court endorsed this precise course of analysis—giving effect to "Congress's decision to amend Title VII's relevant provisions but not make similar changes to the ADEA"—in Gross v. FBL Financial Servs., Inc., 557 U.S. 167, 174, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009). The Court there considered whether a plaintiff suing under § 4(a)(1) of the ADEA must establish that age was the but-for cause of an employer's adverse action. See id. at 173, 129 S.Ct. 2343. The plaintiff urged the Court to adopt Title VII's lesser standard of race being only a motivating factor in the challenged decision. See id. Paramount to the Court's conclusion that an ADEA plaintiff must prove but-for causation were textual differences between the ADEA and Title VII brought about by Congress's amendments to Title VII. See id. at 174, 129 S.Ct. 2343 (explaining that "Congress neglected to add such a [motivating-factor] provision to the ADEA when it amended Title VII [in 1991]" and emphasizing that "[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally"). The Court's instruction was clear: prior decisions interpreting Title VII "do not control our construction of the ADEA" where the text of the two statutes are "materially different." Id. at 173, 129 S.Ct. 2343.

And so it is here. Congress's choice to add "applicants" to § 703(a)(2) of Title VII but not to amend § 4(a)(2) of the ADEA in the same way is meaningful. Gross teaches that we cannot ignore such differences in language between the two enactments. And, at the risk of understatement, Gross is far from an aberration in statutory construction. A mountain of precedent supports giving effect to statutory amendments. See, e.g., United States v. Quality Stores, Inc., 572 U.S. 141, 148, 134 S.Ct. 1395, 188 L.Ed.2d 413 (2014) (quoting Stone v. INS, 514 U.S. 386, 397, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995)) ("When Congress acts to amend a statute, we presume it intends its

amendment to have real and substantial effect."); Fidelity Fin. Servs., Inc. v. Fink, 522 U.S. 211, 220–21, 118 S.Ct. 651, 139 L.Ed.2d 571 (1998) (explaining that after Congress modified the federal statute controlling when a transfer of a security interest was perfected, "we see no basis to say that subsequent amendments removing references to state-law options had the counterintuitive effect of deferring to such [state law] options" without unwinding the statutory amendments); United States v. Wells, 519 U.S. 482, 492–93, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997) (explaining that after Congress amended the federal criminal statute pertinent to false representations to remove any express reference to materiality, "the most likely inference in these circumstances is that Congress deliberately dropped the term 'materiality' without intending materiality to be an element of [18 U.S.C.] § 1014"); Stone, 514 U.S. at 397–98, 115 S.Ct. 1537 (explaining that after Congress amended the Immigration and Naturalization Act, "[t]he reasonable construction [was] that the amendment was enacted as an exception, not just to state an already existing rule").

In no way does this analysis downplay Griggs, as our dissenting colleagues contend. We have approached Griggs as binding precedent and construed its holding not only by reading what the Supreme Court's opinion says (and does not say), but also in light of Congress's immediately amending Title VII (but not § 4(a)(2) of the ADEA) to cover "applicants" as well as the broader development in the law ever since, including with precedents like Smith in 2005 and Gross in 2009.

The upshot is clear: while Congress amended § 703(a)(2) of Title VII in 1972 to cover "applicants for employment," it has never followed suit and modified § 4(a)(2) of the ADEA in the same way. And this is so despite Congress's demonstrating, just a few years after Griggs, that it knew how to amend the ADEA to expressly include outside job applicants. See Villarreal, 839 F.3d at 979–80 (Rosenbaum, J., concurring) (observing that Congress amended the ADEA in 1974 to extend the statute's reach to federal-government employment, and in doing so, explicitly referenced both "employees and applicants for employment" in the new provision, 29 U.S.C. § 633a). Today, then, § 703(a)(2) of Title VII differs from § 4(a)(2) in at least one material respect: the protections of the former extend expressly to "applicants for employment," while the latter covers only individuals with "status as an employee." We underscored this exact difference 14 years ago in our opinion in Francis W. Parker, and we do so again today. See 41 F.3d at 1077 ("The 'mirror' provision in the ADEA omits from its coverage, 'applicants for employment.' "). The plain language of § 4(a)(2) controls and compels judgment in CareFusion's favor.

Beyond his reliance on Griggs, Kleber invites us to read the ADEA against the backdrop of Congress's clear purpose of broadly prohibiting age discrimination. On this score, he points us to the Supreme Court's decision in Robinson v. Shell Oil Company, 519 U.S. 337, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) and to the report of the former Secretary of the Department of Labor, Willard Wirtz.

In Robinson, the Court held that § 704(a) of Title VII extended not just to "employees" (a term used in § 704(a)), but also to former employees. See id. at 346, 117 S.Ct. 843. The Court emphasized that, while the meaning of "employees" was ambiguous, Title VII's broader structure made plain that Congress intended the term to cover former employees, a construction that furthered Title VII's broader purposes. None of this helps Kleber. (Indeed, if anything, Robinson's clear observation of the distinct and separate meaning of "employees" and "applicants for employment" in § 704(a) severely undermines Kleber's textual argument. See id. at 344, 117 S.Ct. 843.) Robinson, in short, provides direction on how courts—if confronted with statutory ambiguity—should resolve such ambiguity. There being no ambiguity in the meaning of § 4(a)(2) of the ADEA, our role ends—an outcome on all fours with Robinson.

The Wirtz Report reflected the Labor Department's response to Congress's request for recommended age discrimination legislation, and a plurality of the Supreme Court in Smith treated the Report as an authoritative signal of Congress's intent when enacting the ADEA. See Smith, 544 U.S. at 238, 125 S.Ct. 1536. We do too. Nobody disputes that the Wirtz Report reinforces Congress's clear aim of enacting the ADEA to prevent age discrimination in the workplace by encouraging the employment of older persons, including older job applicants. But we decline to resolve the question presented here on the basis of broad statutory purposes or, more specifically, to force an interpretation of but one provision of the ADEA (here, § 4(a)(2)) to advance the enactment's full objectives.

Our responsibility is to interpret § 4(a)(2) as it stands in the U.S. Code and to ask whether the provision covers outside job applicants. We cannot say it does and remain faithful to the provision's plain meaning. It remains the

province of Congress to choose where to draw legislative lines and to mark those lines with language. Our holding gives effect to the plain limits embodied in the text of § 4(a)(2).

The ADEA, moreover, is a wide-ranging statutory scheme, made up of many provisions beyond § 4(a)(2). And a broader look at the statute shows that outside job applicants have other provisions at their disposal to respond to age discrimination. Section 4(a)(1), for example, prevents an employer from disparately treating both job applicants and employees on the basis of age. See 29 U.S.C. § 623(a)(1). Section 4(c)(2), prevents a labor organization's potential age discrimination against both job applicants and employees. See 29 U.S.C. § 623(c)(2).

Today's decision, while unfavorable to Kleber, leaves teeth in § 4(a)(2). The provision protects older employees who encounter age-based disparate impact discrimination in the workplace. And Congress, of course, remains free to do what the judiciary cannot—extend § 4(a)(2) to outside job applicants, as it did in amending Title VII.
For these reasons, we AFFIRM.

Add at end of page 522 in Chapter 9 of EDEL, and end of page 464 in Chapter 8 of ED:

RICHARDSON v. CHICAGO TRANSIT AUTHORITY
926 F.3d 881 (7th Cir. 2019)

Flaum, Circuit Judge.

Mark Richardson, a former Chicago Transit Authority ("CTA") bus operator, alleged CTA took adverse action against him because of his extreme obesity in violation of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101–12213, as amended by the ADA Amendments Act of 2008 ("ADAAA"), Pub. L. No. 110-325, 122 Stat. 3553. The district court disagreed. It held extreme obesity only qualifies as a disability under the ADA if it is caused by an underlying physiological disorder or condition, and granted CTA's motion for summary judgment because Richardson offered no such evidence. Richardson appeals this holding, as well as the district court's decision to tax costs against him. We affirm.

I. Background

Mark Richardson began working for CTA in 1993 as a temporary bus operator, and he worked as a full-time operator from August 1999 until February 2012. According to a CTA doctor, Richardson weighed 350 pounds in January 2005. And another CTA doctor indicated Richardson weighed 566 pounds in May 2009. Based on his Body Mass Index (a standardized weight-to-height ratio used to determine whether an individual is underweight, within the normal weight range, overweight, or obese) Richardson has "extreme" obesity whenever he weighs over 315 pounds. He also suffers from hypertension and sleep apnea.

Beginning in early February 2010, Richardson was absent from work because he had the flu. He attempted to return to work on February 19, but Advanced Occupational Medicine Services ("AOMS")—CTA's third-party medical provider—documented that Richardson had uncontrolled hypertension and influenza, weighed over 400 pounds, and could not return to work until he controlled his blood pressure. For that reason, on April 9, CTA's Disability Review Committee transferred Richardson to Temporary Medical Disability–Area 605 ("Area 605"). CTA administrative procedures define Area 605 as a "budgetary assignment for eligible union employees who have been found medically unfit to perform the essential functions of their job classification due to an illness or injury."

On September 13, 2010, AOMS examined Richardson's fitness to return to work. It found Richardson "physically fit to work as a bus operator," but indicated Richardson "must be cleared by safety prior to operating [a] bus." CTA requires AOMS to report if a bus operator returning from extended leave weighs over 400 pounds because CTA bus seats are not designed to accommodate drivers weighing over 400 pounds. Weighing over this maximum does not, however, automatically disqualify employees from working as bus operators. CTA permits such employees to operate buses if the safety department finds they can safely perform their job. To make this determination, CTA administers a "special assessment," a driving performance test used to determine whether bus operators can perform all standard operating procedures on six types of CTA buses.

On September 16, 2010, Richardson completed a special assessment. CTA's Acting Manager of Bus Instruction, Marie Stewart, assigned Bus Instructors John Durnell and Elon McElroy to administer the test. During the assessment, Durnell and McElroy joked about Richardson's weight. Durnell testified he was just trying "to lighten up the situation," and asserted that in response, Richardson "started laughing and he started to relax." Nevertheless, McElroy reported Durnell's comments to Stewart, and Stewart reprimanded Durnell for unprofessionalism.

Following the assessment, Durnell and McElroy each completed a report. While Durnell concluded Richardson "can drive all of CTA's buses in a safe and trusted manner," both instructors noted several safety concerns: Richardson cross-pedaled, meaning his foot was on the gas and brake at the same time; Richardson was unable to make hand-over-hand turns; Richardson's leg rested close to the door handle; Richardson could not see the floor of the bus from his seat; part of Richardson's body hung off the driver's seat; and the seat deflated when Richardson sat.

Additionally, both instructors noted Richardson wore a seatbelt extender, wrote that Richardson was "sweating heavily" and needed to lean onto the bus for balance, and Durnell commented on a "hygiene problem." At his deposition, McElroy testified that as a "former heart patient," he was worried Richardson's "sweating [could] lead to an episode."

Stewart drafted a memorandum to CTA's Vice President of Bus Operations, Earl Swopes, concluding that "[b]ased on the Bus Instructors[']' observations and findings, the limited space in the driver's area and the manufacturer requirements, it would be unsafe for Bus Operator Richardson to operate any CTA bus at this time." She specifically referenced the safety concerns listed above. Moreover, Stewart wrote that "[t]he maximum allowable weight per the manufacturer requirements for CTA buses is 400 pounds," and "[i]t has been represented that Operator Richardson is over that weight maximum." Because Richardson failed the assessment and could not adhere to all CTA operating procedures, Swopes determined that Richardson could not safely operate CTA buses. Swopes testified he based this decision solely on Stewart's memorandum, without any independent investigation.

Instead of immediately terminating Richardson's employment, CTA proposed a written agreement: CTA would transfer Richardson back to Area 605 so he could work with doctors to lose weight and be subject to periodic monitoring; in exchange, Richardson would release his ability to bring various causes of action. Richardson refused. In March 2011, CTA nonetheless transferred Richardson to Area 605; the accompanying form provides as a rationale that Richardson "exceeded the weight requirement to operate the bus." In October 2011, CTA informed Richardson that he was approaching two years of inactive status, and per CTA policy, he could extend his time in Area 605 by one year by submitting medical documentation. Richardson did not submit documentation, and in February 2012, CTA terminated his employment.

On December 15, 2015, the Equal Employment Opportunity Commission ("EEOC") issued Richardson a right-to-sue letter, and on March 10, 2016, Richardson brought the operative complaint against CTA, alleging it violated the ADA by "refus[ing] to allow [him] to return to work because it regarded him as being too obese to work as a bus operator." On October 17, 2016, the district court denied CTA's motion to dismiss, ruling that "[e]ven if [Richardson] is ultimately required to prove that his obesity was caused by a physiological disorder, he is not required to allege the same." On April 20, 2017, Richardson and CTA filed cross-motions for summary judgment, and on November 13, 2017, the district court denied Richardson's motion and granted CTA's motion. It held, based on the language of the ADA and the pertinent EEOC regulation and interpretive guidance, that "to qualify as a protected physical impairment, claimants under the ADA must show that their severe obesity is caused by an underlying physiological disorder or condition." Because Richardson presented no such evidence, the district court entered judgment in CTA's favor.

On December 7, 2017, CTA filed its bill of costs, seeking to recover $ 7,333.56 in deposition and copying costs as the prevailing party pursuant to Federal Rule of Civil Procedure 54(d)(1). Richardson argued costs should not be taxed because of his inability to pay, or alternatively, CTA's costs should be reduced because transcript delivery fees are not recoverable and the transcript costs CTA sought were over the rate allowed by local rules. On May 1, 2018, the district court issued a minute order taxing $ 2,067.26 in costs. It denied copying costs because the documents were available on the electronic docket, and it reduced deposition transcript costs.

Richardson separately appealed the district court's grant of CTA's motion for summary judgment and decision to tax costs. We consolidated the appeals for resolution.

II. Discussion

A. The ADA and Obesity

We review cross-motions for summary judgment de novo, "construing all facts and drawing all reasonable inferences in favor of the party against whom the motion under consideration was filed." Hess v. Bd. of Trs. of S. Ill. Univ., 839 F.3d 668, 673 (7th Cir. 2016). Here, we consider only CTA's motion for summary judgment, so we draw all facts in favor of Richardson. Summary judgment is proper "where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." Id. (citing Fed. R. Civ. P. 56(a)).

The ADA prohibits employers from "discriminat[ing] against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). To succeed on an ADA claim, an employee must show: "(1) he is disabled; (2) he is otherwise qualified to perform the essential functions of the job with or without reasonable accommodation; and (3) the adverse job action was caused by his disability." Roberts v. City of Chicago, 817 F.3d 561, 565 (7th Cir. 2016).

The ADA defines disability as: "(A) a physical or mental impairment that substantially limits one or more major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1). Richardson focuses his claim on the "regarded as" prong. To succeed, he must establish he was subject to a prohibited employment action "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." Id. § 12102(3)(A). At issue here, then, is whether Richardson can demonstrate either: (1) his extreme obesity is an actual impairment; or (2) CTA perceived his extreme obesity to be an impairment.

1. Actual Impairment

Congress has not defined "impairment." In a regulation implementing the ADA, however, the EEOC defined "physical impairment" as: "Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine." 29 C.F.R. § 1630.2(h)(1). EEOC regulations interpreting the ADA are entitled to deference under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., unless they are "arbitrary, capricious, or manifestly contrary to the statute." 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); see Sutton v. United Air Lines, Inc., 130 F.3d 893, 899 n.3 (10th Cir. 1997).

Richardson and CTA disagree about whether his extreme obesity—even without evidence of an underlying physiological condition—meets the definition of physical impairment and is thus an actionable disability for ADA purposes. This is an issue of first impression for this Circuit. However, three of our sister circuits have considered the question; each has held, based on the language of 29 C.F.R. § 1630.2(h)(1), that obesity is an ADA impairment only if it is the result of an underlying "physiological disorder or condition." See Morriss v. BNSF Ry. Co., 817 F.3d 1104, 1108–13 (8th Cir.), cert. denied, —— U.S. ——, 137 S. Ct. 256, 196 L.Ed.2d 136 (2016); EEOC v. Watkins Motor Lines, Inc., 463 F.3d 436, 441–43 (6th Cir. 2006); Francis v. City of Meriden, 129 F.3d 281, 286–87 (2d Cir. 1997).1 The majority of district courts have also expressed this view. In contrast, only a small number of district courts have held extreme obesity is an ADA impairment even without evidence of a physiological cause. See, e.g., Velez v. Cloghan Concepts, LLC, No. 18-cv-1901, 2019 WL 2423145, at *4 (S.D. Cal. June 10, 2019); Velez v. II Fornanio (Am.) Corp., No. 18-cv-1840, 2018 WL 6446169, at *2–4 (S.D. Cal. Dec. 10, 2018); McCollum v. Livingston, No. 14-cv-3253, 2017 WL 608665, at *35 (S.D. Tex. Feb. 3, 2017); EEOC v. Res. for Human Dev., Inc., 827 F. Supp. 2d 688, 693–95 (E.D. La. 2011); Lowe v. Am. Eurocopter, LLC, No. 10-cv-24, 2010 WL 5232523, at *7–8 (N.D. Miss. Dec. 16, 2010).3 We join the Second, Sixth, and Eighth Circuits. Without evidence that Richardson's extreme obesity was caused by a physiological disorder or condition, his obesity is not a physical impairment under the plain language of the EEOC regulation.

In his arguments to the contrary, Richardson focuses first on the ADAAA. Congress passed these amendments in 2008 to ensure that the ADA's "definition of disability ... be construed in favor of broad coverage." 42 U.S.C. § 12102(4)(A). Congress emphasized "that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations," while "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." ADAAA § 2(b)(5), 122 Stat. at 3554.

Specifically, Congress sought to broaden the scope of the "being regarded as having such an impairment" definition of disability. Id. § 2(b)(3); see Miller v. Ill. Dep't of Transp., 643 F.3d 190, 196 (7th Cir. 2011) ("[T]he 'regarded as' prong is an important protection that should not be nullified by creating an impossibly high standard of proof, as Congress indicated even more strongly in the 2008 amendments."). It rejected the Supreme Court's decision in Sutton v. United Air Lines, Inc., 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999), which held that to be

regarded as disabled, an employee's disability must substantially limit a major life activity. See id. at 490, 119 S.Ct. 2139 ("An employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity."). Therefore, Congress amended the ADA to make clear an individual can be "regarded as" having an impairment "whether or not the impairment limits or is perceived to limit a major life activity," 42 U.S.C. § 12102(3)(A), and the EEOC adopted regulations to the same effect. See 29 C.F.R. § 1630.2(j)(2) ("Whether an individual's impairment 'substantially limits' a major life activity is not relevant to coverage under ... the 'regarded as' prong."); id. § 1630.2(l)(1).

Additionally, Congress relaxed court-imposed rules as to how severe an impairment must be to be considered a disability. It sought to abrogate the Supreme Court's decisions in Sutton and Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002), because the Court's definition of "substantially limits a major life activity" in those cases "created an inappropriately high level of limitation necessary to obtain coverage under the ADA" by requiring that employees have an impairment that "severely restrict[ed]" a major life activity. ADAAA § 2(b)(2)–(5), 122 Stat. at 3554.4 It found that EEOC regulations "defining the term 'substantially limits' as 'significantly restricted' [were] inconsistent with congressional intent[ ] by expressing too high a standard," and expressed its "expectation" that the EEOC would revise its regulations. Id. § 2(a)(8), (b)(6). The EEOC adhered to this directive. See 29 C.F.R. § 1630.2(j)(1)(ii) *889 ("An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting."); id. § 1630.2(i)(2) ("[T]he term 'major' shall not be interpreted strictly to create a demanding standard for disability.").

Richardson contends that after the ADAAA, courts must broadly construe impairment to encompass extreme obesity, even without evidence of an underlying physiological condition. Cf. EEOC v. BNSF Ry. Co., 902 F.3d 916, 923 (9th Cir. 2018) ("impairment" should be interpreted "broadly" after the ADAAA). We disagree. While Congress criticized the Supreme Court's understanding of "substantially limits a major life activity" at length, it said nothing about judicial interpretation of impairment. See Morriss, 817 F.3d at 1111. Likewise, while Congress instructed the EEOC to alter its definitions of "substantially limits" and "major life activity," it made no such instruction with respect to the EEOC's definition of impairment. See id. Indeed, the ADAAA's legislative history explicitly states that Congress "expect[ed] that the currently regulatory definition of [physical or mental impairment], as promulgated by agencies such as the [EEOC] ... [would] not change." Statement of the Managers to Accompany S. 3406, The Americans with Disabilities Act Amendments Act of 2008, 154 Cong. Rec. S8342-01, S8345 (Sept. 11, 2008). The EEOC therefore did not modify its regulation defining impairment, and even after the ADAAA, the definition of physical impairment remains inextricably tied to a "physiological disorder or condition." 29 C.F.R. § 1630.2(h)(1); see Morriss, 817 F.3d at 1111 ("The ADAAA's general policy statement cannot trump this plain language.").

Next, Richardson insists that we must interpret the EEOC's definition of physical impairment in light of EEOC interpretive guidance. That guidance, which interprets both the ADA and the EEOC regulation, states:
It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural, and economic characteristics that are not impairments. The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within "normal" range and are not the result of a physiological disorder. 29 C.F.R. pt. 1630, app. § 1630.2(h). While EEOC interpretive guidance is "not entitled to full Chevron deference," it does "reflect a body of experience and informed judgment to which courts and litigants may properly resort for guidance" and is therefore "entitled to a measure of respect under the less deferential Skidmore [v. Swift & Co., 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944)] standard." Fed. Express Corp. v. Holowecki, 552 U.S. 389, 399, 128 S.Ct. 1147, 170 L.Ed.2d 10 (2008) (citations and internal quotation marks omitted); see Gile v. United Airlines, Inc., 95 F.3d 492, 497 (7th Cir. 1996).

According to Richardson, this EEOC guidance specifies that "impairment does not include the physical characteristic of weight if both of the following elements are present: (1) the weight [is] within the normal range; and (2) the weight is not the result of a physiological disorder." The Montana Supreme Court adopted this interpretation. BNSF Ry. Co. v. Feit, 365 Mont. 359, 281 P.3d 225, 229 (2012). So did at least three district courts. See Velez, 2019 WL 2423145, at *4; Velez, 2018 WL 6446169, at *4; Res. for Human Dev., 827 F. Supp. 2d at 694. Removing the negatives, Richardson posits that "[i]mpairment does include the physical characteristic of weight if either of the following elements *890 are true: (1) the weight is not within the normal range; or (2) the weight is the result of a physiological disorder."

Like the Eighth Circuit, we do not find this reading of the interpretive guidance persuasive. Rather, "a more natural reading of the interpretive guidance is that an individual's weight is generally a physical characteristic that qualifies as a physical impairment only if it falls outside the normal range and it occurs as the result of a physiological disorder." Morriss, 817 F.3d at 1108. As the Eighth Circuit reasoned, "reading ... the EEOC interpretive guidance in its entirety supports this conclusion" because, for example, "the interpretive guidance also provides that '[o]ther conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments.' " Id. at 1108–09 (alteration in original) (quoting 29 C.F.R. pt. 1630, app. § 1630.2(h)).

Moreover, Richardson's preferred interpretation is overbroad. If we were to read the EEOC interpretive guidance in the way he suggests, even an employee with normal weight could claim a weight-based physical impairment if his weight was the result of a physiological disorder. Likewise, any employee whose weight—or other physical characteristic—is even slightly outside the "normal range" would have a physical impairment even with no underlying physiological cause. Such results are inconsistent with the ADA's text and purpose and must be rejected. Otherwise, "the 'regarded as' prong ... would become a catch-all cause of action for discrimination based on appearance, size, and any number of other things far removed from the reasons the [ADA] [was] passed." Watkins, 463 F.3d at 443 (quoting Francis, 129 F.3d at 287).

In any event, even if this interpretive guidance means what Richardson says it means, we do not defer to EEOC guidance that is contrary to the text of the regulation it purports to interpret. See Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155, 132 S.Ct. 2156, 183 L.Ed.2d 153 (2012) ("Deference is undoubtedly inappropriate ... when the agency's interpretation is 'plainly erroneous or inconsistent with the regulation.' " (quoting Auer v. Robbins, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997))). The EEOC defines physical impairment as a "physiological disorder or condition." 29 C.F.R. § 1630.2(h)(1). It is directly contrary to that definition to consider a physical characteristic such as weight, even if outside the "normal range," a physical impairment absent evidence of an underlying physiological condition.

Patient and scientific professional organizations, as amici curiae, make a somewhat related, but distinct argument. They insist that because both the medical community and federal and state policymakers understand obesity as a disease, obesity is in and of itself a physiological disorder and therefore a physical impairment within the definition of the ADA. This argument is not persuasive. The ADA is an antidiscrimination—not a public health—statute, and Congress's desires as it relates to the ADA do not necessarily align with those of the medical community. Moreover, amici's argument proves too much; if we agreed that obesity is itself a physiological disorder, then all obesity would be an ADA impairment. While Richardson does not ask us to hold that all obese individuals—found to be as high as 39.8% of the American adult population—automatically have an ADA impairment, adopting amici's position leads to this unavoidable, nonrealistic result.

At bottom, Richardson does not present any evidence suggesting an underlying physiological disorder or condition caused his extreme obesity. Without such evidence, we cannot call Richardson's extreme obesity a physical impairment within the meaning of the ADA and the EEOC regulation. See Morriss, 817 F.3d at 1112; Watkins, 463 F.3d at 443.10

2. Perceived Impairment

Alternatively, Richardson argues that even if we hold extreme obesity is not itself an impairment, he is still disabled under the ADA because CTA perceived his obesity to be a physical impairment. See 42 U.S.C. § 12102(3)(A). To succeed on this claim, Richardson must show CTA took adverse action against him based on the belief that his condition was an impairment—as the ADA defines that term—not merely based on knowledge of Richardson's physical characteristic. See Morriss, 817 F.3d at 1113 ("[A]s a threshold matter, [the employee] was required to show that [the employer] perceived his obesity to be a condition that met the definition of 'physical impairment.' "); Francis, 129 F.3d at 285 ("[T]he plaintiff must allege that the employer believed, however erroneously, that the plaintiff suffered from an 'impairment' that, if it truly existed, would be covered under the [ADA] ...."). In other words, Richardson must present sufficient evidence to permit a reasonable jury to infer that CTA perceived his extreme obesity was caused by an underlying physiological disorder or condition.

Richardson did not make this showing. To be sure, Richardson introduced evidence that CTA took adverse action against him based on his excessive weight. For example, CTA transferred Richardson to Area 605 because he exceeded the weight specifications for CTA buses. Additionally, CTA required Richardson to take a special assessment because he weighed over 400 pounds, not because of any violation of CTA standard operating procedures. And in Stewart's memorandum to Swopes summarizing the results of the special assessment, she highlighted safety concerns directly related to Richardson's weight: he could not perform hand-over-hand turning, he cross-pedaled, he had difficulty getting in and out of the driver's seat, his body hung off the seat, his leg was close to the door handle, and he exceeded the 400-pound maximum per CTA bus manufacturer requirements. But there is no evidence Stewart, Swopes, or anyone else at CTA believed Richardson's excessive weight was caused by a physiological disorder or condition. To the contrary, the evidence suggests CTA perceived Richardson's weight as a physical characteristic that made it unsafe for him to drive. These facts do not permit a finding that CTA regarded Richardson as disabled for purposes of ADA liability. See Francis, 129 F.3d at 287 (no liability where plaintiff "alleges only that [defendant] regarded him as disabled because it disciplined him for failing to meet a weight standard applied to all of its employees," and not "because it perceived him as suffering from a physiological weight-related disorder").

Richardson cites to the First Circuit's opinion in Cook v. State of Rhode Island, Department of Mental Health, Retardation, & Hospitals, 10 F.3d 17 (1st Cir. 1993), and suggests that the court held a jury could find an employer perceived an employee's extreme obesity as a physical impairment merely because the employer "stated concerns about the plaintiff's ability to perform her job duties." Richardson reads Cook too broadly. In Cook, the court affirmed a jury verdict in favor of the plaintiff under the identical "perceived disability" provision of the Rehabilitation Act. Id. at 23. The court explained that a jury could have found the defendant treated the plaintiff "as if she had a physical impairment" because the evidence "show[ed] conclusively that [the defendant] treated plaintiff's obesity as if it actually affected her musculoskeletal and cardiovascular systems." Id. Critically, the court emphasized that the plaintiff presented "expert testimony that morbid obesity is a physiological disorder." Id. Here, by contrast, Richardson presented no such evidence. The district court thus properly held that CTA could not have perceived Richardson as having a physical impairment within the ADA's definition.

B. Costs

"Unless a federal statute, [the Federal Rules of Civil Procedure], or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." Fed. R. Civ. P. 54(d)(1). "There is a presumption that the prevailing party will recover costs, and the losing party bears the burden of an affirmative showing that taxed costs are not appropriate." Beamon v. Marshall & Ilsley Tr. Co., 411 F.3d 854, 864 (7th Cir. 2005). This presumption "is difficult to overcome" and therefore, "the district court's discretion is narrowly confined—the court must award costs unless it states good reasons for denying them." Weeks v. Samsung Heavy Indus. Co., 126 F.3d 926, 945 (7th Cir. 1997). We reverse a district court's decision to award costs only after "a showing of clear abuse of discretion." Id.

We have held that "it is 'within the discretion of the district court to consider a plaintiff's indigency' " when taxing costs against him. Rivera v. City of Chicago, 469 F.3d 631, 634 (7th Cir. 2006) (quoting Badillo v. Cent. Steel & Wire Co., 717 F.2d 1160, 1165 (7th Cir. 1983)). To deny costs based on indigency, the court must first "make a threshold factual finding that the losing party is 'incapable of paying the court-imposed costs at this time or in the future.' " Id. at 635 (quoting McGill v. Faulkner, 18 F.3d 456, 459 (7th Cir. 1994)). "The burden is on the losing party to provide the district court with sufficient documentation to support such a finding." Id. (internal quotation marks and citation omitted).

Richardson argues the district court abused its discretion because it "completely failed to consider or address [his] arguments and the evidence he submitted demonstrating his inability to pay the costs awarded at this time or in the future." We disagree. To be sure, "district judges [must] provide at least a modicum of explanation when entering an award of costs." Cengr v. Fusibond Piping Sys., Inc., 135 F.3d 445, 454 (7th Cir. 1998). Here however, the court provided an explanation. It made clear that CTA was entitled to costs as the prevailing party, and it provided an accounting of how it calculated costs at $ 2,067.26 (significantly less than CTA's initial $ 7,333.56 request). True, the district court did not mention Richardson's claim that he was indigent, but the indigence exception "is a narrow one" and "is not a blanket excuse for paying costs." Rivera, 469 F.3d at 635–36. While we have held that a district court abuses its discretion when it denies costs without explanation on the basis of indigence, see id. at 636–37,

Richardson does not cite any case holding a district court abuses its discretion when it grants costs, with an explanation, but does not explicitly consider the plaintiff's indigence. It was thus not unreasonable for the district court to tax $ 2,067.26 in costs.

III. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court.

Add at end of page 560 in Chapter 9 of EDEL, and end of page 502 in Chapter 8 of ED:

WEAVING v. CITY OF HILLSBORO
763 F.3d 1106 (9th Cir. 2014)

W. FLETCHER, Circuit Judge:

We must decide whether, consistent with the Americans with Disabilities Act ("ADA"), an employer properly terminated an employee who had recurring interpersonal problems with his colleagues that were attributable to attention deficit hyperactivity disorder ("ADHD"). Plaintiff Matthew Weaving worked for the Hillsboro Police Department ("HPD") in Oregon from 2006 to 2009. HPD terminated Weaving's employment in 2009 following severe interpersonal problems between Weaving and other HPD employees. Weaving contends that these interpersonal problems resulted from his ADHD. After his discharge, Weaving brought suit under the ADA. He contended that he was disabled because his ADHD substantially limited his ability to engage in two major life activities: working and interacting with others. He claimed that HPD had discharged him because of his disabilities in violation of the ADA.

The jury returned a general verdict for Weaving, finding that he was disabled and that the City of Hillsboro ("the City") had discharged him because of his disability. The City moved for judgment as a matter of law. It also moved for a new trial on the ground of improper jury instructions. The district court denied both motions, and the City appealed.

We reverse. We hold as a matter of law that the jury could not have found that ADHD substantially limited Weaving's ability to work or to interact with others within the meaning of the ADA.

I. Background

The evidence presented at trial showed the following. In 1973, Weaving, then six years old, was diagnosed with "hyperkinetic activity," known today as ADHD. His pediatrician prescribed medication. Weaving stopped taking medication at age twelve because, as his mother explained to him, he seemed to have outgrown the symptoms of ADHD. He continued, however, to experience interpersonal problems throughout childhood and adolescence.

Weaving joined the Beaverton Police Department ("BPD") in Oregon as a police officer in July 1995. During the application process, he passed a battery of tests, including psychological and medical evaluations. Because he believed ADHD no longer affected him, Weaving did not disclose or discuss his childhood diagnosis and medication. Weaving's evaluations during his employment at BPD described him as "[a]loof, abrasive, too outspoken at inappropriate times," "forcefully outspoken," "disgruntled," and "intimidating," but also stated that he "works well with co-workers" and was "friendly, helpful and hard working." Some of his supervisors noted that he "[h]ad difficulty working in a team environment."

In 2001, while employed by BPD, Weaving became a narcotics detective on an interagency team. He was removed from the team less than a year later because of "personality conflicts" with another officer. Weaving filed a grievance and was put back on the team in 2003. While still employed by BPD, due to ongoing difficulties with colleagues Weaving left the interagency narcotics team to join an FBI task force. Weaving later learned that an FBI agent had complained to BPD about "communication issues" with him. The agent had written a letter to the BPD Police Chief

stating that Weaving was "[f]requently critical and vocal about his fellow investigators" and that he had an "overly aggressive style."

Weaving was hired by HPD in 2006. During the application process, Weaving disclosed what he described as the "intermittent interpersonal communication issues" he experienced at BPD. HPD offered Weaving provisional employment, contingent upon passing a psychological evaluation. Weaving disclosed his childhood history of ADHD but did not believe at that time that ADHD continued to affect him.

Weaving's first-year evaluation at HPD was generally positive. His supervisor, Lt. Jim Kelly, praised his experience and knowledge. Lt. Kelly wrote that he had seen Weaving conduct all his investigations in a "thorough, professional, and conscientious manner." He wrote that Weaving "maintains pos[i]tive and respectful relationships with his teammates, his supervisors, and the community." Lt. Kelly noted that "[a] few members of the Department have the misconception that Weaving is arrogant," but that neither he nor members of Weaving's patrol team had found this to be the case.

Weaving applied for a promotion to sergeant in 2007. The application process included a "psychological leadership assessment," conducted by an off-site psychologist. Weaving did not mention ADHD during the application process because he believed he had outgrown it. The psychologist provided a six-page report in which he described Weaving as having a profile similar to individuals who "tend to be dominant in interpersonal relationships." He described Weaving as "socially interactive" and engaging in "cooperative and outgoing" relationships with others. He observed that Weaving "projects a comfortable social presence" and stated that Weaving "likely presents himself well in just about any type of social situation and is likely to participate with any social group." He described Weaving as "poised in his presentation and articulate in answering the scenarios."

Weaving was promoted to sergeant in April 2007. In his annual evaluation, covering the period from May 2007 through April 2008, Lt. Kelly wrote that Weaving's interactions with the public were professional and that he displayed empathy toward members of the public. Lt. Kelly wrote that Weaving's communication style ("[d]irectness") came across to officers as "arrogant" and inspired fear, but that he personally did not have difficulties with Weaving. Lt. Kelly wrote that Weaving was aware of his communication issues and seemed willing to try new approaches.

Weaving's interpersonal difficulties continued after Lt. Kelly's 2008 evaluation. One subordinate testified at trial that he found Weaving's responses to his questions "demeaning." Another subordinate testified that Weaving's responses to questions were "intimidating," making him "feel stupid and small." In May 2008, a fellow sergeant wrote an email to Weaving and two other officers complaining about the number of "unapproved reports" that had been waiting for him when he arrived for his shift on Sunday morning, and questioning an earlier shift's decision to tow two cars. Weaving replied in an email:

> Allow me to respond to your email that by the way is a "PUBLIC RECORD";
>
> ....
>
> I'll respond to the second part of your inquisitive email [the part about the two cars] with a metaphorical analogy. Envision a swimming pool with a deep end and a shallow end separated by a floating rope....
>
> There are many more potential hazards in the deep end and a person would be foolish to venture there without the technical expertise, stamina and initiative to keep from drowning. There are countless people who are good swimmers but still remain in the shallow end for fear of the potential danger the deep end harbors. Still, there are others who negligently and recklessly venture to the deep end without any technical proficiency and tragically drown. My recommendation to you is that you remain in the shallow end where you can splash around with the kids.
>
> What really upsets me about your inquiry is not the simple fact that you question my judgment and knowledge but the manner in which you have done so. If you have any desire to discuss this incident further or any other incident please do not do so in a public record email, come and find me any day of the week! I'm easy to locate, I'm in the deep end so bring your water wings!

In addition, Weaving referred to some HPD officers in a derogatory fashion, calling them "salad eaters," rather than "meat eaters" or "warriors," to imply that the officers were weak. He also criticized the language skills of a newly hired Latino officer who did not speak English as his first language.

In March 2009, Weaving issued a several-page disciplinary letter to a subordinate who had driven a marked police vehicle through a surveillance area. At the time of the incident, Weaving had verbally rebuked the officer over the open radio. The officer believed the letter was a disproportionate response to what he had done. He filed a grievance against Weaving with the City Human Resources Department. On April 7, 2009, the City placed Weaving on paid administrative leave pending investigation of the grievance.

Weaving testified that, while he was on leave, it occurred to him that some of his interpersonal difficulties at HPD might have been due to ADHD. He met with a mental health nurse practitioner who prescribed him a low dose of medication and referred him to Dr. Gary Monkarsh, a clinical psychologist. Dr. Monkarsh concluded that Weaving suffered from adult ADHD. Dr. Monkarsh testified at trial that people with ADHD "have a hard time understanding their emotions, the emotions of others, the ability to regulate one's emotions and the emotions of others, the ability to empathize with others." He also testified that someone with Weaving's characteristics "could be an excellent police officer."

On May 7, 2009, Dr. Monkarsh sent a letter to the HPD Police Chief stating that he had diagnosed Weaving as having ADHD. A day later, Weaving wrote to the City Human Resources director informing her of Dr. Monkarsh's diagnosis and attaching his letter to the Police Chief. He wrote:

> My Psychologist ... has advised me that he is confident that with sustained treatment I will eliminate communication issues that currently are being considered adverse to the work environment of the Hillsboro Police Department (HPD)....
>
> During my three years of service with HPD I have been told multiple times by several ranking members that my experience, leadership and knowledge are a tremendous asset. I'm excited about transforming an identified weak area into an area of strength and becoming an even greater asset to the City of Hillsboro. I look forward to receiving the positive support from the City that other HPD employees, who are afflicted with a mental disorder or an addiction, receive.

Weaving requested "all reasonable accommodations," including reinstatement to his position as an active-duty sergeant.

On June 16, 2009, Lt. Richard Goerling wrote a memorandum summarizing the findings of the investigation of the grievance against Weaving. The investigation, conducted while Weaving was on leave, included interviews of 28 HPD employees. Lt. Goerling concluded that Weaving had "creat[ed] and foster [ed] a hostile work environment for his subordinates and peers; in particular, he has been described in terms such as tyrannical, unapproachable, noncommunicative, belittling, demeaning, threatening, intimidating, arrogant and vindictive." He wrote, "In the short time Weaving has been employed at HPD, he has demonstrated time and again unacceptable interpersonal communication that suggests he does not possess adequate emotional intelligence to successfully work in a team environment, much less lead a team of police officers."

On Lt. Goerling's recommendation, the City conducted an independent medical evaluation and evaluated Weaving's fitness for duty. Two doctors found Weaving fit for duty despite his ADHD diagnosis. On November 24, 2009, the Deputy Chief of Police sent Weaving, through his attorney, a sixteen-page letter advising him of the City's intention to terminate his employment "unless you persuade me otherwise." The letter described in detail Weaving's interpersonal problems and their effect on HPD. After a hearing, the City terminated Weaving's employment effective December 11, 2009.

Weaving sued the City in federal district court under the ADA. He alleged that (1) the City fired him because he had an impairment that limited his ability to work or interact with others, and (2) the City fired him because it regarded him as disabled. The case was tried to a jury. The City moved for judgment as a matter of law at the close of Weaving's case-in-chief. The district court denied the motion. The City renewed its motion at the close of all evidence. The district court again denied the motion.

The district court instructed the jury that Weaving was disabled if he had a mental impairment that substantially limited one or more major life activities, including "interacting with others, working and communicating." It also instructed the jury, over the City's objection, that "[c]onduct resulting from a disability is part of the disability and not a separate basis for termination."

The jury returned a verdict for Weaving, finding him disabled under the ADA. It found that the City had terminated him because of his disability. The jury awarded Weaving $75,000 in damages. The district court awarded $232,143 in back pay, $330,807 in front pay, and $139,712 in attorney's fees. The district court refused Weaving's request for reinstatement because of "hostility and antagonism between" Weaving and HPD.

The City filed a renewed motion for judgment as matter of law based on insufficient evidence to support the verdict, as well as a motion for a new trial based on an allegedly erroneous jury instruction. The district court denied both motions. The City timely appealed.

We reverse the denial of the motion for judgment as a matter of law. We do not reach the denial of the motion for a new trial. * * *

III. Discussion * * *

Weaving contends that the evidence at trial shows that he is substantially limited in the major life activities of working and of interacting with others. We take these two activities in turn.

A. Working * * *

The 2008 amendments to the ADA relaxed the standard for determining whether a plaintiff is substantially limited in engaging in a major life activity, but Weaving cannot satisfy even the lower standard under current law. The record does not contain substantial evidence showing that Weaving was limited in his ability to work compared to "most people in the general population." *See* 29 C.F.R. § 1630.2(j)(1)(ii). On the contrary, there is evidence showing that Weaving was in many respects a skilled police officer. Dr. Monkarsh and Weaving both testified that Weaving had developed compensatory mechanisms that helped him overcome ADHD's impediments and succeed in his career. Weaving's supervisors recognized his knowledge and technical competence and selected him for high-level assignments. In 2007, before receiving any treatment for adult ADHD, he was promoted to sergeant. In 2009, a psychologist and a physician/psychiatrist both deemed Weaving fit for duty as a police officer.

The only evidence Weaving presents regarding ADHD's effects on his ability to work pertains to his interpersonal problems. He contends in his brief that "[t]he impairment of the major life activity of 'working' was derivative and resulted from the impairments of the major life activities of communication and interaction with others." We discuss in a moment the lack of evidence showing a substantial impairment of Weaving's ability to interact with others. Given the absence of evidence that Weaving's ADHD affected his ability to work, and in light of the strong evidence of Weaving's technical competence as a police officer, a jury could not reasonably have concluded that Weaving's ADHD substantially limited his ability to work.

B. Interacting with Others

Weaving also argues that he is disabled because his ADHD substantially limits his ability to interact with others. Unlike many of our sister circuits, we have specifically recognized interacting with others as a major life activity. *Cf. Bodenstab v. Cnty. of Cook*, 569 F.3d 651, 656 (7th Cir.2009) (assuming, without deciding, that interacting with others is a major life activity); *Heisler v. Metro. Council*, 339 F.3d 622, 628 (8th Cir.2003) (same); *Steele v. Thiokol Corp.*, 241 F.3d 1248, 1255 (10th Cir.2001) (same); *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15 (1st Cir.1997) (assuming, "*dubitante*, that a colorable claim may be made that 'ability to get along with others' is or may be ... a major life activity under the ADA").

We wrote in *McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir.1999), that "[b]ecause interacting with others

is an essential, regular function, like walking and breathing, it easily falls within the definition of 'major life activity.' " *Id.* at 1234. There was evidence in *McAlindin* that the plaintiff suffered from panic attacks, "fear reaction [s]," and "communicative paralysis," which caused him to stay at home for at least twenty hours per day. *Id.* at 1235. We held that this evidence was enough to defeat the defendant's motion for summary judgment. *Id.* at 1235–36. However, we cautioned:

> Recognizing interacting with others as a major life activity of course does not mean that any cantankerous person will be deemed substantially limited in a major life activity. Mere trouble getting along with coworkers is not sufficient to show a substantial limitation....
>
> In addition, the limitation must be severe.... We hold that a plaintiff must show that his "relations with others were characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary."

Id. at 1235. In *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053 (9th Cir.2005), we held that a plaintiff who "avoid[ed] crowds, stores, large family gatherings, and even doctor's appointments," and who did not leave the house for weeks after losing his job, had offered sufficient evidence of disability to survive summary judgment. *Id.* at 1060–61.

The evidence in this case differs starkly from that in *McAlindin* and *Head.* The plaintiffs in those cases were so severely impaired that they were essentially housebound. McAlindin's doctor described him as "barely functional," and there was evidence that he "suffer[ed] from a total inability to communicate at times." *McAlindin*, 192 F.3d at 1235. Head avoided contact with others, even members of his family, and had difficulty even carrying on conversations over the telephone. *Head,* 413 F.3d at 1061.

The evidence at trial showed that Weaving has experienced recurring interpersonal problems throughout his professional life. Those problems have had significant repercussions on his career as a police officer, resulting, most recently, in the termination of his employment with HPD. But Weaving's interpersonal problems do not amount to a substantial impairment of his ability to interact with others within the meaning of the ADA. Weaving's ADHD may well have limited his ability to *get along* with others. But that is not the same as a substantial limitation on the ability to *interact* with others. *See McAlindin,* 192 F.3d at 1235; *see also Jacques v. DiMarzio, Inc.*, 386 F.3d 192, 203 (2d Cir.2004) (distinguishing " 'getting along with others' (a normative or evaluative concept) and 'interacting with others' (which is essentially mechanical)'').

In contrast to the plaintiffs in *McAlindin* and *Head,* Weaving was able to engage in normal social interactions. His interpersonal problems existed almost exclusively in his interactions with his peers and subordinates. He had little, if any, difficulty comporting himself appropriately with his supervisors. A case like Weaving's is what we described in *McAlindin* as not giving rise to a disability claim. 192 F.3d at 1235; *see also Weidow v. Scranton Sch. Dist.*, 460 Fed.Appx. 181, 185–86 (3d Cir.2012) (stating that, assuming that interacting with others was a major life activity, a plaintiff who failed to show that her condition caused her to have trouble getting along with people in general was not disabled because she was not substantially limited in her ability to interact with others); *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1131 (10th Cir.2003) (same); *Steele,* 241 F.3d at 1255 (same).

As we wrote in *McAlindin,* a "cantankerous person" who has "[m]ere trouble getting along with coworkers" is not disabled under the ADA. 192 F.3d at 1325; *see also EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities,* U.S. Equal Employment Opportunity Commission (March 25, 1997), http://www.eeoc.gov/policy/docs/psych. html ("Some unfriendliness with coworkers or a supervisor would not, standing alone, be sufficient to establish a substantial limitation in interacting with others."). One who is able to communicate with others, though his communications may at times be offensive, "inappropriate, ineffective, or unsuccessful," is not substantially limited in his ability to interact with others within the meaning of the ADA. *Jacques,* 386 F.3d at 203. To hold otherwise would be to expose to potential ADA liability employers who take adverse employment actions against ill-tempered employees who create a hostile workplace environment for their colleagues.
* * *

CALLAHAN, Circuit Judge, dissenting:

A jury of Matthew Weaving's peers sat in a courtroom for four days. They observed and listened to his coworkers,

his supervisors, his doctors, his wife, as well as Weaving, himself. After being properly instructed on the law of our circuit, they dutifully studied the evidence and deliberated for eight hours over the course of two days. They found that Weaving was disabled and that the City of Hillsboro fired him because of his disability in violation of the Americans with Disabilities Act ("ADA").

Now on appeal, the majority decides that it knows better. It reweighs the evidence on a cold record and issues its own diagnosis: Weaving isn't disabled, he's just a jerk. * * *

I

* * *

The evidence showed that Weaving was diagnosed with ADHD as a child but had been led to believe that he had "outgrown" his symptoms.[2] As an adult, Weaving had a strong dedication to police work, and initially "was a strong performer" as a patrol officer who was promoted to sergeant over several others. However, he had difficulty in his jobs both at the Beaverton Police Department and the Hillsboro Police Department ("HPD"), particularly once he was promoted beyond patrolman. In particular, his coworkers said that: they would avoid interactions with him; he would engage in lengthy lectures in response to simple questions; he would send impulsive emails; he would "beat a dead horse"; he was "socially retarded"; he made them feel intimidated and demeaned; he lacked any awareness of the reactions of others; and that he was hard to approach.

Lieutenant Richard Goerling's investigation was critical to the City's decision to terminate Weaving. Goerling found that Weaving had difficulty interacting with subordinates, peers, supervisors, and informants throughout his career. Among other things, Goerling concluded that Weaving refused to accept responsibility for his behavior. Goerling also repeatedly suggested that Weaving was a bully and intimidated his coworkers. At trial, however, Goerling *admitted* on the stand that he was *biased* against Weaving and that his report contained numerous inaccuracies and omissions in what were represented as interviewees' direct quotations. Additionally, *none* of the City's witnesses actually suggested that Weaving had bullied or intentionally intimidated his coworkers.

Deputy Chief Chris Skinner adopted Goerling's characterization of Weaving as a "bully" and suggested that he was "hostile" in his letter advising Weaving of the City's decision to terminate Weaving's employment. Despite the fact that Weaving was found "fit for duty,"[3] Skinner concluded that Weaving was critically deficient in the area of emotional intelligence. At trial, Skinner testified that Weaving's lack of emotional intelligence was the "foundation" of his decision. Skinner recognized that Weaving said that he had ADHD, but suggested that Weaving's recent diagnosis was inconsistent with his earlier statements indicating that he had outgrown his symptoms and found that it did not substantially limit him in any major life activity, including work as a law enforcement officer. Skinner thus concluded that Weaving was not disabled and, in any event, that HPD could not accommodate him by returning him to duty as a sergeant.

At trial, Weaving explained that although he was aware that he had a history of childhood problems with ADHD, he initially did not believe that he was affected by it as an adult and also "didn't want to be stigmatized as a police officer with a mental disorder."[4] Weaving's treating psychologist, Dr. Gary Monkarsh, testified that Weaving displayed "one of the clearest examples of adult ADHD I've ever encountered in my clinical practice in 25 years." Dr. Monkarsh's testimony suggested that much of Weaving's problematic behavior was attributable to his ADHD, and that it could be successfully treated with medication and therapy. Among other things, Weaving had been able to improve his weak emotional intelligence—a common symptom of those suffering from ADHD—through therapy. Dr. Monkarsh elaborated that there is a "big difference" between someone who is simply "a jerk" and someone who has ADHD.

Driven by his love of his profession, Weaving had been able to become a successful police officer by developing compensatory mechanisms, such as calendaring systems, that allowed him to prioritize his tasks and overcome some of the effects of his disability, like slow processing speed. Nonetheless, Weaving was "unable to self-regulate" some of the other symptoms of ADHD without therapy, including impulsiveness, "not seeming to listen when spoken to, ... interrupting others, ... difficulty waiting his turn, blurting out comments without having emotional intelligence, [and lack of] awareness of the effect that that communication would have on his other workers at the police department." ADHD thus impaired Weaving's major life activities, including his "work." Dr. Monkarsh also indicated that although Weaving's ability to articulate sounds was not impaired, his communication was impaired because of his lack of ability

to speak with emotional intelligence.

Dr. Leslie Carter, an examining psychologist, agreed with Dr. Monkarsh's diagnosis. Dr. Carter explained that Weaving had difficulty with his visual processing speed, an ADHD symptom. Dr. Carter elaborated:

> [W]hat most people find is that they are inattentive to visual details, one thing that they have difficulty doing is paying attention to the facial expressions that people give. If they take—if a person takes more than 10 seconds to register facial expressions and respond to them, like processing speed, then they are thought to be out of sync or unempathetic to other people, and they don't feel right. And they—they make other people irritable, because they're not quick enough with their responses, and they're not recognizing the other person's needs as quickly as they should.

Despite these diagnoses, based on a "file review" and without an actual examination, the City's expert testified that Weaving did not have ADHD.

In his closing argument, Weaving's counsel explained that he was substantially impaired in the major life activities of "interacting with others, working and communicating," and continued:

> Communicate, well, what does that mean? Well, it means a lot of what Dr. Monkarsh said, about what Chief Skinner said. Those are emotional intelligence things about communicating. It means not being impulsive, not being impulsive, where these things are coming up over and over again, pushing those e-mail buttons, giving those 30–minute lectures over and over and over again. That's communicating.

The City argued that Weaving was not disabled.

The district court instructed the jury with the following variant of the model instruction:

> Major life activities are the normal activities of living which a non-disabled person can do with little or no difficulty, such as caring for oneself, performing manual tasks, walking, sleeping, seeing, hearing, speaking, breathing, learning, engaging in sexual relations, reproducing, interacting with others, working, and communicating.
>
> A limitation is substantial if the disabled person is unable to perform the major activity or is significantly restricted in doing so, when compared to the average person in the general population.
>
> Factors to consider in deciding whether a major life activity is substantially limited include:
>
> (1) the nature and severity of the impairment;
>
> (2) the duration or expected duration of the impairment; and
>
> (3) the permanent or long-term impact of the impairment.

The jury found that Weaving had proven that he had a disability under the ADA, that the City failed to reasonably accommodate his disability, and that the City discharged him because of it. Nonetheless, the jury found that Weaving had not proven that he was regarded as having a disability. The district court subsequently awarded equitable relief in the form of significant back and front pay in light of Weaving's inability to find other employment and the court's finding that Weaving would not be rehired in law enforcement.

II

We review the district court's denial of a renewed motion for judgment as a matter of law de novo. *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1242 (9th Cir.2014). Such a motion should be granted "if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict." *Id.* (citation omitted). In reviewing such a motion, we must scrutinize the entire

evidentiary record and "draw all reasonable inferences in favor of the nonmoving party and 'disregard all evidence favorable to the moving party that the jury is not required to believe.' " *Id.* at 1242–43 (citation omitted).

III * * *

There was sufficient evidence to support the verdict based on Weaving's ADHD substantially limiting his ability to interact with others. However characterized, the gist of Weaving's primary claim all along has been that he suffered from the type of impairment that we recognized in *McAlindin v. County of San Diego*, 192 F.3d 1226, 1234–35 (9th Cir.1999). In *McAlindin*, the plaintiff contended that he suffered from anxiety and panic disorders that would cause him to become "incapacitated" and force him to lie down "at least once a month." *Id.* at 1230–31, 1241. Among other things, during one stress-induced incident that precipitated his taking leave from work, he became agitated, accusatory, and shouted at a supervisor. *Id.* at 1231.

We reversed the district court's grant of summary judgment on the plaintiff's ADA claim. *Id.* at 1230. We recognized that a plaintiff with an "interacting with others" impairment could prevail "[b]ecause interacting with others is an essential, regular function, like walking and breathing."[6] *Id.* at 1234. Thus, we held that a plaintiff could prevail where he showed "that his 'relations with others were characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.' " *McAlindin*, 192 F.3d at 1235 (citation omitted). Summary judgment was inappropriate on the plaintiff's claim because the evidence indicated that he "suffer[ed] from a total inability to communicate at times, in addition to a more subtle impairment in engaging in meaningful discussion." *Id.* at 1235–36. We emphasized that the plaintiff's claims were supported by "clinical findings" and "medical evaluations." *Id.* at 1235.

In so holding, we disagreed with the First Circuit, which had found that "the 'ability to get along with others' was too vague to be a major life activity." *Id.* at 1234 (discussing *Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15 (1st Cir.1997)). We noted that interacting with others was no more vague than many other recognized major life activities, such as "caring for oneself." *Id.* at 1234–35. Nonetheless, we also stated that merely being "cantankerous" or getting into "trouble" with coworkers was not sufficient to show a substantial limitation under the then-applicable ADA standards. *Id.* at 1235. The dissent criticized the "interacting with others" standard as "vague" and implying that "a person's foul temperament may no longer be a reason to deny that person a job." *Id.* at 1240.

In *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053, 1056–57, 1060–61 (9th Cir.2005), we reversed a grant of partial summary judgment on a similar ADA claim where the plaintiff suffered from the periodic inability to leave his house. He admitted that the behavior did not occur all the time, but asserted that it occurred "'many times' or 'most' of the time." *Id.* at 1061. Although recognizing that the plaintiff's impairment did not appear to be as severe as the plaintiff's in *McAlindin*, we found that it was sufficient to avoid summary judgment. *Id.* at 1060–61. * * *

The majority distinguishes *McAlindin* and *Head* by claiming that Weaving was "able to engage in normal social interactions" and that the plaintiffs in those cases "were essentially housebound." Then, relying on the *Jacques* standard and channeling the *McAlindin* dissent, it holds that those who are capable of communicating but whose communications may be "inappropriate, ineffective, or unsuccessful" cannot prevail under the ADA because otherwise, employers would be exposed to liability in the form of actions by "ill-tempered employees who create a hostile workplace environment for their colleagues."

We, however, are compelled to construe the evidence in favor of the jury's verdict. *See Escriba*, 743 F.3d at 1242–43. Here, the evidence showed that Weaving was well beyond being merely cantankerous or troublesome. To the contrary, he had problems in his interactions with just about everyone throughout his career in law enforcement. Not only was he unable to engage in meaningful communication on a regular basis, but his ADHD made him seem unapproachable to his coworkers, thus completely precluding some interactions. Moreover, the majority's suggestion that Weaving's "interpersonal problems" were limited to his interactions with peers and subordinates is dead wrong. HPD's own investigation repeatedly suggested otherwise.[8] His doctors explained that his disability caused the severe lack of emotional intelligence that the City invoked when it fired him—he was not simply being "a jerk" who refused to control himself. The jury outright rejected the City's opposing argument that Weaving was not disabled. * * *

V

Not all disabilities are obvious. To a casual observer, Matthew Weaving may not appear to be disabled. But that doesn't give a panel of appellate judges license to brush away the contrary medical evidence and jury findings. Mental disabilities that cause socially unacceptable behavior are less obvious than physical disabilities, but the Americans with Disabilities Act protects those suffering from either form of disability equally.

The majority may not like Matthew Weaving—or at least the picture of him that it paints based on a cold record. But the outcomes of our disabled litigants' cases should not turn solely on the amount of sympathy they inspire. The law protects the disabled, not the likeable. *Cf. Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) ("[N]o judicial system could do society's work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." (citations omitted)). Because the majority has gutted our controlling precedent and substituted its own factual findings for that of the jury, I respectfully dissent.

[1] Significantly, the majority places undue emphasis on several incidents, such as the "water wings" email Weaving sent to a coworker. Weaving's supervisor took no issue with the email when Weaving sent it, and the supervisor initially said that he thought the email was "funny." Additionally, although Weaving occasionally used terms such as "meat eaters" and "salad eaters" to refer to his coworkers, those terms had been used in the local police culture for a long time and Weaving was not the only sergeant to use them. Similarly, Weaving's supervisor approved Weaving's lengthy reprimand of a subordinate who drove a marked police car through a surveillance area, which later became the basis for the subordinate's grievance against Weaving. Moreover, although a sergeant recalled Weaving disparaging the work of an officer who spoke English as a second language, that sergeant agreed that the report that Weaving was referring to was of "poor" quality.

Add at end of page 595 in Chapter 10 of EDEL, and end of page 537 in Chapter 9 of ED:

6. *The Ministerial Exception*. The Court formulated further the first amendment-based "ministerial exception" in two cases involving the allegedly discriminatory terminations of teachers at Roman Catholic parochial schools. *Our Lady of Guadalupe School v. Morrissey-Berru, 591 U.S. ___ (2020)*. The Court asserted that the exception cannot be limited by any "rigid" application of factors such as the ones considered by the Court in *Hosanna-Tabor*, including the employees' own level of religious instruction, title, or even religious affiliation. Instead, the first amendment requires the exception to cover all employees engaged in work that the faith considers central to its religious mission. This focus, the Court indicated, would cover any kind of teaching in parochial schools, even the primarily secular teaching done by the plaintiff teachers in these cases. Justice Thomas, in a concurrence joined by Justice Gorsuch, asserted, as he had in *Hosanna-Tabor*, that a "religious organization's good-faith claims that a certain position is ministerial" should suffice to invoke the exception. Justice Sotomayor, in an opinion joined by Justice Ginsburg, dissented from what she viewed as a significant expansion of the exception she had joined in recognizing in *Hosanna-Tabor*.

Add at end of page 897 in Chapter 19 of EDEL, and end of page 489 in Chapter 14 of EL:

WOODS
v.
START TREATMENT & RECOVERY CENTERS, INC.
864 F.3d 158 (2d Cir. 2017)

Hall, Circuit Judge:

. . . Plaintiff-Appellant Cassandra Woods appeals a final judgment of the United States District Court for the Eastern District of New York (Ann M. Donnelly, *Judge*) following a jury trial in which Woods lost on all of her claims under

the Family and Medical Leave Act ("FMLA"). Woods was fired from her job at START Treatment and Recovery Centers ("START") in 2012. She says that she was terminated in retaliation for taking leave under the FMLA; START says it was because of her poor performance. The jury appears to have agreed with START.

Woods lodges two main arguments on appeal. First, she contends that the district court wrongly instructed the jury that "but for" causation applies to FMLA retaliation claims. Second, Woods argues that she suffered impermissible prejudice when the district court allowed the jury to draw adverse inferences based on her invocation of the Fifth Amendment at her deposition. We agree on both counts. Accordingly, the judgment of the district court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

I

. . . START is a nonprofit that operates eight clinics providing treatment services to about 3,000 narcotic-addicted patients each day. Cassandra Woods began work as a substance abuse counselor at START's "Kaleidoscope" Clinic in 2007, and her tenure ended on May 18, 2012. The reason for her departure is the subject of this suit.

In her role as a substance abuse counselor, Woods was responsible for counseling around fifty patients, usually in thirty-minute sessions. After each such session, START counselors spend fifteen minutes or so writing a patient "note," which is important for START both to maintain its state certification and to bill Medicaid and other insurance companies. In 2011, START implemented a new, state-mandated note system known as "APG." APG is more complex than the prior note-keeping method, and many counselors struggled to adapt; fifteen percent of counselors were terminated for failing to comply with APG requirements.

Woods also struggled with APG. Although her July 2010 and July 2011 performance reviews were generally satisfactory, START's assessment of her took a turn for the worse in March 2011. START determined that Woods was failing to achieve "required outcomes" in "compliance" and "documentation." START offered Woods "enhanced training."

Enhanced training, however, did not seem to do the trick. Woods received warning memos documenting performance issues in April and June 2011. In August 2011, Woods appeared to right the ship, and she received a pay raise for her efforts, but thereafter her performance again began to slip. She received three more warning memos in November 2011, December 2011, and February 2012. The February 2012 memo recorded that Woods had a twenty-eight percent completion rate for her notes. The typical completion rate among other counselors was ninety to ninety-five percent. By March 2012, Woods was put on ninety-day probation for "her on-going failure to perform [her] job duties as directed and/or within designated time frames de-spite verbal and/or written warnings."

Probation did not appear to have remedied Woods's performance issues either. Her deadline for catching up on a backlog of patient notes was extended by memo twice—on April 4, 2012 and April 18, 2012. On May 10, 2012, Rodney Julian, Clinical Director at the Kaleidoscope Clinic and Woods's direct supervisor, recommended terminating Woods to Dr. Robert Sage, the Senior Vice President for the Division of Human Services. Dr. Sage fired Woods on May 17, 2012, citing Woods's failure to maintain up-to-date patient notes and "on-going failure to perform [her] job duties."

Woods tells a different story about the reason for her termination. She suffers from severe anemia and other conditions and on several occasions requested medical leave under the FMLA. The exercise of her FMLA rights, in Woods's view, is why START fired her. Woods's account begins in February 2011, when she approached Madeleine Miller, an employee in START's human resources department, and requested FMLA leave. Shortly thereafter, Woods cancelled the request. Woods says that she did so because Rodney Julian asked her to; Julian denies that such a conversation ever took place.

In August 2011, Woods was hospitalized for six days while being treated for her anemia. Although START does not appear to have given Woods a full explication of her FMLA rights, it did acknowledge that the hospitalization period was protected. Some months later, while Woods was on probation, she again attempted to take FMLA leave. According to Woods's version of the encounter, she was told that because she was on probation, she could not take

FMLA leave. Renee Sumpter, the human resources contact to whom Woods made the request, says that she told Woods no such thing. The next day, Woods visited her doctor but declined hospitalization because she was afraid of losing her job. START did nothing at that time.

In April 2012, still while Woods was on probation, she was hospitalized for another seven days. START acknowledges that this time too was protected under the FMLA. Woods returned to work on April 28, 2012. Twelve days later, Julian recommended firing Woods, and she was terminated a week later.

Woods sued, bringing claims for, *inter alia*, interference and retaliation under the FMLA. . . .

After the close of discovery, the district court ruled on a number of pre-trial matters. . . .

The district court . . . resolved START's motion for a ruling on whether Woods was required to show that the exercise of her FMLA rights was the "but for" cause of her termination in order to prevail on the retaliation claim. *See Woods v. START Treatment & Recovery Ctrs., Inc.*, No. 13-cv-4719, 2016 WL 590458 (E.D.N.Y. Feb. 11, 2016). After analyzing the FMLA's text and Supreme Court precedent, the district court concluded that Woods did indeed need to demonstrate that her FMLA leave was the "but for" cause of her termination, rather than a mere "motivating factor" in the decision, as Woods had argued. *Id.* at *2 (emphases omitted). The parties were instructed to submit proposed jury instructions that comported with the district court's rulings.

* * *

The district court . . . instructed the jury on the ultimate questions before it. One of those questions was whether START retaliated against Woods for exercising her rights under the FMLA. On the retaliation issue, the district court gave the following instruction:

> To succeed on her claim of retaliation, the plaintiff must prove by a preponderance of the evidence that the defendant terminated her for taking FMLA leave. For you to determine that the plaintiff was terminated for taking FMLA leave, she must prove that the defendant would not have terminated her if she had not taken FMLA leave, but everything else had been the same.
>
> The defendant has given nondiscriminatory reasons for its decision to terminate the plaintiff. The FMLA does not protect an employee from performance problems caused by the conditions for which the FMLA leave is taken. Under the FMLA, a person can be fired for poor performance, even if that poor performance is due to the same root cause as the need for the leave. To put that another way, if an employee's work performance problems are related to the same elements that gave rise to the FMLA leave, then the employee can still be terminated based on her work performance problems regardless of the indirect causal link between the FMLA leave and the decision to terminate the employee.
>
> If the plaintiff has proved by a preponderance of the evidence that the defendant's explanations for the termination are a pretext or an excuse for discrimination, you must find that the defendant violated the FMLA.

After all of the evidence was submitted and the district court instructed the jury on the applicable law, the jury deliberated for a short time and returned a complete defense verdict. Woods timely appealed.

II

Woods first challenges the district court's jury instruction on the appropriate causation standard to be applied to her FMLA retaliation claims, that is, how the jury was to assess the role, if any, that Woods's exercise of FMLA rights played in START's decision to fire her. As it did below, START argues that Woods must prove that her exercise of FMLA rights was the "but for" cause of her termination. Woods counters that she must only show that her FMLA leave was used as a "negative factor" in START's decision to fire her.

* * *

The Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, provides broad protections to employees who need to take time away from work to deal with serious health conditions of the employee or her family. An employee has the right to return to the position she held before taking leave, or to an "equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." *Id.* § 2614(a)(1)(B). The FMLA also "creates a private right of action to seek both equitable relief and money damages against any employer (including a public agency) in any Federal or State court of competent jurisdiction should that employer interfere with, restrain, or deny the exercise of FMLA rights." *Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 174 (2d Cir. 2006) (internal quotation marks omitted).

FMLA claims come in at least two varieties: interference and retaliation. *See Potenza v. City of New York*, 365 F.3d 165, 167 (2d Cir. 2004) (per curiam). In a general sense, an employee brings an "interference" claim when her employer has prevented or otherwise impeded the employee's ability to exercise rights under the FMLA. *See Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415, 424 (2d Cir. 2016). "Retaliation" claims, on the other hand, involve an employee actually exercising her rights or opposing perceived unlawful conduct under the FMLA and then being subjected to some adverse employment action by the employer. *See Potenza*, 365 F.3d at 168. The two types of claims serve as *ex ante* and *ex post* protections for employees who seek to avail themselves of rights granted by the FMLA.

The first issue in this case presents two distinct, but related, legal questions that have yet to be resolved in this Circuit. First, in which provision of the FMLA are retaliation claims rooted? Second, what quantum of causation must a plaintiff prove between the exercise of FMLA rights and the adverse employment action to hold an employer liable for retaliation? Our answer to the first question informs our answer to the second. We hold that FMLA retaliation claims of the sort Woods brings in this case are grounded in 29 U.S.C. § 2615(a)(1) and a "motivating factor" causation standard applies to those claims.

A

There is little question that given its broad salutary intent, the FMLA prohibits retaliation against employees who attempt to exercise their rights under the statute. Which statutory provision creates that protection against retaliation, however, is a subject of some dispute in the circuits.

Two possible statutory sources could support FMLA retaliation claims. The first contender is 29 U.S.C. § 2615(a)(1), which provides:

> It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

Second is the following provision, § 2615(a)(2), which provides:

> It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

The First Circuit finds a basis for FMLA retaliation claims in § 2615(a)(1). *See Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 160 n.4 (1st Cir. 1998) (concluding that retaliation for exercising FMLA rights "can be read into § 2615(a)(1): to discriminate against an employee for exercising his rights under the Act would constitute an 'interfer[ence] with' and a 'restrain[t]' of his exercise of those rights"); *see also Colburn v. Parker Hannifin/Nichols Portland Div.*, 429 F.3d 325, 331 (1st Cir. 2005) ("The term 'interference' may, depending on the facts, cover both retaliation claims ... and non-retaliation claims ...."') (internal citation omitted). The Sixth Circuit assumes that § 2615(a)(2) provides the source for retaliation claims. *See Bryant v. Dollar Gen. Corp.*, 538 F.3d 394, 400–02 (6th Cir.

2008). Other circuits point to a Department of Labor regulation, *see Lichtenstein v. Univ. of Pittsburgh Med. Ctr.*, 691 F.3d 294, 301 (3d Cir. 2012) (citing 29 C.F.R. 825.220(c)), and yet others look to a combination of all three, *see Richardson v. Monitronics Int'l, Inc.*, 434 F.3d 327, 332, 334 (5th Cir. 2005).

We have in the past suggested that retaliation claims fall under § 2615(a)(2). *See Millea v. Metro-North R.R. Co.*, 658 F.3d 154, 164 (2d Cir. 2011). In *Millea* we observed that:

> The FMLA's anti-retaliation provision has the same underlying purpose as Title VII—and almost identical wording. *Compare* 29 U.S.C. § 2615(a)(2) ... *with* 42 U.S.C. § 2000e-3(a).

Id. The underlying question in *Millea*, however, was unrelated to the statutory source of FMLA retaliation claims. Instead, we decided there that the standard for "materially adverse action" under Title VII (first announced in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)) applies to FMLA claims. *See* 658 F.3d at 164. Because the core question did not involve making a specific determination concerning the well from which FMLA retaliation claims spring, we do not read *Millea*'s passing reference to § 2615(a)(2) as controlling.

We now hold that FMLA retaliation claims like Woods's, *i.e.* terminations for exercising FMLA rights by, for example, taking legitimate FMLA leave, are actionable under § 2615(a)(1). The plain language of § 2615(a)(1) supports this conclusion. Firing an employee for having exercised her rights under the FMLA is certainly "interfere[nce]" with or "restrain[t]" of those rights. Indeed, FMLA rights have two parts—the right to take leave and the right to reinstatement, so terminating an employee who has taken leave is itself an outright denial of FMLA rights.

That this sort of retaliation claim falls under § 2615(a)(1) is also consistent with the statutory text of § 2615(a)(2). Section 2615(a)(2) prohibits adverse employment actions—"discharg[ing] or in any other manner discriminat[ing]"—against employees "for opposing any practice made unlawful by this subchapter." Being fired for *taking* FMLA leave cannot easily be described as "opposing any practice made unlawful" by the FMLA. Instead, that adverse employment action in the face of a lawful exercise of FMLA rights fits comfortably within § 2615(a)(1)'s "interfere with, restrain, or deny" language.

Labor Department rules also support this interpretation of the statute. The Department revised its rule at 29 C.F.R. 825.220(c) "to clarify that the prohibition against interference includes a prohibition against retaliation as well as a prohibition against discrimination." The Family and Medical Leave Act of 1993, 73 Fed. Reg. at 67,934, 67,986 (Nov. 17, 2008). The Labor Department further explained that "[a]lthough section 2615(a)(2) of the Act also may be read to bar retaliation, ... the Department believes that section 2615(a)(1) provides a clearer statutory basis for § 825.220(c)'s prohibition of discrimination and retaliation" for exercising FMLA rights. *Id.* We agree.

B

Woods's FMLA retaliation claim being actionable under § 2615(a)(1), the question becomes whether the district court correctly instructed the jury that it must apply a "but for" causation standard in determining whether START was liable for such retaliation. We conclude that the given instruction was erroneous.

In determining that a "but for" causation standard applied, the district court conducted a thorough analysis of the statutory language in § 2615(a)(2). *Woods v. START Treatment & Recovery Ctrs., Inc.*, No. 13-cv-4719, 2016 WL 590458, at *2–3 (E.D.N.Y. Feb. 11, 2016). Specifically, the district court concluded that § 2615(a)(2) contained language indicating Congress's intent to create such a standard, especially in light of the Supreme Court's analogous analyses in *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, —— U.S. ——, 133 S.Ct. 2517, 186 L.Ed.2d 503 (2013) and *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009). We need not decide whether the district court correctly determined the causation standard for claims under § 2615(a)(2), however, because, as we explained above, retaliation claims like Woods's are instead rooted in § 2615(a)(1).

START's argument on the appropriate causation standard largely tracks the district court's analysis. It contends that the FMLA lacks "motivating factor" language and thus, under *Nassar*, the default "but for" causation standard applies. Woods, and the Department of Labor as *amicus*, on the other hand, urge us to give *Chevron* deference to the Department's regulation at 29 C.F.R. 825.220(c), which they say compels a lesser causation standard. That regulation provides:

> The Act's prohibition against interference prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, *employers cannot use the taking of FMLA leave as a negative factor in employment actions*, such as hiring, pro-motions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies.

29 C.F.R. 825.220(c) (emphasis added).

Chevron deference is appropriate where Congress has delegated authority to an administrative agency to make rules carrying the force of law and that agency's interpretation to which deference is to be given was promulgated in the exercise of that authority. Here, Congress delegated to the Secretary of Labor authority to "prescribe such regulations as are necessary to carry out" the FMLA. 29 U.S.C. § 2654. The 825.220(c) regulation was promulgated pursuant to that delegation of authority.

The first step of the *Chevron* analysis is determining whether the statute is ambiguous or silent on the specific question at issue. *See Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Section 2615(a)(1) is silent as to any test for causation. It makes no mention of a motivating factor test, and unlike the statutes in *Nassar* and *Gross*, it lacks any indicia of Congress's intent to create "but for" causation—words like "because" or "by reason of." While the Supreme Court has said that Congress must indicate when it intends to depart from the default tort rule of "but for" causation, *see Nassar*, 133 S.Ct. at 2525, Congress has chosen to remain silent on the causation issue in § 2615(a)(1) and has instead delegated a statutory gap-filling function to the Secretary of Labor. Indeed, "express congressional authorizations to engage in the process of rulemaking" is "a very good indicator of delegation meriting *Chevron* treatment." *United States v. Mead Corp.*, 533 U.S. 218, 229, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). We thus proceed to *Chevron* step two.

At step two, we ask whether the Labor Department's interpretation of the statute is reasonable—both as a matter of statutory construction and as a matter of policy. *See Chevron*, 467 U.S. at 843–44, 104 S.Ct. 2778. It is as to both.

As for statutory interpretation, so long as the Labor Department's interpretation is reasonable, we defer to it "whether or not it is the only possible interpretation or even the one a court might think best." *Holder v. Martinez Gutierrez*, 566 U.S. 583, 132 S.Ct. 2011, 2017, 182 L.Ed.2d 922 (2012); *see Mugalli v. Ashcroft*, 258 F.3d 52, 55 (2d Cir. 2001) ("[I]t is not necessary that we conclude that the agency's interpretation of the statute is the only permissible interpretation, nor that we believe it to be the best interpretation ....") (quoting *Michel v. INS*, 206 F.3d 253, 263 (2d Cir. 2000)). Given the sweeping scope of § 2615(a)(1)'s prohibition—"It shall be unlawful ... to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right"—and the absence of *any* indication of a causation standard, the Labor Department reasonably construed § 2615(a)(1) to prohibit using the exercise of FMLA rights at all in making employment decisions.

The Labor Department's interpretation is reasonable as a matter of policy. The rule was promulgated after notice-and-comment rulemaking, and it comports with the FMLA's broad salutary purposes—namely, "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity; [and] ... to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition." 29 U.S.C. § 2601(b)(1)–(2). The rule is neither arbitrary nor capricious. Instead, it reflects the well-reasoned judgment of the executive officer charged with enforcing the rights granted to this country's employees.

Accordingly, we defer to the Labor Department's regulation implementing a "negative factor" causation standard for FMLA retaliation claims. The district court erred by instructing the jury otherwise.

C

An erroneous jury instruction, however, does not necessarily entitle Woods to a new trial. "A jury verdict will be reversed only when an appellant can show that the instructions considered as a whole prejudiced [her]." *Holzapfel v. Town of Newburgh*, 145 F.3d 516, 521 (2d Cir. 1998). "[T]he party asserting error has the burden of demonstrating prejudice ...." *Renz v. Grey Advert.*, 135 F.3d 217, 223 (2d Cir. 1997) (internal quotation marks omitted). "An error is harmless only if the court is convinced that [it] did not influence the jury's verdict." *Gordon v. N.Y.C. Bd. of Educ.*, 232 F.3d 111, 116 (2d Cir. 2000).

In *Renz*, we held that the district court's erroneous failure to give a motivating factor instruction—and instead requiring but for causation under the Age Discrimination in Employment Act ("ADEA")—"did not prejudice the plaintiff." 135 F.3d at 223. We did so there because the evidence of the plaintiff's poor performance was so overwhelming "that a correct charge on the plaintiff's standard of proof in her ADEA claim would not have made a difference to the verdict." *Id*. at 224. We cannot say the same here.

Although there is evidence from which a reasonable jury could conclude that Woods's deficient performance served as the sole basis for her termination, we are unable to conclude that that evidence is so overwhelming as to render the erroneous instruction harmless. That error, coupled with the erroneous admission of the adverse inferences against Woods described below, resulted in impermissible prejudice.

* * *

Notes and Questions

1. *Families First Coronavirus Response Act* (FFCRA). In March 2020, Congress passed the FFCRA to address gaps in state sick leave laws and the FMLA amid the growing pandemic. The Act provided for two weeks of paid sick leave, along with wage replacement, for any worker sick with the coronavirus. It also amended the FMLA to provide for up to 12 weeks of family leave for workers responsible for caring for children whose schools had closed, or to care for a relative who was quarantined or sick with the coronavirus. Unlike the FMLA, which provides for unpaid leave, workers taking family leave under the FFCRA would receive partial pay, funded by a tax credit to employers. The FFCRA covered all employers with fewer than 500 workers, although businesses with fewer than 50 employees could avail themselves of a hardship exemption. The family leave provisions of the FFCRA expire on December 31, 2020.

Add to Note 3 on page 943 in Chapter 20 of EDEL, and end of page 943_in Chapter 11 of ED:

3. *Tolling of the 180/300 Day Charge-Filing Period*. The Court in *McDonnell Douglas v. Green*, supra, used the term "jurisdictional prerequisite" in referring to the 180/300 day filing requirement in § 706(c). However, in *Fort Bend v. Davis*, 139 S.Ct.1843 (2019) the Supreme Court ruled that the EEOC administrative exhaustion requirement in Title VII is not jurisdictional, but only a prudential limitation that can be asserted as a waivable affirmative defense.

Add at end of page 992 in Chapter 9 of EDEL, and end of page 570 in Chapter 8 of EL:

10. *Arbitration and Concerted Activity*. In *Epic Systems v. Lewis*, 138 S. Ct. 1612, 584 US __ (2018), the Supreme Court rejected the plaintiff's argument that class action waivers in arbitration agreements conflict with the National Labor Relations Act, which protects employees' right to engage in concerted activity. The term "concerted activity" refers to collective employee actions for mutual aid or protection, and plaintiffs asserted that class actions claims qualify as "concerted activity." The court disagreed, noting that the provision of the Federal Rules of Civil

Procedure authorizing class action claims post-dates the National Labor Relations Act. For further analysis, see Samuel Estreicher & Lukasz Swiderski, "Issue Preclusion in Employment Arbitration After Epic Systems v. Lewis," 4 U. PENN. J. LAW & PUB. AFFAIRS, 16 (2018).