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OSHA'S COVID-19 Emergency Temporary Standard, Mandatory Workplace Vaccination Policies and How Employers Are Responding to Reduce Employee Risk In the Face of a Pandemic Landscape that Keeps Changing

By Laurie E. Leader

Most employers assumed that their workplaces would be "back to normal" by now. But with the national vaccination rate hovering around 50% and the Delta variant looming large, many now wonder whether their workplaces will ever be the same. Employers and employees alike are expressing safety concerns about working in-person. A minority of private companies and some localities have instituted mandatory vaccination policies; other companies have imposed policies to encourage vaccinations by, for example, imposing strict COVID testing requirements for unvaccinated workers.

Against this backdrop, the Occupational Safety and Health Administration (OSHA) of the United States Department of Labor recently issued an Emergency Temporary Standard (ETS) to cover health care workers and provide guidance to assist those not covered by the ETS to identify COVID-19 exposure risks and take appropriate measures to reduce such risks.[1] This article highlights the ETS and OSHA guidance as well as the current dialogue on mandatory and permissive vaccination policies in the workplace.

OSHA's ETS and Guidance for Employers Not Subject to the ETS

OSHA's ETS is designed to prevent healthcare workers and those providing health care support services – including emergency responders, certain home healthcare workers, and employees of hospitals, skilled nursing and assisted living facilities – from contracting the coronavirus in settings with suspected or confirmed cases of the virus.[2] Conversely, the ETS does not apply to first aid or health care provided in settings that do not pose a high risk of exposure.

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[1] *See* 29 C.F.R. §1910.502 at www.osha.gov/coronavirus/ets for the full text of the ETS. The Standard was published on June 21, 2021; written comments on any portion of the ETS are to be submitted on or before August 20, 2021.

[2] Employees in ambulatory facilities where suspected or confirmed coronavirus patients are treated are also covered by the ETS.

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OSHA'S COVID-19 Emergency Temporary Standard, Mandatory Workplace Vaccination Policies and How Employers Are Responding to Reduce Employee Risk In the Face of a Pandemic Landscape that Keeps Changing
By Laurie E. Leader

(text continued from page 231)

Expressly excluded from the ETS are: first aid providers who are not licensed healthcare workers; non-hospital ambulatory care settings where all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not permitted to enter the premises; well-defined hospital ambulatory care settings and home healthcare settings where all employees are fully vaccinated and all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not permitted to enter the premises; healthcare support services not performed in a healthcare setting; telehealth services performed outside of a setting where direct patient care occurs; and pharmacists dispensing prescriptions in a retail setting.[3]

Both the ETS and OSHA's general guidance are consistent with current guidance from the Centers for Disease Control and Prevention (CDC) and will be updated, as necessary, to align with changes in the CDC guidelines and the pandemic.[4]

The ETS requires that covered employers conduct a hazard assessment and develop a COVID-19 plan for each workplace to mitigate the spread of the virus. If the employer has more than ten employees, the COVID-19 plan must be written.[5] Employers also must designate one or more onsite COVID-19 safety coordinators to implement and monitor the plan, and the plan must be updated, as needed.[6] A sample COVID-19 Plan Template and a COVID-19 Healthcare Worksite Checklist and Employee Job Hazard Analysis are available on OSHA's website.

To minimize the risk of COVID-19 transmission, the ETS requires that healthcare employers limit and monitor points of entry to their facilities and screen and triage all clients, patients, residents, visitors and other non-employees with access to the premises.[7] Additionally, covered employers must provide certain employees with N95 respirators and other personal protective equipment and ensure a distance of at least 6 feet between workers or, where feasible, erect barriers between employees.[8] Facemasks must be worn indoors at all times, with the employee's nose and mouth covered, except when an employee is alone in a room, is wearing other respiratory protection, or where the employee cannot wear a facemask "due to a medical necessity, medical condition, or disability as defined in the Americans With Disabilities Act, or due to a religious belief."[9] Where the use of a facemask presents a hazard to the employee, the employee must wear a faceshield.[10]

Additionally, covered employers must provide their employees with paid time off to get vaccinated and, when necessary, to recover from vaccine side effects. Employees who have the coronavirus or who may be contagious must work remotely or be separated from other workers, if possible, or be given paid time off for up to $1400 per week for the first two weeks of leave; beginning in the third week of leave, an employee must only be paid two-thirds of his or her regular pay (or up to $200 per day).[11]

Under its original guidance, OSHA exempted fully vaccinated workers from the ETS masking, distancing and barrier requirements when in well-ventilated areas where "there is no reasonable expectation that any person will be present with suspected or confirmed coronavirus."[12] In response to modified COVID-19 recommendations published by the CDC on July 27, 2021, OSHA updated its "Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace" on August 13, 2021. In that updated Guidance, otherwise highlighted below, OSHA joined the CDC in calling for both vaccinated and unvaccinated individuals to wear masks in "public indoor settings," in areas of substantial or high transmission. For fully vaccinated individuals, the updated Guidance is designed "to reduce the risk of becoming infected with the Delta variant and potentially spreading it to others."[13] This updated Guidance creates some ambiguity in terms of OSHA's ETS requirements for fully vaccinated individuals working in communal areas indoors.

The timeframe for ETS compliance is immediate. Employers were required to implement a plan in accordance with the ETS and to establish physical barriers,

3 29 C.F.R. §§1910.502(a)(2)(i)-(vii).
4 29 C.F.R. §§1910.502(d)(3), (e).
5 29 C.F.R. §§1910.502(c)(1)-(2), (c)(4)(i).
6 29 C.F.R. §§1910.502(c)(3), (c)(6).
7 29 C.F.R. §§1910.502(d)(1)-(2).
8 29 C.F.R. §§1910.502(f)(2), (h), (i).
9 29 C.F.R. §§1910.502(a)(2).
10 29 C.F.R. §§1910.502(f)(1)(iii)(F),
11 29 C.F.R. §§1910.502(l)(3).
12 USDOL OSHA Nat'l New Release, "US Dep't of Labor's OSHA issues emergency temporary standard to protect health care workers from the coronavirus, *reprinted at* www.osha.gov (June 10, 2021).
13 *See* osha.gov/coronavirus/safework (Aug. 13, 2021).

ventilation and training programs on or before July 21, 2021.[14] All other ETS requirements had to be implemented on or before July 6, 2021.[15]

In contrast to the ETS, OSHA's original general guidance – referenced as "Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace" above -- focused exclusively on protecting unvaccinated or otherwise at-risk workers in the workplace through education and training, physical distancing, ventilation, the recording and reporting of COVID-19 infections and deaths, cleaning and disinfection of the work environment, and the provision of personal protective equipment.[16] The original Guidance did not cover fully vaccinated workers.

Recent revisions to that Guidance, again issued on August 13, recommends that "[f]ully vaccinated people in areas of substantial or high transmission should be required to wear face coverings inside" and suggests that employers consider adopting policies that require workers to get vaccinated or to undergo regular COVID-19 testing – in addition to mask wearing and physical distancing – if they remain unvaccinated. The revised Guidance further suggests that fully vaccinated individuals may "choose[] to wear a mask regardless of level of transmission, particularly if individuals are at risk or have someone in their household who is at increased risk of severe disease or not fully vaccinated" and should get tested within three to five days following a known exposure to someone with suspected or confirmed COVID-19 and wearing a mask in public indoor settings for fourteen days after exposure or until a negative test result is received.[17]

Mandatory and Voluntary Vaccination Policies in the Workplace

Notwithstanding OSHA's general guidance, a minority of private companies and local governments are instituting mandatory vaccination policies. Although employers can require employees to get vaccinated, setting up a mandatory vaccination policy is not without risk. Specifically, employers must be careful when seeking certain medical information from workers, so as not to run afoul of the Americans With Disabilities Act (ADA)[18] and the Genetic Information Nondiscrimination Act (GINA).[19] Employers also need to reasonably accommodate workers who fail to get vaccinated because of a disability, pregnancy or sincerely-held religious belief to ensure compliance with ADA and Title VII requirements.[20]

To help employers navigate these waters, the Equal Employment Opportunity Commission (EEOC) issued initial guidance in December 2020 and updated that guidance on May 28, 2021.[21] In its updated guidance, the EEOC cautioned that while vaccination incentive programs are not unlawful as long as the incentive is not coercive, "[b]ecause vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information."[22]

Employer questions about an employee's ability to get vaccinated or whether the employee has been vaccinated, thus, present traps for the unwary. For example, pre-screening vaccination questions may prompt employees to disclose "disability-related" information under the ADA. The ADA requires that any pre-screening questions be "job-related and consistent with business necessity."[23] To satisfy this standard, the employer must have a reasonable belief – based on objective evidence – that employees who fail to answer COVID-related questions pose a direct threat

[14] 29 C.F.R. §§1910.502(s)(2)(ii).

[15] 29 C.F.R. §§1910.502(s)(2)(i).

[16] *See generally* "Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace," at www.osha.gov/safework (as modified Aug. 13, 2021).

[17] *See* osha.gov/coronavirus/safework.

[18] 42 U.S.C. §12101 *et. seq.*

[19] *See* 42 U.S.C. §2000ff-1.

[20] For an overview of related accommodation requirements, *see* the EEOC's guidance on "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," *published at* https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (EEOC Guidance),

[21] *See* EEOC Guidance. Part K of that Guidance relates to "COVID-19 Vaccinations." The EEOC Guidance was more broadly analyzed in Bulletin issues published earlier this year. *See generally* L. Leader, "New EEOC Guidance on COVID-19 Vaccines and the Workplace," Bender's Labor & Employment Bulletin (Feb. 2021), and C. Chambers, "Getting Back to Normal: Whether Requiring Employees to Get the COVID-19 Vaccine Is Advisable and, More Importantly, Permissible," Bender's Labor & Employment Bulletin (Apr. 2021).

[22] EEOC Guidance at K-3.

[23] *See* 42 U.S.C. §12111(3); Williams v. FedEx Corp. Servs., 849 F.3d 889, 901 (10th Cir. 2017).

to the health and safety of themselves or others.[24] Given the ever-changing science related to the coronavirus and its variants, proving the existence of a direct threat itself presents challenges.

While asking for proof of a COVID-19 vaccination is not a prohibited disability-related inquiry under the ADA, related or follow-up questions may violate the ADA or GINA. By way of example, where employees fail to provide proof of vaccination, employers should not ask why they were not vaccinated, since this query may elicit information about an employee's disability or other medical information. To avoid this minefield, employees should be counseled not to provide any medical information along with proof of vaccination.

Where vaccination programs are voluntary, the employee must be advised that answering pre-screening disability-related questions must also be voluntary.[25]

Conclusion

While the ETS is limited in its application to certain healthcare settings, employers may reduce or minimize workplace risks associated with COVID-19 by taking note of OSHA's general guidance and of the EEOC's current guidance on the pandemic. Other factors that may assist in containing the virus and its risks include: staggering employee shifts, minimizing the degree to which employees interact with the public in person, the feasibility of accomplishing work by telework, and geographical isolation within the workplace. Employers should also consider the level of COVID-19 disease transmission in their communities in deciding whether to opt for remote or hybrid work models. There are no bright-light rules, and the rules and science are constantly changing. But one thing is clear: the pandemic and its aftermath will continue to challenge employers in the months to come.

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[24] *See* 42 U.S.C. §12111(3). To determine if an employee who is not vaccinated due to a disability poses a "direct threat" in the workplace, the employer must make an initial assessment of the employee's ability to safely perform the essential functions of the job. The EEOC Guidance outlines a number of factors relevant to this assessment but cautions that the direct threat assessment "should be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19." *See* EEOC Guidance at K-4 (May 28, 2021).

[25] *See* 42 U.S.C. §12112(d)(4)(B); 29 C.F.R. §1630.14(d).

Ministerial Exception Bars Title VII Hostile Work Environment Claims, According to *En Banc* Seventh Circuit

By Alexander P. Berg

Employment discrimination lawsuits against religious institutions "present[] a collision between two interests of the highest order: the Government's interest in eradicating discrimination in employment and the constitutional right of a church to manage its own affairs free from governmental interference."[1] In *Demkovich v. St. Andrew the Apostle Parish*,[2] the Court of Appeals for the Seventh Circuit, sitting *en banc*, held, in a case of first impression in that circuit, that the church's First Amendment interests trumped the employee's interest in being free from a hostile work environment based on his sex and sexual orientation.[3]

To understand how this outcome came to be, it is critical first to understand the statutory and constitutional underpinnings of the relationship between Title VII and the First Amendment.

The Ministerial Exception To Title VII

Title VII of the Civil Rights Act of 1964 generally forbids covered employers from "discriminat[ing] against any individual with respect to his [or her] terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]"[4] This prohibition is not absolute, however; it is subject to both legislative and judicial exceptions.

The Legislative Exception for Religious Organizations

Of particular relevance here is an exception for religious organizations contained in Section 702 of the Civil Rights Act of 1964.[5] "Both the language and the legislative history" of Title VII demonstrate that this statutory exception is intended to "permit[] a religious organization to discriminate only on the basis of religion."[6] Specifically, "[t]he original House version of [section] 702 . . . provided a religious organization with a blanket exemption from the provisions of Title VII[,]" under which Title VII "would 'not apply . . . to a religious corporation, association, or society.'"[7] To achieve passage in the Senate, however, the bill was amended by then Senate Majority Leader Hubert Humphrey "'to limit the general exemption of religious groups to those practices relating to the employment of individuals of a particular religion to perform work connected with the employer's religious activities[.]'"[8] Thus, when Title VII was initially enacted, it did "not apply . . . to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work with the carrying on by such corporation, association, or society of its religious activities[.]"[9] Accordingly, as the Court of Appeals for the Fifth Circuit concluded in its foundational decision in *McClure v. Salvation Army*,[10] "Congress did *not* intend that a religious organization be exempted from liability for discriminating

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[1] *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 460 (D.C. Cir. 1996); *accord Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1167 (4th Cir. 1985) ("Tensions have developed between our cardinal Constitutional principles of freedom of religion, on the one hand, and our national attempt to eradicate all forms of discrimination, on the other.").

[2] No. 19-2142, 2021 U.S. App. LEXIS 20410, ___ F. 4th ___ (7th Cir. July 9, 2021) (en banc).

[3] *See also Young v. Northern Ill. Conf. of United Methodist Church*, 21 F.3d 184, 185 (7th Cir. 1994) ("[I]n a direct clash of 'highest order' interests, the interest in protecting the free exercise of religion embodied in the First Amendment . . . prevails over the interest in ending discrimination embodied in Title VII.").

[4] 42 U.S.C. § 2000e-2(a)(1).

[5] *See* 42 U.S.C. § 2000e-1(a).

[6] *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972).

[7] 460 F.2d at 558 (quoting H.R. 7152 (1964)).

[8] 460 F.2d at 558 (quoting 110 Cong. Rec. 12818).

[9] Pub. L. 88-352, 78 Stat. 255, at § 702 (emphasis added). Based on an amendment in the Equal Employment Opportunity Act of 1972, the final mention of the word "religious" was removed from Section 702. *See* Pub. L. 92-261, 86 Stat. 103, at § 3. Still, Congress confirmed that religious organizations "'remain subject to the provisions of Title VII with regard to race, color, sex or national origin.'" *Rayburn*, 772 F.2d at 1167 (quoting Section-by-Section Analysis of H.R. 1946, *reprinted in* Subcommittee on Labor of the Committee on Labor and Public Welfare of the United States Senate, Legislative History of the Equal Employment Opportunity Act of 1972 (Comm. Print 1972), at 1844, 1845).

[10] 460 F.2d 553 (5th Cir. 1972).

against its employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment."[11]

Judicial Carve-Outs Under the "Ministerial Exception" Doctrine

Moreover, regardless of Congressional intent, under the so-called "ministerial exception," applying Title VII to certain employees' circumstances runs afoul of the Establishment Clause and the Free Exercise Clause of the First Amendment.[12] Specifically, in order to maintain the wall of separation between church and state, matters touching "[t]he relationship between an organized church and its ministers . . . . must necessarily be recognized as of prime ecclesiastical concern."[13] And, "a long line of Supreme Court cases" affirm this fundamental right for churches to "'decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'"[14]

As such, applying Title VII to this relationship "would involve an investigation and review of [the religious organization's] practices and decisions" in a manner that would shift "[c]ontrol of strictly ecclesiastical matters from the church to the State" and leave the organization "without the power to decide for itself, free from state interference, matters of church administration and government."[15] This, in turn, could have a chilling effect on church decision making, as "churches, wary of EEOC or judicial review of their decisions, might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral needs of their members."[16]

In short, "[t]he ministerial exception is judicial shorthand for two conclusions: the first is that the imposition of secular standards on a church's employment of its ministers will burden the free exercise of religion; the second, that the state's interest in eliminating employment discrimination is outweighed by a church's constitutional right of autonomy in its own domain."[17]

After the scope of the ministerial exception percolated and developed for several decades among lower courts, the Supreme Court eventually weighed in on the subject in two pivotal decisions over the last ten years. They are discussed in turn.

Hosanna-Tabor Evangelical Church v. EEOC

In 2012 – forty years after the Fifth Circuit recognized the ministerial exception in *McClure* – the U.S. Supreme Court unanimously affirmed the existence and application of the exception to Title VII in *Hosanna-Tabor Evangelical Church v. EEOC*.[18] The Court further clarified that the ministerial exception "operat[es] as an affirmative

[11] 460 F.2d at 558 (emphasis added); *accord Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985) ("The language and the legislative history of Title VII both indicate that the statute exempts religious institutions only to a narrow extent[,]" such that "Title VII does *not* confer upon religious organizations a license to make [employment] decisions on the basis of race, sex, or national origin[.]") (emphasis added).

[12] *McClure*, 460 F.2d at 558; *accord Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1304 (11th Cir. 2000) ("[T]he Free Exercise and Establishment Clauses of the First Amendment prohibit a church from being sued under Title VII by its clergy.").

[13] *McClure*, 460 F.2d at 558-59.

[14] *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 462 (D.C. Cir. 1996) (quoting *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952), and citing *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929); and *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 717 (1976)).

[15] *McClure*, 460 F.2d at 560.

[16] *Rayburn*, 772 F.2d at 1171; *accord Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987) ("Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.").

[17] *Catholic Univ. of Am.*, 83 F.3d at 467.

[18] 565 U.S. 171, 188 (2012). In reaching this conclusion, the Court aligned itself with the uniform consensus of every court of appeals. *See* 565 U.S. at 188 & n.2 (citing *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989); *Rweyemamu v. Cote*, 520 F.3d 198, 204-09 (2d Cir. 2008); *Petruska v. Gannon Univ.*, 462 F.3d 294, 303-07 (3d Cir. 2006); *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 800-801 (4th Cir. 2000); *Combs v. Central Tex. Annual Conf.*, 173 F.3d 343, 345-50 (5th Cir. 1999); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225-27 (6th Cir. 2007); *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360, 362-63 (8th Cir. 1991); *Werft v. Desert Sw. Annual Conf.*, 377 F.3d 1099, 1100-04 (9th Cir. 2004) (per curiam); *Bryce v. Episcopal Church*, 289 F.3d 648, 655-57 (10th Cir. 2002); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1301-04 (11th Cir. 2000); and *EEOC v. Catholic Univ.*, 83 F.3d 455, 460-63 (D.C. Cir. 1996)).

defense to an otherwise cognizable [Title VII] claim, not [as] a jurisdictional bar."[19]

The *Hosanna-Tabor* Court further confirmed that "the ministerial exception is not limited to the head of a religious congregation[,]" though it declined to "adopt a rigid formula for deciding when an employee qualifies as a minister[,]" *i.e.*, for deciding who is covered by the exception.[20] The Court was also careful to point out that it "express[ed] no view on whether the [ministerial] exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers."[21]

The Court found that the plaintiff (Cheryl Perich) qualified as a minister for exemption purposes based on a totality of circumstances including the facts that: Perich was designated by her religious employer as a "Minister of Religion, Commissioned"; she held herself out as a minister of the Church; she engaged in a "significant degree of religious training" to qualify as a minister; and her job duties "reflected a role in conveying the Church's message and carrying out its mission." As a result of the finding that Perich was a minister, the Court concluded that "the First Amendment require[d] dismissal of [her] employment discrimination suit" under Title VII and the Americans with Disabilities Act (ADA) "against her religious employer."[22] Justice Alito wrote a separate concurrence for a broader, function-based approach to the ministerial exception, under which the exception "should apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith."[23]

Our Lady of Guadalupe School v. Morrissey-Berru

Eight years later, however, Justice Alito's concurrence in Hosanna-Tabor was essentially elevated to the reasoning of the Court in *Our Lady of Guadalupe School v. Morrissey-Berru*.[24] Writing this time for a seven-justice majority, Justice Alito explained that while religious institutions do not "enjoy a general immunity from secular laws," a faithful application of the "ministerial exception" means that "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions."[25]

The *Morrissey-Berru* Court further explained that "[i]n determining whether a particular position falls within the *Hosanna-Tabor* [ministerial] exception, a variety of factors may be important."[26] Whether an individual has the title "minister" itself is a factor, but it is relatively unimportant. "Simply giving an employee the title of 'minister' is not enough to justify the exception. And by the same token, since many religious traditions do not use the title 'minister,' it cannot be a necessary requirement."[27]

A second factor – "the academic requirements of a position" – "may show that the church in question regards the position as having an important responsibility in elucidating or teaching the tenets of the faith."[28] And with respect to teachers at religious institutions, "[t]he significance of formal training must be evaluated in light of the age of the students taught and the judgment of a religious institution regarding the need for formal training."[29] That said, just like it is not strictly required that an individual be given the title of "minister[,]" the Court does not "insist[] in every case on rigid academic requirements[.]"[30] By the same token, "[a] teacher, such as an instructor in a class on world religions, who merely provides a description of the beliefs and practices of a religion without making any effort to inculcate those beliefs could *not* qualify for the exception[.]"[31]

"What matters, at bottom," according to the Court, "is what an employee does."[32] Under this functional approach, evidence that an individual "perform[s] vital religious duties" weighs in favor of the exception applying.[33] To that end, "[a] religious institution's explanation of the role of [the] employee[] in the life of the religion in question is important[,]" if not entitled to outright deference.[34]

Justice Thomas (joined by Justice Gorsuch) would have gone further by "defer[ring] to [religious organizations'] good-faith understandings of which individuals are charged with carrying out the organizations' religious missions."[35] In dissent, Justice Sotomayor (joined by

[19] *Hosanna-Tabor*, 565 U.S. at 195 n.4.

[20] 565 U.S. at 190.

[21] 565 U.S. at 196.

[22] 565 U.S. at 193-94.

[23] 565 U.S. at 199 (Alito, J., concurring).

[24] ___ U.S. ___, 140 S. Ct. 2049 (2020).

[25] *Morrissey-Berru*, 140 S. Ct. at 2060.

[26] 140 S. Ct. at 2063.

[27] 140 S. Ct. at 2063-64. "For instance, Jehovah's Witnesses consider *all* baptized disciples to be ministers." *Hosanna-Tabor*, 565 U.S. at 202 (Alito, J., concurring) (emphasis added) (citing The Watchtower, Who Are God's Ministers Today? Nov. 15, 2000, p. 16).

[28] 140 S. Ct. at 2064.

[29] 140 S. Ct. at 2067-68.

[30] 140 S. Ct. at 2064.

[31] 140 S. Ct. at 2067 n.26 (emphasis added).

[32] 140 S. Ct. at 2064.

[33] 140 S. Ct. at 2066.

[34] 140 S. Ct. at 2066.

[35] 140 S. Ct. at 2071 (Thomas, J., concurring).

Justice Ginsburg) criticized the majority for "collaps[ing] *Hosanna-Tabor*'s careful analysis into a single consideration: whether a church thinks its employees play an important religious role."[36] In short, Justice Sotomayor reasoned, "one cannot help but conclude that the Court has just traded legal analysis" – the *Hosanna-Tabor* Court's multi-factor analysis that included "objective and easily discernable markers like titles, training, and public-facing conduct" – "for a rubber stamp[]" of the religious organizations' opinion about whether their employees should be able to sue them for employment discrimination.[37]

The Seventh Circuit's Decision in *Demkovich*

St. Andrew the Apostle Parish, a Roman Catholic church of the Archdiocese of Chicago, hired Sandor Demkovich as its music director, choir director, and organist in September 2012. Demkovich, a gay man, allegedly was subjected to "derogatory comments and demeaning epithets" by his supervisor, Reverend Jacek Dada, "showing a discriminatory animus toward his sexual orientation."[38] After Demkovich married his partner in September 2014, Dada demanded that Demkovich resign and, when Demkovich refused, fired him.[39]

Demkovich then sued the church under Title VII, claiming that he was the victim of discrimination based on his sex, sexual orientation, and marital status.[40] Demkovich also filed suit under the ADA, claiming that Dada "made belittling and humiliating comments" about him based on his diabetes, metabolic syndrome, and weight issues.[41] The district court dismissed Demkovich's Title VII claims pursuant to the ministerial exception, while allowing his disability-based hostile work environment claims to proceed.[42]

The church subsequently moved to certify a question of law to the Seventh Circuit, *i.e.*, "Under Title VII and the [ADA], does the ministerial exception ban all claims of a hostile work environment brought by a plaintiff who qualifies as a minister, even if the claim does not challenge a tangible employment action?"[43]

A three-judge panel of the Seventh Circuit reversed the dismissal of Demkovich's sex, sexual orientation, and marital status claims, while also permitting Demkovich's disability-based hostile work environment claim to proceed.[44] The Seventh Circuit then "vacated the panel opinion and reheard this interlocutory appeal en banc."[45]

In a 7-3 decision, and following "two motions to dismiss, two subsequent decisions and orders, the beginnings of discovery, an interlocutory appeal, a panel opinion, and now en banc rehearing," the Seventh Circuit held that Demkovich's suit should have been dismissed based on the ministerial exception.[46]

The *En Banc* Majority Opinion

After tracing the "rich lineage" of the ministerial exception, as recited in *Hosanna-Tabor* and *Our Lady of Guadalupe*, Judge Brennan (joined by Chief Judge Sykes and Judges Flaum, Easterbrook, Kanne, St. Eve, and Kirsch) concluded that, "although these cases involved allegations of discrimination in termination, their rationale is not limited to that context." Rather, "[t]he protected interest of a religious organization in its ministers covers the entire employment relationship, including hiring, firing, and supervising in between."[47] The majority also reiterated that the ministerial exception is intended to prevent "civil intrusion and excessive entanglement" by civil courts.[48] Consequently, "[a]djudicating a minister's hostile work environment claims based on interaction between ministers would undermine this constitutionally protected relationship."[49]

This is because "hostile work environment claims challenge a religious organization's independence in its ministerial relationships[,]" in that "[a] judgment against the church" in such claims "would legally recognize that it fostered a discriminatory employment atmosphere for one of its ministers."[50] But, given the Religion Clauses of

[36] 140 S. Ct. at 2072 (Sotomayor, J., dissenting).

[37] 140 S. Ct. at 2075-76 (Sotomayor, J., dissenting).

[38] *Demkovich v. St. Andrew the Apostle Par.*, No. 19-2142, 2021 U.S. App. LEXIS 20410, at *3-4 (7th Cir. July 9, 2021).

[39] 2021 U.S. App. LEXIS 20410, at *4.

[40] 2021 U.S. App. LEXIS 20410, at *5.

[41] *See* 2021 U.S. App. LEXIS 20410, at *5.

[42] *See* 2021 U.S. App. LEXIS 20410, at *5.

[43] 2021 U.S. App. LEXIS 20410, at *7-8.

[44] *See* 2021 U.S. App. LEXIS 20410, at *8.

[45] 2021 U.S. App. LEXIS 20410, at *8.

[46] *See generally* 2021 U.S. App. LEXIS 20410. Ten judges participated, instead of 11, because "Circuit Judge Scudder did not participate in the consideration or decision of [the] case." *Id.* at *3 n.1.

[47] 2021 U.S. App. LEXIS 20410, at *13; *see also Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 700, 703-04 (7th Cir. 2003) ("The 'ministerial exception' applies without regards to the type of claims being brought.").

[48] *Demkovich*, 2021 U.S. App. LEXIS 20410, at *13.

[49] 2021 U.S. App. LEXIS 20410, at *33.

[50] 2021 U.S. App. LEXIS 20410, at *15.

the First Amendment, "[t]he contours of the ministerial relationship are best left to a religious organization, not a court."[51]

In reaching this outcome, the Seventh Circuit observed the circuit split about "whether the ministerial exception covers hostile work environment claims."[52] Specifically, the Tenth Circuit holds that hostile work environment claims cannot be litigated by ministers against religious organizations.[53] By contrast, the Ninth Circuit permits such hostile work environment claims.[54] The Seventh Circuit thus made clear it was joining the Tenth Circuit's view.[55]

The Court also made clear that there are several limits to its holding. First, its ruling is limited to employees properly classified as ministers, and nonministers may still maintain hostile work environment claims: "Because ministers and nonministers are different in kind, the First Amendment requires that their hostile work environment claims be treated differently."[56] In short, the *Demkovich* Court has merely "[p]reclud[ed] hostile work environment claims arising from minister-on-minister harassment[.]"[57] Second, because of "[t]he ministerial exception's status as an affirmative defense," "some threshold inquiry" and limited "discovery to determine who is a minister" is necessary.[58] Third, the ministerial exception does not "protect[] against criminal or personal tort liability."[59]

The *En Banc* Dissent

In dissent, Judge Hamilton (joined by Judges Rovner and Wood) accused the majority of misreading *Hosanna-Tabor* and *Our Lady of Guadalupe*, observing that the question of "whether the ministerial exception should extend to hostile environment claims[] was neither presented nor decided" by the Supreme Court.[60] Moreover, the dissent explained, the ministerial exception question "has never been what sorts of legal immunities might *help* churches[,]" but rather, "whether this particular legal immunity 'is *necessary* to comply with the First Amendment.'"[61]

In addition, the dissent viewed hostile work environment claims as different in kind from those based on discrete acts such as "[h]iring, firing, promoting, retiring, [and] transferring[.]"[62] Specifically, in contrast to those acts, which bear on a religious organization's ability to control its ministers and its message, "[h]ostile environment claims . . . are by definition based on actions that are *not* necessary for effective supervision of employees[.]"[63] In short, in the dissent's view, "a hostile work environment, by definition, simply is not a permissible means of exerting (constitutionally protected) 'control' over employees and accomplishing the mission of the business or religious organization."[64] As such, the dissent criticized "the majority's absolute bar to statutory hostile environment claims by ministerial employees" as "not necessary to protect religious liberty or to serve the purposes of the ministerial exception."[65]

Implications for Practitioners

While, on its face, the *Demkovich* decision only strictly affects those practitioners within jurisdictions covered by the Seventh Circuit (*i.e.*, Illinois, Indiana, and Wisconsin), its reasoning is illustrative of the wide swath of the ministerial exception following the Supreme Court's guidance in *Hosanna-Tabor* and, especially, *Our Lady of Guadalupe*. It is highly likely that the Supreme Court, as currently constituted, would readily agree with the *en banc* majority's outcome in *Demkovich*.

In any event, attorneys representing employees will need to marshal highly creative and fact-driven arguments to

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[51] 2021 U.S. App. LEXIS 20410, at *18. Put otherwise, "the point of the ministerial exception" is that "[d]eciding where a minister's supervisory power over another minister ends and where employment discrimination law begins is not a line to be drawn in litigation[.]" *Id.* at *19.

[52] 2021 U.S. App. LEXIS 20410, at *33.

[53] *See* 2021 U.S. App. LEXIS 20410, at *32 (citing *Skrzypczak v. Roman Cath. Diocese of Tulsa*, 611 F.3d 1238, 1243-46 (10th Cir. 2010) (in turn citing *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003)).

[54] *See Demkovich*, 2021 U.S. App. LEXIS 20410, at *32 (citing *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004), and *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 945-50 (9th Cir. 1999)).

[55] *See Demkovich*, 2021 U.S. App. LEXIS 20410, at *32-33.

[56] 2021 U.S. App. LEXIS 20410, at *17.

[57] 2021 U.S. App. LEXIS 20410, at *19.

[58] 2021 U.S. App. LEXIS 20410, at *28-29.

[59] 2021 U.S. App. LEXIS 20410, at *27.

[60] 2021 U.S. App. LEXIS 20410, at *39 (Hamilton, J., dissenting).

[61] 2021 U.S. App. LEXIS 20410, at *45 (Hamilton, J., dissenting).

[62] 2021 U.S. App. LEXIS 20410, at *45 (Hamilton, J., dissenting).

[63] 2021 U.S. App. LEXIS 20410, at *46-47 (Hamilton, J., dissenting) (emphasis added).

[64] 2021 U.S. App. LEXIS 20410, at *47 (Hamilton, J., dissenting) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).

[65] 2021 U.S. App. LEXIS 20410, at *61 (Hamilton, J., dissenting).

persuade civil courts that their clients' cases fall into that narrow subset of employment discrimination claims that is still cognizable against religious institutions. Conversely, management side attorneys should be prepared to assert that their religious organization clients view an employee as important to the mission of the faith, such that disputes related to their employment should be left to ecclesiastical authorities and not to the courts.

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Heightened Scrutiny Applies to Post-Certification Class Action Settlements In Addition to Pre-Certification Class Action Settlements

By Kacey Riccomini

Rule 23(e) of the Federal Rules of Civil Procedure imposes an obligation on district courts "to ensure that any class settlement is "fair, reasonable, and adequate,' accounting for the interests of absent class members." Courts, likewise, have an obligation "to ensure that [any attorneys' fee] award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount."[1] The Ninth Circuit recently applied these principles to a post-class certification settlement agreement in *Briseño v. Henderson*,[2] to find a "squadron of red flags" in the underlying agreement, including: the fact that class counsel would receive seven times more money than the class members, an injunction that appeared to be worthless or illusory, a provision in which the defendant agreed not to challenge the amount of class counsel's attorneys' fees, and a provision that any reduction in fees would revert to the defendant rather than to the class.[3] While the Ninth Circuit did not invalidate these types of provisions *per se*, it cautioned against their inclusion in pre- and post-class certification agreements seeking court approval or, where necessary, that counsel be able to explain that the agreement is fair, reasonable and adequate, despite such provisions. *Briseño* is a consumer class action but its principles equally apply to class action settlements in the employment realm.

The District Court Proceedings

At the time the suit was initiated in 2011, the defendant, ConAgra Foods, Inc., owned Wesson Oil and labelled the product as "100% Natural." Plaintiff Robert Briseño and others sued ConAgra, contending that the "100% Natural" label was misleading, because Wesson Oil contains ingredients made from genetically modified organisms ("GMOs"). Although Plaintiffs' initial motion for class certification failed, their amended motion for class certification was successful. In their amended motion, Plaintiffs relied on multiple experts, who asserted that consumers paid a 2.28% price premium for the allegedly mislabeled products. The United States District Court for the Central District of California certified a Rule 23(b)(3) damage class, but refused to certify a Rule 23(b)(2) injunctive class for lack of standing. ConAgra's unsuccessfully appealed the class certification ruling and, also unsuccessfully, attempted to seek *certiorari*.[4]

Thereafter, the parties began settlement negotiations. During that time, in May 2017, ConAgra attempted to sell Wesson Oil and voluntarily removed the disputed label, maintaining that the litigation played no role in these decisions. Plaintiffs and ConAgra reached an agreement-in-principle in November 2018. ConAgra agreed to sell Wesson Oil to The J.M. Smucker Company the following month, with the deal closing in February 2019. In March 2019, Plaintiffs and ConAgra proposed a settlement agreement.[5]

Under the proposed settlement agreement, ConAgra agreed to pay: (a) $0.15 for each unit of Wesson Oils purchased by households that submitted valid claim forms (to a maximum of thirty units without proof of purchase); (b) an additional fund of $575,000 to be allocated among New York and Oregon class members submitting claim forms as compensation for statutory damages under those states' consumer protection laws; and (c) an additional fund of $10,000 to compensate the class members who submitted proof of purchase receipts for more than 30 units of Wesson Oil at $0.15 per unit, with class counsel paying any claims over $10,000 from attorneys' fees awarded in the case. Thus, the proposed settlement agreement provided that ConAgra would only pay out claims submitted by the nearly 15 million consumer class. However, the agreement did not provide direct notice to class members. Despite this, ConAgra claimed that the settlement exposed it to $67.5 million in claims.[6]

Additionally, the settlement agreement provided injunctive relief, stating that if ConAgra reacquired Wesson Oils, it would not advertise Wesson Oil as "natural" unless the FDA permitted use of the term to describe oil derived from

[1] *Briseño v. Henderson*, 998 F.3d 1014, 1022 (9th Cir. 2021).

[2] 998 F.3d 1014 (9th Cir. 2021).

[3] 998 F.3d at 1018-19.

[4] 998 F.3d at 1019.

[5] 998 F.3d at 1019.

[6] 998 F.3d at 1020.

GMO seeds. The parties contended that the injunction was worth $27 million.[7]

The settlement further provided that plaintiffs would request, and ConAgra would not contest, an award of $6.85 million in attorneys' fees and expenses. In the event that the court reduced this amount, the benefit of any reduction reverted to ConAgra, not to the class.[8]

In addition to several problems inherent in agreement itself, the parties' representations about the agreement and settlement were, at a minimum, misleading. As the Ninth Circuit noted, "The [parties represented that their settlement could theoretically be worth over $100 million – around $95 million in value to the class ($67.5 million in potential payout and $27 million in injunctive relief value), along with another $6.85 million for the attorneys."[9] But, in reality, ConAgra paid far less. The actual settlement "was less than $8 million, with a mere $1 million of that going to the class. Class counsel's fees swallowed $5.85 million, and expenses devoured another $978,671."[10] Of the 15 million class members, "barely more than one-half of one percent of them submitted claims."[11]

Only one class member, M. Todd Henderson, opted out of the settlement and objected to it under Rule 23(e). He contended that the attorneys "hoarded 88% of the class's actual recovery," that the court should treat the settlement as a constructive common fund, the value of the injunctive relief was illusory, and that the clause providing that ConAgra would not contest the division of funds between the class and class counsel with ConAgra receiving the benefit of any reduction was collusive.[12]

Plaintiffs sought final approval of the settlement in July 2019, contending that ConAgra's label change was worth $19.1 million; if Wesson Oil's new owner refrained from labelling the product as "natural" for a year, the value of the injunction would reach $30.2 million with an annual benefit of $11 million. Plaintiffs' attorneys noted that their fees request represented 25.4% of the estimated value of the injunctive relief and that their lodestar was allegedly around $11.5 million.[13]

However, class members only made 97,880 timely claims totaling $418,919, not $67.5 million. With the separate settlement funds for New York and Oregon claims, ConAgra would pay a maximum of $993,919 to class members.[14]

At the district court's final fairness hearing, Henderson and class counsel disagreed on almost every issue, including who bore the burden of persuasion. Henderson argued that the settlement agreement, particularly the clause reverting any reduction of attorneys' fees to ConAgra, demonstrated that ConAgra was willing to settle for $8 million, and that class counsel bargained away absent class members' rights in exchange for most of the settlement.[15]

The district court rejected Henderson's motion to strike Plaintiffs' expert report on the grounds that the valuation of the injunction was helpful to the court and, even if no injunction was offered, the court would find the settlement agreement "was fair and reasonable given the likely obstacles to Plaintiffs recovering" at trial. The district court evaluated the settlement for fairness under *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003), finding that there was substantial overlap between that decision and Rule 23(e)(2). The court also found that class counsel's fees were reasonable under the loadstar method and considering that ConAgra was "willing to pay anything at all given the many liability and damages issues this case has had from the beginning." The district court concluded that the $0.15 per unit award was "substantial" and offered a tangible benefit that might not be awarded if the litigation continued. Despite Henderson's objections, the district court stated that it was not persuaded that "the disproportionate attorney fee award under the settlement render[ed] the entire settlement unfair," and instead that class counsel did not bargain away the benefit to the class to suit their own interests.[16]

The District Court Failed To Apply Rule 23(e)(2)

The Ninth Circuit reversed the order approving settlement, finding that the district court erred in two respects. First, the district court failed to apply the most recent version of Rule 23(e)(2), which, in part, requires that courts scrutinize attorneys' fee arrangements in class settlements. The Ninth Circuit observed that Rule 23(e) requires district courts to ensure class settlements are "fair, reasonable, and adequate," including for absent class members, that attorneys' fees awards are reasonable, and that special attention should be given to settlement agreements providing counsel a disproportionate share of the settlement.[17]

[7] 998 F.3d at 1020.
[8] 998 F.3d at 1020
[9] 998 F.3d at 1020.
[10] 998 F.3d at 1020.
[11] 998 F.3d at 1020
[12] 998 F.3d at 1020.
[13] 998 F.3d at 1021.
[14] 998 F.3d at 1021.
[15] 998 F.3d at 1021.
[16] 998 F.3d at 1021.
[17] 998 F.3d at 1022-23.

Additionally, the Ninth Circuit recognized the risks of allowing class counsel to bargain for an entire class, including prior to class certification where class counsel might try to strike a quick bargain. In the court's prior decision, *In re Bluetooth Headset Product Liability Litigation*, the Ninth Circuit found that courts should scrutinize settlement agreements for" subtle signs that class counsel have allowed pursuit of their own self-interests. . . to infect the negotiations."[18] In *Bluetooth*, the court identified three of those signs, specifically: (1) "when counsel receive[s] a disproportionate distribution of the settlement"; (2) "when the parties negotiate a 'clear sailing arrangement,'" under which the defendant agrees not to challenge a request for an agreed-upon attorney's fee; and (3) when the agreement contains a "kicker" or "reverter" clause that returns unawarded fees to the defendant, rather than the class."[19] *Bluetooth* left open the question of whether this heightened inquiry applies to post-class certification settlements, in *Briseño* the Ninth Circuit found that it does.[20]

Indeed, under the revised Rule 23(e)(2)(C)(iii), district courts must now consider "the terms of any proposed award of attorney's fees" when determining whether "the relief provided for the class is adequate." That is, courts must "balance" proposed attorneys' fees against the relief provided to the class to determine whether the settlement is adequate for class members.[21]

Although there may be greater potential for collusion pre-certification, the Ninth Circuit noted that, even post-certification, "class counsel still has the incentive to conspire with the defendant to reduce compensation for class members in exchange for a larger fee. A defendant goes along with this collusion because it cares only about the total payout, not the division of funds between class and class counsel." Thus, courts must apply *Bluetooth*'s heightened scrutiny to post-class certification settlements to assess whether they are fair and adequate.[22]

The Ninth Circuit found that the district court failed to apply Rule 23(e)(2) in *Briseño*, because it never scrutinized the fee arrangement for potential collusion. The district court's reliance on the loadstar and its belief that the fee request was reasonable because it was less than half of the lodestar amount was misplaced. As the Ninth Circuit cautioned, "the lodestar alone cannot tell us if the requested fees are reasonable."[23] The court explained that "counsel may have frittered away hours on pointless motions or unnecessary discovery, padding the loadstar," or may have "devoted tremendous hours but achieved very little for the class."[24] The district court also failed to apply the *Bluetooth* factors to determine if collusion disadvantaged the class members.[25]

Applying the first *Bluetooth* factor, the Ninth Circuit found that it was clear that Plaintiffs' counsel received a disproportionate share of the settlement – nearly $7 million while the class received less than $1 million. The settlement was also structured to reduce the redemption rate, which was already low for low-value items, because there was no direct notice to the class members. Second, ConAgra's agreement not to challenge the fee structure between class counsel and the class was another red flag, and increased the likelihood that class counsel "bargained away something of value for the class," to obtain unreasonably high fees. Finally, the "kicker" or "reverter" clause where ConAgra, and not the class, would receive the remaining funds if the court reduced the attorneys' fees was another red flag. In the Ninth Circuit's view, there is no plausible reason why the class should not benefit from the spillover of excessive fees. The Ninth Circuit also noted that agreement to a "kicker," where class members cannot increase recovery by challenging excessive fees, because those fees are returned to the defendant, means that class members may not have standing to object to excessive fees as a court could not redress their purported injury.[26]

In sum, all three *Bluetooth* factors were implicated in *Briseño*, and, while the existence of the factors did not necessarily mean that the parties failed to arrive at a fair or adequate agreement, the presence of the factors underscored the need for the district court to have taken a hard look at the settlement agreement to ensure that the parties did not collude at the class members' expense.[27]

The District Court Failed to Approximate the Value of the Injunction

The Ninth Circuit found that the district court also erred by failing to recognize that the settlement's injunctive relief was worthless. Here, two years before the parties reached a settlement, ConAgra agreed not to market Wesson Oil as "100% Natural," and it subsequently sold Wesson Oil to a company that could resume using the "100% Natural"

[18] 998 F.3d at 1023.

[19] *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011).

[20] *Briseño v. Henderson*, 998 F.3d 1014, 1023 (9th Cir. 2021).

[21] 998 F.3d at 1024.

[22] 998 F.3d at 1025.

[23] 998 F.3d at 1026.

[24] 998 F.3d at 1026.

[25] 998 F.3d at 1026.

[26] 998 F.3d at 1026-27.

[27] 998 F.3d at 1027-28.

label. Thus, the injunction was illusory and "practically worthless." Further, in the court's view, Plaintiffs' expert's conclusion about the annual value of injunctive relief reaching over $11 million did not address other market factors, was "unverifiable," and "worth as little as the settlement's injunctive relief."[28]

The District Court Did Not Shift the Burden of Proof To Henderson and Did Not Err

The Ninth Circuit observed that Rule 23(e)(2) "assumes that a class action settlement is invalid." The rule allows the court to approve a settlement after a hearing and finding that the settlement is fair, reasonable and adequate, which is what the district court attempted to do in *Briseño*. The district court did not, as Henderson contended, require him to show that the settlement was "clearly inadequate." Moreover, the assumption that the settlement is invalid does not undermine the strong judicial policy favoring settlements.[29]

Conclusion

Although *Briseño* involved a consumer class action, its principles are readily applicable to employment class actions. In light of the *Briseño* decision and recent revisions to Rule 23, counsel should consider avoiding terms that run afoul of the *Bluetooth* factors, regardless of whether the settlement is reached before or after class certification. Disproportionate fee awards for class counsel have been, and will continue to be, a problem that will be difficult to address in negotiations, especially in employment litigation, and are more appropriately addressed by the legislature. However, other terms are more manageable or less problemmatic. Indeed, including a "clear sailing arrangement" is not necessary in an employment case, because a defendant generally has no interest in undermining the terms of settlements to which they agree only to face the expense of additional litigation and potential liability at trial. Similarly, including a "kicker" or "reverter" provision returning unapproved attorneys' fees to the defendant, rather than to the class, should be avoided, since they are inherently collusive and create a risk of invalidating the settlement altogether. In the event that one of more of these terms are included in future class settlements, they will receive heightened scrutiny, and the parties should be prepared to make a factual showing that there was no collusion, and that the class members are receiving a fair, reasonable and adequate settlement.

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[28] 998 F.3d at 1028-29.

[29] 998 F.3d at 1031-32.

RECENT DEVELOPMENTS

ADEA

Plaintiff Could Not Establish That She Was Denied A Job Because Of Her Prior Protected Activity

Chatman v. Bd. of Educ. of Chi., 2021 U.S. App. LEXIS 21430 (7th Cir. July 20, 2021)

Mildred Chatman worked in the Chicago Public Schools for over two decades. In 2009, she was laid off. She then filed a discrimination charge against the Chicago Board of Education, which later settled. As part of the settlement, Chatman secured the opportunity to interview for open positions within the Chicago Public Schools. She interviewed for positions at several schools, four of which were relevant to this appeal, but received no job offer. She filed suit, alleging race and age discrimination, as well as retaliation based on her prior discrimination charge. The United States District Court for the Northern District of Illinois granted summary judgment for the Board. On appeal challenging the entry of summary judgment, the Seventh Circuit affirmed, holding that Chatman's claims ultimately failed for a lack of proof. Even taking all reasonable inferences in her favor, the record could not support Chatman's contention that the Board discriminated or retaliated against her.

One of the positions at issue was a teacher's assistant position at Earle Elementary School. Chatman's claims against Earle were untimely, since the school took no action within the 300-day charge-filing period. Moreover, it was not clear from the record that there actually was an Earle teacher assistant position available or that Chatman interviewed with the Earle principal. The court noted that Chatman chose not to depose the Earle principal—or any other principal involved in this case—and that decision contributed to the sparse record. The lack of any documentation regarding the Earle position is particularly noteworthy, because Chatman's settlement with the Board obligated her to identify open positions. While Chatman was able to produce certain position descriptions that the Board posted on its hiring website, she was unable produce such evidence in connection with the Earle Elementary position. While the statute of limitations is an affirmative defense and that if the "evidence [is] inconclusive at best, the tie must go to the plaintiff" (*Salas v. Wis. Dep't of Corr.*, 493 F.3d 913, 921 (7th Cir. 2007), in Chatman's case, evidence that she timely filed her "Earle claim" was not inconclusive; it was absent. Under such circumstances, her Earle claim was barred by the statute of limitations.

Similarly, the court saw no way for a reasonable factfinder to conclude that Chatman's protected activity was the but-for cause of her failure to be hired at Mireles Elementary. Chatman had marshalled no evidence that the Board's decision to eliminate the Mireles position for budgetary reasons was based on retaliatory motives. In any event, K.D. – who was much younger than Chatman and engaged in no protected activity – suffered a position cut for budget reasons. Chatman, therefore, could not possibly establish that she would have been hired absent her prior protected activity.

COLLECTIVE BARGAINING

Board Permissibly Adjusted Composition of Voting Group and Permissibly Determined That Group Shares Community of Interest With Preexisting Bargaining Unit it Voted to Join

Alaska Communs. Sys. Holdings v. NLRB, 2021 U.S. App. LEXIS 22614 (D.C. Cir. July 30, 2021)

Alaska Communications Systems Holdings, Inc. provided telecommunications services throughout Alaska and in Oregon. While most of the Company's employees were based in Alaska, some were based in Oregon. Before the proceedings in this case, the union that represented a majority of the Company's employees did not represent any of the Oregon-based employees. The union then sought to hold a representation election among a subset of the Oregon-based employees. The National Labor Relations Board certified a voting group that differed slightly from the petitioned-for unit, and that group voted to join the preexisting bargaining unit. The Company thereafter challenged the Board's certification of the voting group.

The District of Columbia Circuit concluded that the Board permissibly adjusted the composition of the voting group and permissibly determined that the adjusted group shared a community of interest with the preexisting bargaining unit it voted to join. The court thus rejected the Company's challenges, denied the petition for review, and granted the Board's cross-application for enforcement of its order. Under the relevant standard, the court would uphold the

Board’s decision if its ruling was not “arbitrary, capricious, ior founded on an erroneous application of the law, and if its factual findings are supported by substantial evidence.” The court found that the Board appropriately considered the full record in concluding that the voting group shared a community of interest with the existing bargaining unit, and that the Board took account of evidence that tended to cut against its finding. The court thus held that the Board's ultimate finding of a community of interest was supported by substantial evidence.

The court, similarly, rejected the Company’s argument that, because it ostensibly received inadequate notice of the possible bargaining units, the Board's unit-selection procedures failed to provide an "appropriate hearing" within the meaning of Section 9(c) of the Act [29 U.S.C. § 159(c)(1)]. Under Section 9(c), the Board must provide an “appropriate hearing” when representation questions arise. But the board held two sets of multiday hearings on the record about the appropriate bargaining unit and collected extensive evidence from the parties to support its determination. On the record, the court concluded that the Board's process was fully consistent with its duty under the Act to "provide for an appropriate hearing upon due notice."

The court also found no basis for setting aside the Board's determination, since the factors relating to the employees' organization within the Company weighed in favor of finding the requisite community of interest. As the Board determined, including the voting group within the existing Alaska Unit cohered with the Company's departmental structure. The voting group was coextensive with the Cable Systems Group (aside from supervisors, whom the Board found to be ineligible), which the Company organized together with the Alaska Unit under the broader Network Development and Engineering Department. Thus, as the Board’s Regional Director explained, "[a]llowing the Cable Systems Group employees to vote in a self-determination election would not fracture the Alaska Unit.” It simply made sense and was defensible for all of the articulated reasons and was, therefore, upheld.

DISCRIMINATION

Substantial Evidence Did Not Support the NLRB's Determination that an Employee Was Disciplined For a Reason Other Than Sending a Union-Related Email

Communs. Workers of Am., AFL-CIO v. NLRB, 2021 U.S. App. LEXIS 21869 (D.C. Cir. July 23, 2021)

The Communication Workers of America petitioned for review of a decision by the National Labor Relations Board ("NLRB") finding that T-Mobile did not unlawfully discriminate against union activity at its call center in Wichita, Kansas. The Union's claims arose from T-Mobile's responses to an email sent by a customer service representative (“Befort”) -- through her work email account -- inviting her coworkers to join ongoing efforts at the call center to organize a union. T-Mobile reprimanded the customer service representative for sending the email, and call center management further responded by sending out a facility-wide email stating that it did not permit its employees to send mass emails through the Company email system for non-business purposes. An administrative law judge held that, in so responding, T-Mobile violated the National Labor Relations Act ("NLRA"), including by discriminating against the employee based on the union-related content of her email. The judge rejected T-Mobile's claim that its reactions to the email were justified by written company policies.

The Board reversed in all respects relevant to these petitions, distinguishing evidence that T-Mobile had previously permitted mass emails, on the ground that those emails were not similar in character to the email here. As the Board saw it, T-Mobile's emails were business-related, whereas the one that drew the reprimand was for the employee’s personal benefit or to advance an organization other than the employer.

The District of Columbia Circuit granted the Union's petitions in full. Reversing the Board’s position, the court stated that the Board erred in rejecting evidence of disparate treatment and in ignoring judicial precedent by relying on its own post hoc distinction between permissible and impermissible employee conduct. Based on the evidence of disparate treatment, and because the policies and rationales that T-Mobile itself offered in defense of its actions did not support them, the Board's decision to reverse the ALJ's finding that T-Mobile discriminatorily enforced Company policies related to email use was not supported by substantial evidence.

The court stated that there was no suggestion that Befort somehow violated the authorization process for access to her email or exceeded "specified access and permission levels" by breaking into a distribution list or any other component of the email system. *Cf. Van Buren v. United States*, 141 S. Ct. 1648, 1657 (2021) ("In the computing context, 'access' references the act of entering a computer 'system itself' or a particular 'part of a computer system,' such as files, folders, or databases."). Under these facts, the

court declined to fill in the Board's silence on how Befort's email implicated the Enterprise User Standard. The court saw no record basis upon which to credit T-Mobile's theory that Befort's use of multiple emails somehow constituted unauthorized access.

Based on the evidence of disparate treatment of Befort's email and related facts suggesting a singling out of the union, "substantial evidence does not support the Board's determination that [Befort] was disciplined for a reason other than that she sent a union-related email." *Guard Publ'g Co. v. NLRB*, 571 F.3d 53, 60, 387 U.S. App. D.C. 53 (D.C. Cir. 2009). The Board sidestepped those facts only by relying on the type of post hoc distinction that was previously deemed impermissible in *Guard Publishing*. The court thus granted the Union's petition for review.

MINIMUM WAGES

Fact That Pay Was Not Specifically Attached to Each Hour of Work Did Not Mean that Employer Violated California Law, Lab. Code § 204(A)

Bernstein v. Virgin Am., Inc., 2021 U.S. App. LEXIS 21446 (9th Cir. July 20, 2021)

Plaintiffs were California-based flight attendants employed by Virgin America, Inc. ("Virgin"). During the Class Period, approximately 25% of Virgin's flights were between California airports. Class members spent approximately 31.5% of their time working within California's borders. The United States District Court for the Northern District of California certified: a Class of all individuals who worked as California-based Virgin flight attendants during the period from March 18, 2011; a California Resident Subclass; and a Waiting Time Penalties Subclass. Plaintiffs alleged that Virgin violated a host of California labor laws. The district court certified a class of similarly-situated plaintiffs and granted summary judgment to plaintiffs on virtually all of their claims, and Virgin appealed before the U.S. Court of Appeals for the Ninth Circuit. The court affirmed in part, reversed in part and vacated in part. As a threshold matter, the court held that the dormant Commerce Clause did not bar applying California law in the context of this case.

The court reversed the district court's summary judgment to plaintiffs on their claims for minimum wage and payment for all hours worked. Specifically, the court held that Virgin's compensation scheme based on block time did not violate California law. The fact that pay was not specifically attached to each hour of work did not mean that Virgin violated California law. The Ninth Circuit held that under the circumstances of this case, Virgin was subject to the overtime strictures of California Lab. Code § 510 as to both the Class and California Resident Subclass.

The court affirmed the district court's summary judgment to plaintiffs on their rest and meal break claims. The court rejected Virgin's contention that federal law preempted California's meal and rest break requirement in the aviation context because federal law occupied the field. Specifically, the court held that field preemption under the Federal Aviation Act was not necessarily limited to state laws that regulate aviation safety. Also, conflict preemption did not bar application of California's meal and rest break requirements. With respect to Virgin's impossibility preemption argument, the court held that it was physically possible to comply with federal regulations prohibiting a duty period of longer than fourteen hours and with California's statutes requiring ten-minute rest breaks and thirty-minute meal periods at specific intervals. The court held further that Virgin's obstacle preemption argument mischaracterized the relevant federal regulation and improperly dismissed the possibility of increasing flight attendant staffing on longer flights. Contrary to Virgin's characterization, the relevant regulations defined safety duties for a minimum number of flight attendants. The court agreed with the district court, which held that airlines could comply with both the Federal Aviation Administration safety rules and California's meal and rest break requirements by staffing longer flights with additional flight attendants in order to allow for duty-free breaks.

Finally, the court held that the meal and rest break requirements were not preempted under the Airline Deregulation Act. Extrapolating the principles of *Sullivan v. Oracle Corp.*,[1] the court held that California's meal and rest break requirements applied to the work performed by the Class and California Resident Subclass.

Applying *Ward v. United Airlines, Inc.*,[2] holding that California Lab. Code § 226(a) applied to workers who do not perform the majority of their work in any one state, but who are based for work purposes in California, the court affirmed the district court's summary judgment to plaintiffs on their wage statement claim.

On plaintiffs' waiting time penalties claim, the court held that -- although there was no California Supreme Court

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[1] 51 Cal. 4th 1191, 127 Cal. Rptr. 3d 185, 254 P.3d 237 (Cal. 2011).

[2] 9 Cal. 5th 732, 264 Cal. Rptr. 3d 1, 466 P.3d 309, 321 (Cal. 2020).

case specifically interpreting the reach of the waiting time penalties statute (but for Cal. Labor Code §§ 201 and 202 for interstate employees) -- the analogy to Lab. Code § 226 was compelling. Because the California Supreme Court held § 226 to apply under these circumstances, the court held that §§ 201and 202 also applied.

The Ninth Circuit further affirmed the district court's decision on class certification. Specifically, the court held that the applicability of California law has been adjudicated on a class-wide or subclass-wide basis, and thus, that no individual choice-of-law analysis was necessary.

The Ninth Circuit also reversed the district court's holding that Virgin was subject to heightened penalties for subsequent violations under California's Private Attorney General Act. The court stated that Virgin was not notified by the Labor Commissioner or any court that it was subject to the California Labor Code until the district court partially granted plaintiff's motion for summary judgment. On this basis, the court held that Virgin was not subject to heightened penalties for any Labor Code violation that occurred prior to that point.

The court held that since it reversed in part the district court's judgment on the merits, California law required that the court vacate the attorneys' fees and costs award, and remanded the issue to the district court for determination.

TERMINATION

Employee's Complaint Failed to Plead That Either His Age or Protected Speech Was a But-For Cause of His Termination

Lively v. WAFRA Inv. Advisory Grp., Inc., 2021 U.S. App. LEXIS 21857 (2d Cir. July 23, 2021)

Francis Lively was terminated by his former employer, WAFRA Investment Advisory Group, Inc. ("WAFRA"), for violating company policies prohibiting sexual harassment in the workplace. He sued, alleging that the stated basis for his termination was pretext and that the real reason he was fired was age discrimination and retaliation, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 623. Defendants answered, submitting evidence of Lively's improper workplace conduct, and moved for judgment on the pleadings under Fed. R. Civ. P. 12(c). The United States District Court for the Southern District of New York granted defendants' motion, dismissing Lively's age discrimination and retaliation claims. Although on a Rule 12(c) motion the district court should not have weighed the plausibility of competing allegations in the movant's pleading or considered evidence extrinsic to the non-movant's pleading, The Second Circuit affirmed, because Lively's complaint failed to plead that either his age or protected speech was a but-for cause of his termination.

The court stated that on a motion for judgment on the pleadings, courts may consider all documents that qualify as part of the non-movant's "pleading," including: (1) the complaint or answer, (2) documents attached to the pleading, (3) documents incorporated by reference in or integral to the pleading, and (4) matters of which the court may take judicial notice. But a court may not resolve the motion by weighing the plausibility of competing allegations or by considering evidence extrinsic to the non-movant's pleading without converting the motion to one for summary judgment.

The court affirmed the district court's conclusion that Lively failed to plausibly allege that his age was the but-for cause of his termination. To start, the court did not credit Lively's vague and conclusory allegation that he was victim to a "campaign to purge [WAFRA] of elder workers." Although Lively provided the names and positions of several executives who were fired or otherwise forced out, he offered no details that would support any inference of age discrimination, such as the executives' ages or the dates and stated reasons for their terminations. This vague allegation thus lacked facial plausibility.

The court stated that Lively's termination letter, which was attached as an exhibit to Defendants' answer, was also within the universe of materials the district court could consider on a Rule 12(c) motion as a document incorporated by reference into the complaint. In light of that factual context, Lively's conclusory narrative that the sexual harassment allegation "was nothing more than a pretext to fire him for being an older worker" was implausible. Thus, on the basis of Lively's complaint and drawing all inferences in his favor—and not based on defendants' answer or the materials attached to it (other than materials of which the court could take judicial notice)—the court affirmed the district court's dismissal of Lively's age discrimination claim.

The court stated that Lively's retaliation claim failed for similar reasons. He alleged, in essence, that he complained to WAFRA about Al-Mubaraki's comments but received no response and was terminated five months later in retaliation. Even if true, Lively failed to plead but-for causation, which requires "that the adverse action would not have occurred in the absence of the retaliatory motive." *Duplan v. City of New York*, 888 F.3d 612, 625 (2d Cir. 2018).

TITLE VII

Employee Did Not Demonstrate That Three Incidents of Alleged Harassment by Her Immediate Supervisor Permeated or Poisoned Her Work Environment

Hairston v. Wormuth, 2021 U.S. App. LEXIS 22464 (8th Cir. July 29, 2021)

On January 28, 2013, the Army hired Hairston as a general supply specialist in the Property Book Office within the Arsenal's Directorate of Logistics (the "Arsenal"). Hairston's immediate supervisor was Duane Johnson, an equipment manager at the Arsenal. Her second-level supervisor was Deborah Moncrief, and her team leader was Elizabeth Blackwood. The first year of Hairston's employment was a probationary period. Hairston, sued the Secretary of the Department of the Army (the "Army") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging that she was subjected to a hostile work environment based on sex and that the Army retaliated against her after she reported sexual harassment.

In support of her claim that she was subject to a hostile work environment, Hairston pointed to three instances of alleged harassment: Johnson's comment to her coworkers that she had a "nice booty," an incident when he dropped a saltshaker down her shirt, and Johnson's inappropriate remarks about a Victoria's Secret show. The court took seriously Hairston's allegations and did not question that some of the conduct she described could contribute to a hostile work environment under Title VII. The court stated that because the conduct alleged was not "severe or pervasive enough to create an objectively hostile or abusive work environment," Hairston had not established a prima facie case, and the Army was entitled to judgment as a matter of law. The court, therefore, affirmed the district court's grant of summary judgment on Hairston's hostile work environment claim.

The court stated that though the Army's stated explanations for firing Hairston "would have been a legitimate basis for terminating" Hairston, this "does not neutralize the probative value" of the other evidence in the record. That evidence indicated that Hairston's alleged misconduct did not become an issue until immediately after she reported Johnson to the EEO and that Moncrief treated Johnson's and Hairston's allegations against each other unevenly: she gathered information from Johnson that eventually formed the basis of Hairston's termination while not pursuing any comparable investigation into Johnson's conduct. This evidence sufficed to "raise genuine doubt as to the legitimacy of [the Army's] motive" for firing Hairston and would allow a reasonable jury to conclude that the Army unlawfully retaliated against her. Accordingly, the court reversed the district court's grant of summary judgment to the Army on Hairston's retaliation claim.

Reasonable Person Could Have Believed His Workplace Was Hostile Work Environment Because of His Association With Others And Thus Violated Title VII

Kengerski v. Harper, 2021 U.S. App. LEXIS 22494 (3d Cir. July 29, 2021)

Jeffrey Kengerski, a Captain at the Allegheny County Jail, made a written complaint to the jail Warden alleging that Robyn McCall, a former captain who was promoted to major, referenced his biracial grand-niece a "monkey" and then sent him a series of text messages with racially offensive comments about his coworkers. McCall was placed on administrative leave and resigned three months later. Seven months after his complaint was made and three months after McCall's resignation, Kengerski was fired. He contended that the County fired him in retaliation for reporting McCall's behavior and sued the County under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). The United States District Court for the Western District of Pennsylvania granted the County's motion for summary judgment, holding that Kengerski, who was white, could not maintain a claim for Title VII retaliation. The Third Circuit disagreed. Not only does Title VII protect employees from retaliation when they complain about behavior which they reasonably believe violates the statute, but it also protects employees against harassment because of their association with a person of another race, such as a family member in Kengerski's case. In light of the foregoing and because a reasonable person could believe that the Allegheny County Jail was a hostile work environment for Kengerski, the court vacated the district court's grant of summary judgment.

The court stated that its ruling did not mean that Kengerski would ultimately succeed on his retaliation claim, or even that he would survive summary judgment on remand. The County claimed that it fired Kengerski for an unrelated reason that was unquestionably serious: mishandling a sexual harassment claim, including allegations that he told two subordinates to lie on their reports during the investigation. The court, thus, remanded the case to the district court to determine whether Kengerski had sufficiently shown that he was fired because of his Title VII complaint.

The court stated that a retaliation claim must be tied to Title VII. An employee must have complained about the type of conduct that is generally protected by that statute, such as discrimination on the basis of race. This includes discrimination because of an employee's association with a person of another race (such as a family member). But a complaint about workplace behavior that is so minor and isolated that it could not "remotely be considered 'extremely serious'"—that is not within some striking distance of an actual hostile work environment—is not protected because "no reasonable person could have believed that [it] ... violated Title VII's standard." *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 271, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001) (per curiam). Viewing McCall's comment and her text messages together, the court concluded that a reasonable person could have believed the jail was a hostile work environment for Kengerski, and thus violated Title VII.

Further, the court stated that while "one might expect the degree of an association to correlate with the likelihood of severe or pervasive discrimination on the basis of that association," the "degree of association is irrelevant" to whether a plaintiff "is eligible for the protections of Title VII in the first place." *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 513 (6th Cir. 2009); *accord Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 884 (7th Cir. 1998). Accordingly, employees may not be discriminated against because of their interracial relationships with distant relatives such as a grand-niece.

The court stated that the crux of a retaliation claim is reasonableness: employees are protected from retaliation whenever they make good-faith complaints about conduct in their workplace they reasonably believe violates Title VII. Here, a reasonable employee could believe that McCall created a hostile work environment in violation of Title VII, by calling Kengerski's biracial relative a "monkey" and then sending Kengerski a series of text messages with offensive racial stereotypes. Under all of the circumstances, including Kengerski's alleged misconduct, the court remanded the case to the district court to consider whether the County fired Kengerski because of his complaint or because of his conduct.

Race-Based Shift Change Amounted to Discrimination With Respect to Terms and Privileges of Employment Under § 703(A)(1) Of Title VII

Threat v. City of Cleveland, 2021 U.S. App. LEXIS 22076 (6th Cir. July 26, 2021)

Reginald Anderson, Pamela Beavers, Margerita Noland-Moore, Michael Threat, and Lawrence Walker worked for the City of Cleveland in its Emergency Medical Service Division. They were captains in the Division, belonged to the same union, and all were black. They sued the City of Cleveland and their supervisor under federal and state law. Among the allegations in their complaint was a claim that the City illegally assigned officers to night and day shifts based on the color of their skin. The United States District Court for the Northern District of Ohio rejected many of the claims at the pleading stage and rejected others at summary judgment. The district court found, in particular, that the shift changes were race-based but the captains could not show that the changes subjected them to a "materially adverse employment action." The Sixth Circuit reversed dismissal of the shift claim on the basis that this was a cognizable claim with triable issues of fact, because the shifts qualified as "terms" of employment under Title VII.

The court stated that when Congress enacted Title VII, it did not indicate that it sought to cover any difference in personnel matters. Yes, "hundreds if not thousands of decisions say that an 'adverse employment action' is essential to the plaintiff's prima facie case" even though "that term does not appear in any employment-discrimination statute." *Minor v. Centocor, Inc.*, 457 F.3d 632, 634 (7th Cir. 2006). The same could be said about decisions which impose a "materiality" requirement on actionable employment actions. In contrast to the district court's interpretation, the Sixth Circuit considered these "innovations" to be shorthand for the operative words in the statute and otherwise to incorporate a de minimis exception to Title VII. But employer-required shift changes from a preferred day to another day or from day shifts to night shifts exceed any de minimis exception and, when race-based, violate Title VII as discrimination on the basis of race in the terms and privileges of employment. To the extent the plaintiffs claimed that the City's race-based assignment policy affected their bidding schedule, controlled when and with whom they worked, reduced the benefits of seniority, and diminished their supervisory responsibility, the appellate court said these issues should be decided on remand, since the district court never reached these issues.

The Ohio Civil Rights Act applies when an employer decides "to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." Ohio Rev. Code § 4112.02(A). Despite the differences in language, Ohio courts generally mimic their interpretation of O.R.C. § 4112.02 with the federal courts' interpretation of Title VII. *See Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio C.R. Comm'n*, 66 Ohio St. 2d 192, 421 N.E.2d 128, 131 (Ohio 1981). On this

basis, the court reversed and remanded the state law claims long with the federal ones.

UNFAIR LABOR PRACTICE

Company's Justification for Discharging Union Officials Was Pretextual

Mondelez Global, LLC v. NLRB, 2021 U.S. App. LEXIS 21548 (7th Cir. July 21, 2021)

Mondelez, an Illinois corporation, makes Ritz crackers, Oreo cookies, and other baked goods at its production plant in Fair Lawn, New Jersey. Local 719—a chapter of the Bakery, Confectionary, Tobacco Workers and Grain Millers International Union—represents the Fair Lawn plant's production workers (excluding supervisors) across several departments. Each employee is assigned a specific job classification and prohibited from working in other classifications. A union filed charges of unfair labor practices against Mondelez, alleging violations of the National Labor Relations Act. The National Labor Relations Board's General Counsel filed a consolidated complaint, and an administrative law judge found that the company had unlawfully discharged union officials, made unilateral changes to various conditions of employment, and failed to timely and completely provide relevant information the union requested. The Board agreed. Because substantial evidence supported the Board's decision, the Seventh Circuit denied Mondelez's petition for review and granted the Board's cross-application for enforcement.

The court stated that given the record, the Board reasonably concluded that Mondelez's justification was pretextual. There was ample support for "an inference that stealing time was not the real reason why Gutierrez, Scherer, and Vlashi were discharged." Substantial evidence therefore supported the Board's conclusion that Mondelez failed to prove it would have suspended and discharged the union officials even in the absence of their union activities.

The Board first clarified that the "sound arguable basis" standard, which the ALJ employed, did not apply to cases involving an expired CBA. The proper inquiry, the Board explained, was whether Mondelez unilaterally changed a term or condition of employment, not whether its unilateral actions were based on a reasonable interpretation of contract language. Given that employee work schedules are mandatory bargaining subjects, *Bloomfield Health Care Ctr.*, 352 N.L.R.B. 252, 256 (2008), the Board determined that Mondelez violated § 8(a)(5) and (a)(1) by altering the warehouse employees' shift schedules without bargaining collectively. Substantial evidence supported this conclusion.

Substantial evidence also supported the finding that Mondelez failed to provide a complete record of the new hires as requested by the union, in violation of § 8(a)(5) and (a)(1). In July 2016, the union requested a full list of newly hired employees from "June 2015 to the present." This request, the ALJ concluded, was necessary and reasonable for the union to co-ordinate a new hire orientation. After receiving no response from Mondelez, the union sent another request two months later on September 8, 2016. But the ALJ found "nothing in the record to show that [the union's] September 8 reaffirmation of [the] request was acknowledged or followed-up by Clark-Muhammad [Human Resources Manager]."

Mondelez failed to mount any meaningful counter to this finding. It offered the same "discovery" contention as above: that the request for new hire information constituted impermissible prehearing discovery related to the union's allegation that Mondelez refused to deduct union dues from new employees' pay. The ALJ properly rejected this assertion, noting that the union's "primary focus" for its information request "was to ensure that new hires receive their union orientation," rather than an effort to conduct discovery on the dues-deduction charge. Under the circumstances, it was reasonable for the Board to conclude that Mondelez failed to provide a complete record of the new hires as requested in violation of § 8(a)(5) and (a)(1).

WAGE AND HOUR LAWS

29 U.S.C. § 206(A)(1) of the FLSA Addressed Meal and Rest Periods, and California Law Did Not Provide Rule of Decision For Meal- And Rest-Time Claims Arising on Outer Continental Shelf

Mauia v. Petrochem Insulation, Inc., 2021 U.S. App. LEXIS 21410 (9th Cir. July 20, 2021)

Petrochem Insulation, Inc. ("Petrochem") appealed the United States District Court for the Northern District of California court's order denying its motion to dismiss Iafeta Mauia's ("Mauia's) claims alleging violations of California's wage and hour laws. Mauia alleged that Petrochem failed to provide adequate meal and rest periods to workers on oil platforms off the coast of California. Pursuant to the

Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 et seq., all law on the Outer Continental Shelf ("OCS") is federal; state law is adopted on the OCS only to the extent it is applicable and not inconsistent with federal law [43 U.S.C. § 1333(a)(2)(A)]. The U.S. Supreme Court explained in *Parker Drilling Management Services v. Newton*,[3] that there must be a gap in federal law before state law will apply on the OCS. Because federal law addresses meal and rest periods, the court concluded that there was no gap in the applicable federal law. The Ninth Circuit reversed the district court's denial of Petrochem's motion to dismiss Mauia's California meal-and rest-period claims. Because Mauia conceded that his unfair competition claim was predicated on Petrochem's alleged violations of California meal-and rest-break laws, the court also reversed the order denying Petrochem's motion to dismiss his unfair competition claim.

To resolve Mauia's claims the Ninth Circuit began by asking "whether federal law has already addressed" the relevant issue. Mauia's meal-and rest-period claims rely on his allegations that Petrochem provided only one meal break after the beginning of the sixth hour of work, and only two rest breaks during his twelve-hour shifts. Mauia contended that California law applied, and that Petrochem's practices violated California law. The court disagreed. Because the FLSA addresses meal and rest periods, the court concluded that California's meal-and rest-period laws were not adopted as surrogate federal law on the OCS.

The Ninth Circuit stated that Mauia was correct that the claims at issue in *Parker Drilling* had direct federal counterparts: both the FLSA and California law provide for a minimum wage—although California's is more generous—and both federal and California law address whether employees must be paid for standby time. But the court stated that by urging the court to find a gap if there was "no direct federal counterpart" to a state provision, Mauia essentially asked the court to revive the type of pre-emption analysis the Supreme Court rejected in *Parker Drilling*. Mauia's argument failed because *Parker Drilling* does not require a direct federal counterpart; it requires that the court ask whether federal law addresses the relevant issue, not whether federal law addresses it in the same way. Stated differently, the Ninth Circuit held that because federal law addresses meal and rest periods, California law does not provide the rule of decision for meal-and rest-time claims arising on the OCS.

[3] 139 S. Ct. 1881, 1892, 204 L. Ed. 2d 165 (2019).

Two Unilateral Changes to Existing Terms of Conditions of Employment After Collective Bargaining Agreement, Was Unfair Labor Practice

NLRB v. Nexstar Broad., Inc., 2021 U.S. App. LEXIS 20526 (9th Cir. July 12, 2021)

The management of a television station and the union representing the station's employees entered into a collective bargaining agreement ("CBA"). When the CBA expired, management made two unilateral changes to the existing terms and conditions of employment. Subsections 8(a)(1) and (5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1), (5), provide that such unilateral changes made before bargaining over a new CBA reaches an impasse are unfair labor practices. Management, nonetheless, asserted that it was entitled to make the changes under the "contract coverage" doctrine. Rejecting that argument, the National Labor Relations Board (“NLRB” or “Board”) applied its longstanding rule that after a CBA has expired, unilateral changes by management are permissible during bargaining only if the CBA "contained language explicitly providing that the relevant provision" permitting such a change "would survive contract expiration." *Nexstar Broad. Inc.*, 369 NLRB No. 61.

The court granted the Board's petition for enforcement of its decision, holding that management of a television station committed unfair labor practices under subsections 8(a)(1) and (5) of the NLRA by making two unilateral changes to the existing terms of the conditions of employment after a collective bargaining agreement ("CBA") expired.

Specifically, following expiration of the CBA, management began requiring employees to complete an annual motor vehicle and driving history background check. In addition, management began posting employee work schedules two weeks in advance after it had previously posted schedules four months in advance.

Agreeing with the Board, the court rejected management's argument that it was entitled to make changes to the terms and conditions of employment under the "contract coverage" doctrine. The court held that the Board's decision was rational and consistent with the NLRA where the Board applied its longstanding rule that, after a CBA has expired, unilateral changes by management are permissible during bargaining only if the CBA contained language explicitly providing that the relevant provision permitting such a change would survive contract expiration. The court concluded that there was no explicit language in the CBA to allow management to make unilateral changes to terms and conditions of employment in the post-expiration period. The court also rejected management's argument that the Board should have referred this dispute to arbitration.

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2021

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Oct. 6-7	NELI Webinar: ADA Workshop	
Nov. 3-5	NELI Webinar: Employment Law Conference	
Nov. 18-19	NELI Employment Law Conference	Washington, DC
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