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Employee Misclassification – Federal and State Perspectives

By Laurie E. Leader

Classifying a worker as an "employee" or "independent contractor" has profound economic consequences. Employees are subject to federal and state withholding, while independent contractors pay self-employment tax. Only employees may receive certain governmental benefits – like unemployment compensation, Social Security and Medicare benefits – and health insurance and other employer-provided benefits. Employment status, likewise, determines coverage under federal, state, and local labor and employment laws, and state workers' compensation statutes.[1] Because these coverages and benefits are not generally available to independent contractors, employers are economically incentivized to classify workers as independent contractors.

Several tests have been used to determine whether a worker should be classified as an employee or independent contractor. Those tests – which have their origins in federal statutes and regulations and at common law – typically focus on the hiring party's right to control the manner and means by which the work is performed.[2] This "right to control test" is the essence of the traditional common law test for employment. It has been criticized in recent years as too easily manipulated by employers, particularly in the virtual workplace.[3] To avoid such manipulation and because employee misclassification has real costs – to workers, employers and the government in terms of lost benefits and revenues – states have increasingly enacted misclassification statutes to penalize employers who push the envelope too far to classify workers as independent contractors. Instead of focusing on the traditional benchmarks for employment status, these state laws often presume that the relationship is one of employment and turn their focus to the nature of the work being performed to decide whether a worker qualifies as an employee or independent contractor.[4]

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[1] *See generally* U.S. Dep't of Lab.: Wage-Hour Div. *Misclassification of Employees as Independent Contractors*, *https://www.dol.gov/whd/workers/misclassification*.

[2] *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

[3] *See generally* Deknatel, A. & Hoff-Downing, L., *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes,* 18 U. Pa. J.L. & Soc. Change 53, 54 (2015) ("*ABC on the Books and in the Courts*").

[4] *See ABC on the Books and in the Courts,* 18 U. Pa. J.L. & Soc. Change at 58-59, 60-69; *see, e.g.,* Mass. Gen. Laws Ann. Ch. 149, § 148B(a)(1)-(3) (2019); 43 Pa. Stat. Ann. § 933.3(a) (2019); Or. Rev. Stat. Ann. §670.600(2) (2019).

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Employee Misclassification – Federal and State Perspectives
By Laurie E. Leader

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This article provides an overview of various classification tests articulated under federal and state law, both in terms of the test factors and outcomes. Not surprisingly the tests that focus on the character of the work – rather than on the hiring party's right to control that work – more broadly define employment relationships to afford benefits and statutory protections to some workers who would otherwise be denied those benefits and protections at common law.

a. The Traditional Common Law Agency Test

The common law definition of "employee" appears simplistic but produces varied results. Its focus is on "the hiring party's right to control the manner and means by which the work is accomplished."[5] In *Nationwide Mutual Insurance Co. v. Darden*,[6] the United States Supreme Court declared that the common law agency test should be used as the benchmark to determine employment status when a federal statute offers little guidance on the issue.[7]

In applying the common law test, courts have articulated several factors – in addition to the right to control – to weigh in on this analysis, including: (1) the skill required to do the job; (2) the source of the instrumentalities and tools; (3) the location of the work; (4) the duration of the relationship between the parties; (5) whether the hiring party has the right to assign additional projects to the hired party; (6) the extent of the hired party's discretion over when and how long to work; (7) the method of payment; (8) the hired party's role, if any, in hiring and paying assistants; (9) whether the work is part of the regular business of the hiring party; (10) whether the hiring party is in business; (11) the provision of employee benefits; and (12) the tax treatment of the hired party.[8] While none of these factors is dispositive,[9] the right to control remains at the centerpiece of all iterations of the common law test with its recognized shortcomings.

Some courts rely on a hybrid test to determine employment, combining the traditional; common law test and the economic realities test typically applied in cases arising under the Fair Labor Standards Act.[10]

b. The IRS 20-Factor Test

Historically, the IRS adopted a twenty-factor test to determine whether a worker is an independent contractor or employee.[11] This test was expanded the common law test and identified the following twenty (20) factors as helpful to determine the existence of an employment relationship: (1) right to control the manner and means of performance; (2) whether the worker has the right to hire, fire, supervise, and pay assistants; (3) whether the hiring party mandates or provides training; (4) who sets the hours of work; (5) whether the worker's services are an integral part of the hiring party's operations; (6) who sets the work schedules; (7) whether the services are performed by the hired party or may be delegated by the hired party; (8) the permanency or duration of the relationship, particularly focusing on whether the work is to be performed on a project basis or for a set duration; (9) who sets the sequence for performance of work; (10) the location of performance of services; (11) who provides the tools or equipment used to perform the work; (12) whether the worker is required to submit periodic reports and the circumstances under which they are submitted; (13) whether the worker has an investment in the work facilities or a particular project; (14) how the worker is paid and whether that payment is subject to federal and state withholdings; (15) whether the worker's job-related expenses are paid by the hiring party; (16) whether a worker may be terminated at will or pursuant to specified contract terms; (17) whether the worker has the ability to realize profit or loss on the job (as distinguished from bonuses); (18) whether the worker is hired on a full-time basis; (19) whether the worker has the right to work for persons or entities in addition to the hiring party; and (20) whether the worker holds him – or herself out the public or other contractors for hire.[12]

The current IRS test consolidates these twenty (20) factors into three broad categories: (1) "behavioral

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[5] *See Reid*, 490 U.S. 730, 751-52 (1989).

[6] 503 U.S. 318 (1992).

[7] 503 U.S. at 322-23.

[8] *Reid,* 490 U.S. at 751-52 (sometimes known as the "*Reid* factors"); *see also Darden,* 503 U.S. at 322-23 (applying the *Reid* factors to determine whether the terminated plaintiff qualified as an "employee" for purposes of ERISA coverage).

[9] *Reid,* 490 U.S. at 751-52.

[10] *See, e.g.*, *Muhammad v. Dallas Cnty. Cmty. Supervision & Corr. Dep't*, 479 F.3d 377, 380 (5th Cir. 2007) ("To determine whether an employment relationship exists within the meaning of Title VII, we apply a hybrid economic realities/common law control test.") (internal citation and quotation omitted); *EEOC v. Zippo Mfg., Co*., 713 F.2d 32, 37 (3d Cir. 1983) (mentioning the use of hybrid test for Title VII cases). The economic realities test is discussed at ns. 15-20 and accompanying text *infra.*

[11] Rev. Rul. 87-41, 1987-1 C.B. 296.

[12] Rev. Rul. 87-41, 1987-1 C.B. 296.

control," (2) "financial control," and (3) the relationship of the parties.[13] Together, these categories and their factors focus on the totality of the relationship to determine whether a worker is an independent contractor or employee.

c. The Fair Labor Standards Act's Economic Realities Test

Subject to certain exceptions, the Fair Labor Standards Act ("FLSA") defines an "employee" as "any individual employed by an employer."[14] An "employer" is similarly defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee,"[15] while the term "employ" is defined to mean "to suffer or permit to work."[16] Courts have adopted an "economic realities test" to determine whether a worker is an employee within the meaning of the FLSA.[17]

The economic realities test is broader in reach than the common law test in defining whether a worker qualifies as an employee. It is a totality of circumstances test that looks to the economic reality of the business relationship as a whole to determine whether the relationship is one of employment.[18]

In particular, courts focus on a number of factors to decide how to classify a worker including:

> (1) the degree of control exercised by the alleged employer over the workers; (2) the worker's opportunity for profit or loss and investment in the business; (3) the degree of skill and independent initiative required to perform the work; (4) the permanency or duration of the relationship; and (5) the extent to which the work is an integral part of the employer's business.[19]

Although descriptions of these factors and their outcomes vary among the circuits, a common denominator among the decisions is a focus on the economic dependence of the worker on the hiring party for his or her livelihood.[20] That is because economic dependence generally signals the existence of an employment relationship.

d. Other Federal Statutory Definitions of Employment

Like the FLSA. other federal statutory definitions of employment offer little guidance on how to classify a worker, leaving the task of employee classification to fall largely on the courts. For example, Title VII of the Civil Rights Act of 1964 defines an "employee" as "an individual employed by an employer," subject to certain exceptions.[21] Title VII's definition of "employer" is also circular, focusing on the number of employees (fifteen or more) "for each working day in each of the twenty or more calendar weeks in the current or preceding calendar year" and on whether the putative employer is engaged in an industry affecting commerce.[22] Neither definition considers the nature of the work being performed in deciding how to classify a worker for coverage purposes. Similar issues plague the statutory definitions of "employee" and "employer" set forth in the Employee Retirement Income Security Act ("ERISA")[23] and the Age Discrimination in Employment Act ("ADEA").[24]

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[13] *See generally* IRS Brochure: *Independent Contractor Or Employee*, at https://www.irs.gov/pub/irs-pdf/p1779.pdf (Apr. 14, 2019).

[14] 29 U.S.C. § 203(e)(1) (2019).

[15] 29 U.S.C. § 203(d) (2019).

[16] 29 U.S.C. § 203(g) (2019).

[17] *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726-27 (1947) (affirming the lower court's decision that the common law test did not apply to the FLSA because "the Act concerns itself with the correction of economic evils through remedies which were unknown at common law. . .[and] the underlying economic realities . . .lead to the conclusion that the [plaintiffs] were and are employees of [the defendant]."). The Supreme Court first articulated the economic realities test in *Rutherford.* Decades later, the Court expressly adopted the test for FLSA cases in *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985).

[18] *Alamo Found.*, 471 U.S. at 301. How the parties label the relationship is of little consequence.

[19] *Alamo Found.*, 471 U.S. at 301; *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 67 (2d Cir. 2003).

[20] *See Hopkins* v. Cornerstone *Am.*, 545 F.3d 338, 343 (5th Cir. 2008). Even within the same circuit, courts may apply different economic realities tests depending on the factual context of the case before them. For example, even though the Eleventh Circuit has applied a two-part economic realities test in determining individual liability under the FLSA, it has applied a four-part economic realities test in determining whether prisoners should be considered employees under the FLSA. *See Patel v. Wargo, 803 F.2d 632, 637-38 (11th Cir. 1986)* (using two-part economic realities test); *Villarreal v. Woodham*, 113 F.3d 202, 205 (11th Cir. 1997) (utilizing four-part test).

[21] 42 U.S.C. § 2000e(f) (2019).

[22] 42 U.S.C. § 2000e(b) (2019).

[23] 29 U.S.C. § 1002(6) (2019) (defining "employee" as "any individual employed by an employer").

[24] 29 U.S.C. § 630(f) (2019) (defining "employee" as "an individual employed by any employer," excepting certain elected officials, their personal staff, immediate advisors and those on a policymaking level).

To further complicate the issue, court decisions interpreting these statutes have been inconsistent at best, based on the overlapping tests used to determine employment status and an ever-changing list of factors deemed relevant to this analysis. Although courts tend to define employment more broadly when the statute has a remedial purpose, like the ADEA,[25] they most often rely on the common law test—and not on the underlying statutory purpose—in determining whether an individual is an employee or independent contractor.[26] Not only does that approach produce varied results but it allows for potential misclassification by relying on the control factor that may be subject to manipulation by the hiring party.

e. The ABC Test and Its Focus on the Nature of the Work Performed

More recently, courts and state legislatures have increasingly adopted the ABC test to determine employment status[27] The test presumes that an employment relationship exists and shifts the burden on the hiring party to establish that the worker is an independent contractor by proof of *each* of the following factors: "(a) that the worker is free from control and direction over performance of the work, both under the contract and in fact; (b) that the worker performs work that is outside the usual course of hiring entity's business; *and* (c) that the worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed for the hiring entity."[28]

Massachusetts and several states have adopted the ABC test, in whole or in part, to determine who qualifies as an employee for classification purposes.[29] Like the common law test, the first element or the (A) prong of the ABC test focuses on the right to control. However, in its classic form, this prong of the test is framed in a way that makes it more difficult to manipulate than its common law counterpart, since it requires that the worker be "free[] from control and direction" instead of focusing on who controls the manner or means by which the work is accomplished.

The (B) and (C) elements of the ABC test also impose a more stringent test than the common law agency test, consistent with the ABC test's presumption in favor of employment. More specifically, the (B) prong of the test requires that work performed by an independent contractor be performed outside of the hiring party's business or, stated differently, that such work not be an integral part of the hiring party's business.[30] Several state statutes modify this prong to require only that the putative independent contractor have a business license for its satisfaction.[31]

The appropriate inquiry under the (C) prong of the classic ABC test "is whether the person engaged in covered employment actually has an independent business, occupation, or profession of the same nature as the work to be performed, not whether he or she could have one."[32]

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[25] *See* Lilley v. BTM Corp., 958 F.2d 746, 750 (6th Cir. 1992) ("The term 'employee' is to be given a broad construction in order to effectuate the remedial purposes of the ADEA").

[26] *Lilley*, 958 F.2d at 750; *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (applying common law test to ERISA and endorsing the use of that test to determine employment status whenever a federal statutory definition of "employee" is less than helpful).

[27] *See* Mass. Gen. Laws Ann. ch. 149, § 148B(a)(1)-(3) (2019); *see also Dynamex Operations W., Inc. v. Superior Court*., 416 P.3d 1, 48-50 (Cal. 2018) (applying the ABC test to determine employee status under a California wage order). Another article in this Bulletin is devoted to the *Dynamex* decision and its application.

[28] *See Dynamex,* 416 P.3d at 48-50.

[29] *See generally ABC on the Books and in the Courts,* n.3 *supra,* 18 U. Pa. J.L. & Soc. Change at 58-59, 60-69; *see, e.g.,* Mass. Gen. Laws Ann. ch. 149, § 148B(a)(1)-(3) (2019); 43 Pa. Stat. Ann. § 933.3(a) (2019); Or. Rev. Stat. Ann. § 670.600(2) (2019); N.M. Stat. Ann. § 60-13-3.1(A) (2019).

[30] Mass. Gen. Laws Ann. ch. 149, § 148B(a)(2) (2019). Several states modify this prong to only require that the work be performed outside of the hiring party's physical establishment. *See, e.g.,* Md. Code Ann., Lab. & Empl. §3-903(c) (2019); Neb. Stat. Ann. §48-604(5)(b) (2019); N.J. Stat. Ann. §34:20-4(b) (2019).

[31] N.M. Stat, Ann. §60-13-3.1(A)(2) (2019); 43 Pa. Stat. Ann. §933.3(a) (2019).

[32] Mass. Gen. Laws Ann. ch. 149, §148B(3) (2019); Md. Code Ann., Lab. & Empl. § 3-903(c)(1) (ii)(2) (2019); *see also JSF Promotions, Inc. v. Adm'r*, 828 A.2d 609, 614 (Conn. 2003) (fact that the hiring party permits a worker to engage in similar activities for other businesses is insufficient to satisfy part C of the test; worker must be "customarily engaged in an independently established trade, occupation, profession or business" to satisfy part C of the standard).

Where 604(5)(b)the hiring party fails to establish each of these elements, the worker is deemed to be an employee and not an independent contractor.[33]

Conclusion

Virtual work presents a challenge to traditional notions of employment, since individuals working from home often appear to be more autonomous (and, thus, subject to less control) than they really are. The ABC test offers a means to appropriately classify these and other workers based on the nature of their work and the realities of the modern workplace. It should also afford workers benefits and protections to which they are entitled based on work actually performed but which they might not receive if classified based on the traditional common law agency test.

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[33] McGuire v. Dep't of Emp't. Sec., 768 P.2d 985, 987 (Utah Ct. App. 1989); *Fleece on Earth v. Dep't of Emp't & Training*, 923 A.2d 594, 599-600 (Vt. 2007) (work-at-home knitters and sewers who made clothing sold by plaintiff children's wear company were employees; company that designed all of the clothing and provided all patterns and yarn to the homeworkers could not satisfy part A of the ABC test, despite the facts that workers used their own machines and worked at their own pace and on days and at times of their choosing); *see generally ABC on the Books and in the Courts,* n.3, *supra*.

One Year In: Grappling with *Dynamex*'s Requirement That Independent Contractors "Perform Work Outside the Usual Course of the Hiring Entity's Business"

Understanding Part B of the "ABC Test"*

Raymond W. Bertrand, Brit K. Seifert & James P. de Haan

Introduction

California's "ABC" test turns one year old on April 30, 2019. Last year in *Dynamex Operations West, Inc. v. Superior Court*,[1] the California Supreme Court adopted the test as the governing standard for deciding if a worker is an employee or independent contractor for claims under California's Wage Orders.[2] The young ABC test upended well-settled law by replacing the veteran multi-factor "control" test set forth in 1989 in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*.[3]

Dynamex triggered controversy[4] and criticism. For example, the new ABC test is stringent: Each of its three conditions—parts A, B, and C—must be satisfied in order for a worker to qualify as a bona fide independent contractor no covered by the Wage Orders.[5] Yet at the same time, the test supplies no bright-line standards.

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[1] 4 Cal. 5th 903 (2018).

[2] California's Industrial Welfare Commission (IWC) is empowered to promulgate regulations known as "wage orders" that set forth standards related to wages, hours, and other working conditions. There are 16 such IWC Wage Orders, most covering specific industries. Curry v. Equilon Enters., LLC, 23 Cal. App. 5th 289, 300 (2018); *see, e.g.,* Cal. Code Regs., tit. 8, §§ 11070, 11090.

[3] 48 Cal. 3d 342 (1989). *See* Lawson v. Grubhub, Inc., No.15-cv-05128-JSC, 2018 U.S. Dist. LEXIS 201718, at *10 (N.D. Cal. Nov. 28, 2018) ("*Dynamex* upset a settled legal principle. Prior to *Dynamex*, the California and federal courts nearly unanimously applied *Borello* to decide whether a California worker had been misclassified as an independent contractor."). The *Borello* test is based on common law agency principles and primarily focused on the principal's right to control the manner and means by which an agent performs his or her duties. *Borello*, 48 Cal. 3d at 367 ("A material and often conclusive factor is the right of an employer to exercise complete and authoritative control of the mode and manner in which the work is performed.").

[4] The California Supreme Court later, on June 20, 2018, denied petitions to modify the *Dynamex* decision and for rehearing. Separately, pending in the California Assembly are two *Dynamex*-related bills, one aimed at overruling the ABC test and re-installing the previous control test, and the other aimed at codifying and clarifying California's ABC test. As of mid-March 2019, Assembly Bill Number 5, introduced by Democratic Assembly Member Lorena Gonzalez, would create a new Labor Code section that would "state the intent of the Legislature to include provisions . . . [to] codify the decision in the *Dynamex* case and clarify its application . . . ." *See* proposed Assembly Bill 5 at http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5. Assembly Bill Number 71, introduced by Republican Assembly Member Melissa Melendez, would create a new Labor Code section codifying the nonexhaustive list of factors set forth in the 1989 *Borello* decision. *See* proposed Assembly Bill 71 at http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB71. The new Labor Code provision also would expressly provide that "[n]otwithstanding any other law, a determination of whether a person is an employee or an independent contractor for the purposes of this division shall be based on the multifactor test set forth in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*," with a recitation of such factors

[5] *Dynamex*, 4 Cal. 5th at 957.

The article below examines part "B" of the *Dynamex* ABC test, which requires a showing that the worker "performs work that is outside the usual course of the hiring entity's business" (herein, Part B).

A Quick Recap of the Broader ABC Test

Under *Dynamex,* an individual hired to provide services is presumed to be an employee for purposes of the Wage Orders.[6] As such, the hiring company must ensure that it complies with Wage Order requirements entitling the individual to overtime, meal and rest periods, and other benefits.

To overcome this presumption and show a *bona fide* independent contractor relationship, the company that engages the worker must show that the worker –

(A) is free from the control and direction of the hiring company in the performance of the work, both under the contract for the performance of the work and in fact;

(B) performs work that is outside the usual course of the hiring entity's business; *and*

(C) is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.[7]

If the hiring company cannot establish one (or more) of the parts, the worker will be deemed an employee under the applicable Wage Order, thereby entitled to overtime, meal and rest periods, and other employee benefits.[8]

Part B: Performing Work That is "Outside the Usual Course of the Hiring Entity's Business"

The *Dynamex* ABC test "permits the hiring entity to satisfy Part B only if it establishes that the work is outside the usual course of the business of the hiring entity."[9] To aid in how to construe and apply this standard, this article addresses the *Dynamex* opinion itself and holdings from several post-*Dynamex* decisions that have addressed Part B.

Gleaning Guidance from the *Dynamex* Decision Itself

The *Dynamex* opinion itself affords some guidance that may help in understanding the application of Part B.[10]

First, the opinion makes clear that unlike some ABC tests in use outside of California, a company cannot satisfy Part B by bringing forward proof that the workers never performed their work on such company's premises.

California's Part B is more stringent than the "either-or" part B standard adopted in certain other states' ABC tests. The *Dynamex* court reviewed other states' iterations of the standard and took care to point out that it was adopting a Part B standard that "tracks the Massachusetts version of the ABC test":[11]

> Unlike some other versions, which provide that a hiring entity may satisfy part B by establishing *either* (1) that the work provided is outside the usual course of the business for which the work is performed, *or* (2) that the work performed is outside all the places of business of the hiring entity . . . , the Massachusetts version permits the hiring entity to satisfy part B only if it establishes that the work is outside the usual course of the business of the hiring entity.[12]

Massachusetts requires proof that "the service is performed outside the usual course of the business of the employer"; similarly, California requires proof that the worker "performs work that is outside the usual course of the hiring entity's business."[13]

By narrowing Part B in this way, the California Supreme Court ensured that significant numbers of modern-day workers whose jobs are performed "off-site" – remote/work-at-home workers, gig workers, and others in flexible

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[6] 4 Cal. 5th at 957-58. *Dynamex* specifically addressed the first of three definitions of "to employ" set forth within the Wage Orders: to "suffer or permit to work."

[7] 4 Cal. 5th at 957.

[8] 4 Cal. 5th at 99-100.

[9] 4 Cal. 5th at 956, n.23.

[10] *See*, *e.g.*, *Dynamex*, 4 Cal. 5th at 960-61 (discussing at length that an expansive definition of "employee" is needed to protect workers who want the wage order benefits and might lose them to others willing to forego them, and to protect companies that comply against unfair advantage by companies characterized as trying to evade the Wage Orders).

[11] 4 Cal. 5th at 956, n.23.

[12] 4 Cal. 5th at 956, n.23 (referring to New Jersey statutory citation setting forth ABC test with "either-or" part B standard).

[13] Mass. Gen. Laws Ann. ch. 149, § 148B; *Dynamex*, 4 Cal. 5th at 956, n.23.

work arrangements – could not, based on the situs of their work, be excluded from "employee" status under the Wage Orders.[14]

Thus, location-related evidence showing that no work is performed on-site at a company's offices or other business locations is insufficient, in and of itself, to satisfy Part B. What is unclear, though, is the extent to which such proof is probative in deciding whether the work is "outside the usual course of the hiring entity's business."

Second, the determination of the hiring company's "usual course of business" is essential to determining if a worker's services are performed "outside" such usual course of business.

Determining if an individual "performs work that is outside the usual course of the hiring entity's business," as Part B expressly requires, necessarily involves the predicate determination as to what work is performed *inside* that qualifies as "the usual course of the hiring entity's business." The opinion describes essentially an "if-it-looks-like-a-duck" approach: Workers in roles that reasonably look like employee roles at that business *are* employees. Specifically, the *Dynamex* Court explained that workers fitting within the category of "employees" include:

> [A]ll individuals who are reasonably viewed as providing services to the business in a role comparable to that of an employee, rather than in a role comparable to that of a traditional independent contractor. Workers whose roles are most clearly comparable to those of employees include individuals whose services are provided within the usual course of the business of the entity for which the work is performed and thus who would ordinarily be viewed by others as working in the hiring entity's business and not as working, instead, in the worker's own independent business.[15]

Thus, Part B requires conclusions as to the work that comprises the "usual course of business" of the hiring company in order to distinguish the type of work outside that realm.

Third, the relatively simple examples offered to illustrate the application of Part B indicate that some measure of regularity in the frequency of services being provided is required for work to be within "the usual course of business."

The *Dynamex* Court set forth examples of work outside and inside a company's "usual course of business":

> Thus, on the one hand, when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee.[16]

> On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company, or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes, the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees. . . . [T]he workers' role within the hiring entity's usual business operations is more like that of an employee than that of an independent contractor.[17]

These examples suggest that under *Dynamex*, a factor material to evaluating whether certain services are inside or outside the "usual course of business" is how regularly or frequently they occur, separate and apart from the nature of the services. The sporadic plumber services are contrasted with the cake decorators engaged to work on a "regular basis." The opinion elsewhere notes certain workers who "could not reasonably have been intended by the Wage Order to be treated as employees of the hiring business[18]. . . include unquestionably independent plumbers, electricians, architects, sole practitioner attorneys, and the like – who provide *only occasional*

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[14] *Dynamex*, 4 Cal. 5th at 956, n.23 ("In light of contemporary work practices, in which many employees telecommute or work from their homes, we conclude [that this] version of Part B provides the alternative that is more consistent with the intended broad reach of the suffer or permit to work definition in California wage orders.").

[15] 4 Cal. 5th at 959 (citations omitted).

[16] 4 Cal. 5th at 959 (citing Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. Rev. 983, 1159 (1999)).

[17] *Dynamex*, 4 Cal. 5th at 960 (citing Silent Woman, Ltd. v. Donovan, 585 F. Supp. 447, 450-52 (E.D. Wis. 1984); Goldberg v. Whitaker House Co-op, Inc., 366 U.S. 28, 33 (1961); Dole v. Snell, 875 F.2d 802, 811 (10th Cir. 1989)).

[18] *Dynamex*, 4 Cal. 5th at 949.

services unrelated to a company's primary line of business and who have traditionally been viewed as working in their own independent business."[19]

Thus, analysis of Part B may include proof regarding how regularly or frequently a company uses a worker's services.

Guidance from Post-*Dynamex* Cases Addressing the Part B Standard

Certain principles have begun to emerge in post-*Dynamex* cases that have addressed the Part B standard, providing potentially helpful guidance.

The Same Essential Analysis Underlying the "Regular Business" Factor Under the 1989 Borello *Test May Apply to the Part B "Usual Course of Business of the Hiring Entity" Standard.*

One month after *Dynamex* issued, the California Court of Appeal modified its decision in *Curry v. Equilon Enterprises, LLC*.[20] The court concluded that to the extent *Dynamex* applies in the joint employer context, the defendant *did* satisfy Part B of the ABC test based on the same analysis used by the court earlier in the opinion when analyzing the *Borello* test's "regular business" factor.

In *Curry*, Shell Oil Products, owner and operator of several hundred gas stations, switched its business model by no longer operating its stations or employing employees to work at them. Instead, Shell entered into written lease and operating agreements that made outside companies responsible for day-to-day operations, including hiring and managing employees to staff gas stations.[21] Shell remained owner of the stations and the fuel that was sold to customers; the contracted operating company both hired and managed employees who carried out the tasks related to the fuel pricing and delivery to customers; and Shell reimbursed the operator, under the contract, for the cost of labor related to the fuel operations and sales.[22] One such operating company was ARS, which hired Sadie Curry and employed her as manager at two Shell-owned gas stations.[23]

Curry filed a putative class action directly against Shell, claiming it employed her (as well as ARS), misclassified her as exempt, and failed to provide overtime and rest and meal breaks as required under the applicable Wage Order.[24] Preliminarily, the *Curry* Court observed that in 2010, in *Martinez v. Combs,* the California Supreme Court had held that the Wage Order's phrase "to employ" could be construed as meaning any of three alternative definitions: "(a) to exercise control over the wages, hours, or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship."[25]

The *Curry* Court analyzed whether an employment relationship existed between Curry and Shell under each of these three definitions.

With respect to its analysis under the first definition, whether Shell "exercised control over the wages, hours, or working conditions," the Curry Court set forth its analysis of multiple factors under the *Borello* "control" test—and ultimately concluded that Shell failed to exercise sufficient control to be treated as her employer. The *Curry* Court went on to set forth its analysis under each of the second and third definitions, likewise finding no employment relationship.

With regard to *Curry*'s analysis of the second definition, defining "to employ" as "to suffer or permit to work," Curry argued that the *Dynamex* ABC test should govern. Although *Dynamex* involved the second definition, "to suffer or permit to work," the *Curry* Court was unsure, pointing out that *Dynamex* involved misclassification of individuals as independent contractors by a single employer, while *Curry* involved alleged joint employment. Separately, the *Curry* Court distinguished *Dynamex* because it involved policy reasons, as stated by the California Supreme Court in *Dynamex*, for selecting the ABC test that are "uniquely relevant" to allegedly misclassified independent contractors. Such cases are different from alleged joint employer cases, the *Curry* Court reasoned, because in joint employer cases, there is already a primary employer responsible for paying taxes and providing legal protections. "As a result, the policy purpose for presuming the worker to be an employee and requiring the secondary employer to disprove the worker' status as an employee is unnecessary" in the joint employment context.[26]

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[19] 4 Cal. 5th at 949.

[20] 23 Cal. App. 5th 289 (Apr. 26, 2018), as modified by Curry v. Equilon Enterprises, LLC., No. E 065764, 2018 Cal. App. LEXIS 456, at *1 (May 18, 2018) (modification includes new section of "Discussion" portion of decision to replace such section in earlier decision) (hereafter cited only by the 23 Cal. App. 5th 289 citation).

[21] *Curry*, 23 Cal. App. 5th at 293.

[22] 23 Cal. App. 5th at 292-95.

[23] 23 Cal. App. 5th at 293.

[24] 23 Cal. App. 5th at 296-300.

[25] 49 Cal. 4th 35, 64 (2010).

[26] 23 Cal. App. 5th 289, 313 (May 29, 2018).

Nevertheless, the *Curry* Court decided that "out of an abundance of caution" and "*because much of the analysis has already been completed ante*, we will discuss the 'ABC' factors."[27]

The *Curry* Court's reasoning is significant. The "analysis" that it stated largely "ha[d] already been completed"—and now could be used to evaluate the *Dynamex* ABC test—was the court's analysis of *Borello*'s "regular business" factor earlier in its own opinion. Specifically, with regard to how the *Curry* Court analyzed the *Dynamex* Part B standard – i.e., whether Curry performed work "outside the usual course of the hiring entity's business," the *Curry* Court expressly relied on its earlier analysis of the *Borello* "regular business" factor, which considers "whether or not the work is a part of the regular business of the principal."[28]

For the Part B analysis, the *Curry* Court integrated, and even quoted, its own earlier *Borello* findings:

> We concluded *ante* that Curry was engaged in the distinct occupation of an ARS station manager. We also concluded *ante* that Curry's "management of two gas stations was part of ARS's regular business because ARS's business involved operating gas stations." We explained that "Shell was not in the business of operating fueling stations—it was in the business of owning real estate and fuel." Thus, there is not a triable issue of fact as to the "B" factor because managing a fuel station was not the type of business in which Shell was engaged.[29]

To be sure, there are considerations that militate toward caution in relying on *Curry* for the contention that Part B is analyzed according to the same standards and cases that have evolved under the *Borello* "regular business" factor. At the same time, that the California Court of Appeal found the standards so similar that it quoted its own *Borello* findings to resolve the Part B standard is a topic worth following in ongoing *Dynamex* jurisprudence.

A Hiring Entity Can Be in the Business of Owning a Facility or Worksite, Separate From Being in the Business of Operating That Same Facility or Worksite

In *Curry*, the California Court of Appeal determined that ownership versus operations can distinguish the "usual course of business" of two companies involved with the same gas station properties.

Specifically, the *Curry* Court was persuaded that Shell's ownership of gas station properties and fuel meant that it had a distinct "usual course of business" that was separate from that of ARS, a different company (and lessee) that ran the operations at the same gas station properties that sold the fuel resources.[30] As set forth above, ARS employed the plaintiff Curry as a gas station manager. The court concluded that her "management of two gas stations was

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[27] 23 Cal. App. 5th at 314 (emphasis added).

[28] *Borello*, 48 Cal. 3d at 347 (noting that in the facts of that case, "[t]he harvesters form a regular and integrated portion of Borello's business operation. Their work, though seasonal by nature, is 'permanent' in the agricultural process. . . . This permanent integration of the workers into the heart of Borello' business is a strong indicator that Borello functions as an employer . . . .").

[29] *Curry*, 23 Cal. App. 5th at 314-15. The Curry Court's analysis under *Borello* earlier in its opinion was as follows:

> Shell owned approximately 365 fueling stations in California. There is nothing indicating Shell employed people at the gas stations. Thus, Curry's work at the fueling station was not part of Shell's business. In other words, Shell was not in the business of operating fueling stations—it was in the business of owning real estate and fuel. Curry contends "Shell was and is in the business of selling its motor fuel at facilities which it owns. . . . ARS merely provided the station employees and made sure that they performed their tasks in the manner in which Shell dictated." Curry's argument is problematic. If ARS supplied the employees and supervised the employees' work, then ARS was in the business of operating the station, and Shell was in the business of owning the station. For example, if the owner of an apartment complex hires a property management company, and that property management company hires an on-site manager for the complex, the owner is not engaged in the business of property management. Rather, the owner is in the business of owning real estate, while the property management company is in the business of managing properties. Shell's contract with ARS did not put Shell in the business of operating fuel stations." 23 Cal. App. 5th at 307-08.

[30] *Curry*, 23 Cal. App. 5th at 289.

part of ARS's regular business because ARS's business involved operating gas stations."[31] In contrast, Shell was "not in the business of operating fueling stations—it was in the business of owning real estate and fuel."[32]

Summary judgment was granted as to Shell: "[T]here is not a triable issue of fact as to the 'B' factor because managing a fuel station was not the type of business in which Shell was engaged.[33]

The ownership-versus-operations holding of *Curry* can apply to other types of businesses with interests as to the same property. An obvious example involves companies that own real estate consisting of commercial or residential properties, and the separate companies with which they contract to provide building or property management services. Under *Curry*, they each have a separate "usual courses of business."

For example, if the owner of an apartment complex hires a property management company, and that property management company hires an on-site manager for the complex, the owner is not engaged in the business of property management. Rather, the owner is in the business of owning real estate, while the property management company is in the business of managing properties.

The Application of Part B to Motor Carriers That Are Regulated by Federal Law Results in Preemption of the Dynamex *ABC Test.*

Recently, a federal court applying the *Dynamex* ABC test found that federal law governing the motor industry preempted the application of Part B of *Dynamex*'s ABC test to truck drivers.

In *Alvarez v. XPO Logistics Cartage LLC*,[34] truck drivers filed a putative class action against the trucking company with which they had contracted, claiming that they were misclassified as independent contractors. The truck drivers, who transported containers to and from ocean and railway shipping terminals, brought wage statement claims and sought recovery for unpaid overtime, minimum wage, and other benefits, some of which were provided under the applicable Wage Order. The company moved for judgment on the pleadings, arguing that the Federal Aviation Administration Authorization Act (FAAAA) preempted the *Dynamex* ABC test when it was applied to ascertain the truckers' status as employees or independent contractors for their claims under the state Wage Order.[35]

The district court agreed that FAAAA preemption applied, relying on the reasoning set forth by First Circuit decisions addressing this issue under Massachusetts' similar prong B in its ABC test.

In sum, application of Part B of the *Dynamex* test "would require a court to look at a motor carrier's service, determine that the service is outside the carrier's usual course of business, and then bar the carrier from using workers as independent contractors to perform that service."[36]

The *Alvarez* Court also noted *dicta* from the recent decision of the Ninth Circuit Court of Appeals in *California Trucking Association v. Su*, where the Ninth Circuit noted that "the ABC test may effectively compel a motor carrier to use employees for certain services because, under the ABC test, a worker providing a service within an employer's usual course of business will never be considered an independent contractor."[37]

The *Alvarez* Court held that the entire "ABC test—as adopted by the California Supreme Court ... [was] preempted by the FAAAA."[38]

Conclusion

Companies struggling with how to apply Part B to their relationships with independent contractors may find at least some green shoots of guidance emerging from the case developments discussed above, together with some of the reasoning and language of the *Dynamex* opinion itself. As *Dynamex* moves beyond its first birthday,

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[31] 23 Cal. App. 5th at 314-15.

[32] 23 Cal. App. 5th at 314-15.

[33] 23 Cal. App. 5th at 314-15.

[34] No. CV 18-03736 SJO (E), 2018 U.S. Dist. LEXIS 208110 (C.D. Cal. Nov. 15, 2018).

[35] *Alvarez*, 2018 U.S. Dist. LEXIS 208110, at *6. The FAAAA references "[m]otor carriers of property." 49 U.S.C. § 14501(c). For preemption to apply, a state law must (1) "relate[] to the 'price, route, or service' or a motor carrier" in a way that is not "tenuous, remote, or peripheral;" and (2) "concern a motor carrier's 'transportation of property.'" Dan's City Used Cars, Inc. v. Pelkey, 569 U.S. 251, 261 (2013).

[36] *Alvarez*, 2018 U.S. Dist. LEXIS 208110, at *12-13 (citing and relying on Schwann v. FedEx Ground Package Sys., 813 F.3d 429, 437 (1st Cir. 2016); Massachusetts Delivery Ass'n v. Healey, 821 F.3d 187, 190 (1st Cir. 2016)).

[37] *Alvarez*, 2018 U.S. Dist. LEXIS 208110, at *14-15 (referring to California Trucking Ass'n v. Su, 903 F.3d 953, 964 (9th Cir. 2018)).

[38] *Alvarez*, 2018 U.S. Dist. LEXIS 208110, at *15 n.2 (noting that California's ABC test was adopted through the common law, not by statute, and for this reason, the court "decline[d] to address Plaintiffs' argument regarding severability" of preemption only as to Part B).

additional guidance will undoubtedly arrive from both judicial and legislative developments in California.

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Cleaning Up The "Similarly Situated" Mess *Lewis v. Union City*

By Elizabeth Torphy-Donzella

On April 9, 2019, the U.S. Court of Appeals for the Eleventh Circuit issued an *en banc* decision with the stated purpose of "cleaning up a mess." That "mess" was the result of *McDonnell Douglas Corp. v. Green*[1] which established the familiar burden shifting scheme of proof applicable to summary judgment in discrimination cases, but did not clearly define what it means for a comparator to be "similarly situated" to the plaintiff. As practitioners in this area know, absent direct evidence of discrimination, a showing that the plaintiff was treated differently than a similarly situated employee outside his/her protected class is necessary to establish a prima facie case (and to survive the employer's motion for summary judgment). This concept has been defined differently by the various federal circuits, and vexingly to the Eleventh Circuit, inconsistently among cases within its own Circuit. "It's a mess," Circuit Judge Newsom declared in *Lewis v. Union* City.[2]

Although the Eleventh Circuit unanimously agreed upon the operative standard, the court was sharply divided on how the standard should be applied. This article will discuss the dueling opinions issued by the Eleventh Circuit when it took the case *en banc* in order to "clean up, and to clarify once and for all the proper standard for comparator evidence in intentional discrimination cases[.]"[3] This article will review the "guideposts" set by the majority for the case-by-case determination of what it means to be "similarly situated" and the dissenting judges' position that the majority "drops an anvil on the employer's side of the balance"[4] in how it defined the standard.

Facts of the Case

After the Plaintiff, Lewis, a police detective, suffered a heart attack, she was cleared to work without restrictions. The following year, the City's Police Chief, Odom announced a new policy requiring all officers to carry Tasers. As part of the training, all officers had to be subjected to a five-second Taser shock, which was intended to help them evaluate when it was appropriate to use the Taser, testify in court about the effects of a shock, and develop confidence that a Taser shock was survivable.[5]

Lewis became concerned that the Taser shock (as well as a pepper spray certification training she was scheduled to attend), might harm her given her prior heart attack. Lewis's doctor, who agreed, advised Chief Odom that the doctor "'would not recommend' that either a Taser or pepper spray be used either 'on or near' Lewis."[6] Chief Odom instructed Lewis to take leave until her doctor released her to full active duty. Lewis was told she could use her paid leave until it was exhausted and apply for FMLA leave. Lewis failed to return the FMLA paperwork and, after her paid leave concluded, was terminated pursuant to the City's personnel rules, which provided for termination for "any unapproved leave of absence".[7]

Lewis's Lawsuit and Appeal

Lewis brought suit against Union City, claiming that her termination constituted discrimination based on race (African-American) and gender (Female) under Title VII, the Equal Protection Clause, and 42 U.S.C. § 1981.[8] In response to the City's motion for summary judgment, Lewis identified two White male comparators who received more favorable treatment. The first was an officer who, nearly four years after Lewis's termination, failed the balance portion of a physical fitness test and was put on leave pursuant to the City's physical fitness/medical examinations policy, which provided for 90 days of unpaid leave to remedy a condition. He did so, passed the test and was reinstated. The second was an officer who, nearly three years after Lewis's termination, failed an agility test and was placed on unpaid leave for 90 days pursuant to the same policy. After being offered (and declining) an alternative position, this officer was terminated because he could not demonstrate he was fit for duty (after a 449 day period, during which time his attorney was in negotiations with the City). The policy of providing 90 days of unpaid leave was adopted by the City two years after Lewis's termination. However, Lewis argued that these officers were similarly

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[1] 411 U.S. 792 (1973).

[2] 918 F.3d 1213, 1217 (11th Cir. 2019) *(en banc).*

[3] 918 F.3d at 1217.

[4] 918 F.3d at 1231.

[5] 918 F.3d at 1218-19 and n.1.

[6] 918 F.3d at 1219.

[7] 918 F.3d at 1219.

[8] The Plaintiff also brought a claim under the Americans with Disabilities Act ("ADA"). The panel reversed the district court's grant of summary judgment on that claim, concluding that there were issues of material fact as to whether the City regarded Plaintiff as disabled. 877 F.3d 1000, 1014 (7th Cir. 2017), vacated by, rehearing *en banc* granted by, 893 F.3d 1352 (11th Cir. 2018). The ADA ruling was not subject to *en banc* review.

situated comparators because they all were placed on administrative leave when they could not meet the physical demands of the job pursuant to City policy.

The district court granted summary judgment for the City, holding that Lewis's comparators were not similarly situated under either the "nearly identical" or "same or similar" standards that had alternatively been applied by the Eleventh Circuit. A divided panel of the Eleventh Circuit reversed, and held that Lewis had raised a genuine issue of material fact as to whether she was treated less favorably than the comparators she identified.[9]

The panel decision was vacated after the Eleventh Circuit granted *en banc* review.[10] The question that the parties were instructed by the court to address was the following:

> The Supreme Court has held that in order to make out a prima facie case of discrimination under Title VII of the Civil Rights Act of 1964, the Equal Protection Clause of the Fourteenth Amendment, or 42 U.S.C. § 1981, a plaintiff must prove, among other things, that she was treated differently from another "similarly situated" individual. What standard does the phrase "similarly situated" impose on the plaintiff: (1) "same or similar," (2) "nearly identical," or (3) some other standard?[11]

The Eleventh Circuit's En Banc Decision

Although the Eleventh Circuit unanimously concluded that the standard to be applied to comparators was that they be "similarly situated in all materials respects," the court was anything but united on what this means. As explained below, the court split fundamentally on how fulsome the examination of a comparator may be at the prima facie stage under the *McDonnell Douglas* burden shifting paradigm.

1. The Decision of the Court as to the Applicable Standard

The court began with a "tour" through prior Eleventh Circuit precedent, remarking, "to date, our attempts to answer that question have sown only confusion."[12] In that regard, in some cases the court had required the comparators to be "nearly identical" to the plaintiff, while others expressly rejected such a standard. In yet other cases, the court had used a "same or similar conduct" analysis to compare the plaintiff and the identified comparators. "And to make matters worse, in still others we have applied both the nearly identical and same-or-similar standard simultaneously."[13] Rejecting the prior formulations, the court held that "a plaintiff asserting an intentional discrimination claim under *McDonnell Douglas* must demonstrate that she and her comparators were 'similarly situated in all material respects.'"[14]

2. The Majority's Explanation of How the Standard Must Be Applied

The majority framed its task in answering the question of what showing the plaintiff must make with respect to satisfying the "similarly situated in all material respects" element as being a two-part undertaking: "First, should the 'similarly situated'—*i.e.*, comparator—analysis be conducted at the prima facie stage of the *McDonnell Douglas* framework, as we (and the Supreme Court) have traditionally held, or should it instead be reserved for the pretext stage? Second, and in either event, what is the proper standard for determining whether a plaintiff and her comparators are 'similarly situated'?"

As to the first question, the majority noted that the examination of comparators had always happened in the Plaintiff's prima facie case, but that Lewis essentially was asking that the examination be deferred to the later pretext stage. This position, to the majority, was inconsistent with precedent.

> Beginning in *McDonnell Douglas* itself, the Court emphasized that a Title VII plaintiff—there bringing a failure-to-hire claim—carries his prima facie burden "by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and"—importantly here—"(iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.""[15]

This showing – that the plaintiff and her comparator are similarly situated – is inherent in determining if there is discrimination, which requires that **like** cases be treated **differently**. To omit this showing from the plaintiff's initial burden would, according to the majority, mean that anyone in a protected class could create an inference of discrimination by showing that she belonged to that class, suffered some adverse employment action, and was

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[9] 877 F.3d at 1017. The panel majority also ruled that even if Lewis was not similarly situated to her comparators, the "mosaic of circumstantial evidence" presented by her created a jury issue. *Id.* at 1018-1019.

[10] 893 F.3d 1352 (11th Cir. 2018) *granting en banc review and vacating* 877 F.3d 1000 (11th Cir. 2017).

[11] 918 F.3d at 1218.

[12] 918 F.3d at 1217.

[13] 918 F.3d at 1217-18.

[14] 918 F.3d at 1218.

[15] 918 F.3d at 1221-22 (citations omitted).

qualified to perform the job. Noting that the prima facie case is supposed to create an inference of discrimination, which is dispositive absent an explanation by the employer of its legitimate, non-discriminatory reason, without evidence of differential treatment, "there's no way of knowing (or even inferring) that discrimination is afoot."[16] Equally important, the formulation would effectively shift to the employer the burden of disproving discrimination (something the Supreme Court has forbidden). As such, the majority conduced that a "meaningful comparator analysis" must occur in the prima facie case.[17]

Turning to the standard, the majority explained that its interpretation was founded both on the ordinary meaning of "discrimination" and the twin policies of prima facie case under the *McDonnell Douglas*: "(1) to eliminate 'the most common nondiscriminatory reasons' for an employer's conduct, and (2) to provide a sound basis for an 'inference of unlawful discrimination."[18] The majority deemed the approach advocated by both Lewis and the City failed these tests.

The standard of discrimination urged by Lewis, that "[s]o long as the distinctions between the plaintiff and the proposed comparators are not 'so significant that they render the comparison effectively useless'—fails these tests."[19] According to the majority, an insufficient correspondence between the plaintiff and her comparators would not provide a "sound basis for eliminating legitimate reasons for an employer's conduct or validly inferring discrimination."[20] It also would give courts too much leeway to upset employer's valid business judgments by "thrust[ing] courts into staffing decisions that bear no meaningful indicia of unlawful discrimination."[21]

The standard advocated by the City – that a plaintiff and her comparator be nearly identical – "gave off the wrong vibe" because, despite the "nearly" qualification, "courts have come to believe that it requires something akin to doppelganger-like sameness. . . . And we are not willing to take the risk that the nearly-identical test is causing courts reflexively to dismiss potentially valid antidiscrimination cases."[22]

Given that the standard adopted by the court – similarly situated in all material respects – is not self-defining and needed to be decided on a case-by-case basis, the majority offered a non-exclusive summary of guideposts that the majority "envisioned" courts would follow in deciding similarity. The plaintiff and her comparator should have (1) engaged in the same basic conduct; (2) been subject to the same employment policy, guideline, or rule; (3) (although not invariably) have been under the same supervision; and (4) share employment and disciplinary history.[23] Citing the Supreme Court's decision construing the Pregnancy Discrimination Act in *Young v. United Parcel Service,* the majority opined, "a plaintiff and her comparator must be sufficiently similar, in an objective sense, that they 'cannot reasonably be distinguished.'"[24]

Turning to the case at hand, the majority concluded that Lewis and her comparators were not similar in all material respects. Lewis asserted that they were similar because they"were all placed on administrative leave by the City when they could not meet the physical requirements of the job." The majority said this summary assertion glossed over the fact that the comparators were placed on leave pursuant to a policy that did not exist when Lewis was placed on leave (that provided a 90-day period to resolve fitness for duty questions) and years after she was terminated. In addition, the majority compared the underlying conditions – balance and agility – of the comparators, which were "at least theoretically (and in [one officer's] case actually) remediable."[25] By contrast, Lewis's condition (chronic heart condition) was not fixable; she never was cleared to return to duty.[26]

Accordingly, the majority concluded, "For these reasons—because they were subject to different personnel policies and placed on leave for different underlying conditions—we conclude that [the comparators] were not similar to Lewis 'in all material respects,' and thus were not valid comparators for purposes of Lewis's prima facie case."

3. The Dissent's Explanation of How the Standard Must Be Applied

Three of the 12 judges filed a dissenting opinion providing a detailed rebuttal of the majority's opinion. The dissent accused the majority of disguising a "meaningful" application of the similarly situated standard as, in fact, a "rigorous" application done entirely (and improperly) in the prima facie case. "Yet that construction of the prima facie case rebukes its parent: *McDonnell Douglas* and its progeny explicitly and implicitly require a generalized application of the 'similarly situated' standard at the initial, prima facie juncture and a more particularized

[16] 918 F.3d at 1223.
[17] 918 F.3d at 1223-24.
[18] 918 F.3d at 1225.
[19] 918 F.3d at 1225.
[20] 918 F.3d at 1225.
[21] 918 F.3d at 1226.
[22] 918 F.3d at 1226.
[23] 918 F.3d at 1227-28.
[24] 918 F.3d at 1228 *quoting* 135 S.Ct. 1338, 1355 (2015).
[25] 918 F.3d at 1230.
[26] 918 F.3d at 1230.

one at the pretext phase of the framework—after the employer has satisfied its burden of coming forward with its nondiscriminatory reason for adverse action."[27] For the dissent, the comparators were similarly situated in all "material" respects because "the upshot of all three officers' conditions was that the City deemed them all physically unfit to patrol the streets of Union City and, in turn, relied on that fact to put them all on administrative leave. Meanwhile, Lewis, an African-American woman, received only 21 days of administrative leave before being fired, but one white male comparator enjoyed 449 days before his dismissal and the other got up to 90 days to demonstrate he had become physically fit enough to resume his duties."[28]

Thereafter, over the course of the 30-page opinion, the dissent set forth its interpretation of what *McDonnell Douglas* intended the prima facie showing to entail, which would have resulted in reversal of the district court's grant of summary judgment. That analysis, in compressed form, is as follows.

First, the showing at the prima facie case has repeatedly been described as "not onerous" because discrimination is "notoriously difficult-to-prove[.]"[29] As such, there should only be a generalized examination of the similarity of the comparators with the plaintiff at the prima facie stage, leaving a more rigorous review at the pretext stage. This latter stage, under established Supreme Court precedent, is intended to involve "a new level of specificity."[30] In the dissent's view "[b]y maxing out the specificity at the prima facie stage, [the majority] simply ignores Supreme Court precedent."[31]

Second, in doing so, the majority "effectively considers the employer's non-discriminatory reasons (the second stage inquiry) at the first stage – the prima facie case – without providing the protection of allowing the employee to present evidence and argument challenging those reasons as pretext for discrimination."[32] In the dissent's view, the facts cited by the majority as rendering plaintiff and her comparators not similarly situated were simply the employer's proffered reasons for why it treated them differently; namely, they had different physical conditions and were placed on leave under different policies. That level of specificity must, under Supreme Court precedent, be saved for the pretext phase.[33]

Third, the majority's rationale for the scrutiny imposed at the first stage of the analysis over-weighted the employers' interests. Those interests – eliminating the most common non-discriminatory reasons for an employer's actions, winnowing out meritless claims, and leaving employer's the necessary "breathing space" to make business judgments – were acknowledged by the dissent. Yet, the dissent complained that this focus disregarded the *employee's interests* "in being able to earn a livelihood without being discriminated against and in having a chance to prove her case, despite the difference in her access (versus that of her employer) to information about the employment action."[34]

Fourth, the majority's definition of "material" was a misapprehension of how that concept has been applied by the Supreme Court. The dissent explained:

> [I]n the context of the *McDonnell Douglas* framework, a comparator who is "similarly situated in all material respects" is a comparator who was similarly situated to the employee in all ways necessarily crucial to—**but only in those ways necessarily crucial** to—the employer's decision to take action against the employee. And if any material issue of fact exists concerning whether a nondiscriminatory factor (or reason) was necessarily crucial to the employer's employment action, it raises a material issue of fact concerning whether the employer's proposed narrower comparator class is actually "similarly situated" to the plaintiff. As a result, the case must survive summary judgment.[35]

In contrast to the "guideposts" offered by the majority for determining materiality, the dissent offered the following discernments from the cases (because the endeavor is necessarily a case-by-case undertaking, not amendable to a "checklist").[36] Under *McDonnell Douglas*, comparators will have engaged in the same conduct that would trigger the same employment decision by the employer (unless at the pretext stage the employer can demonstrate nondiscriminatory reasons why they are not appropriate comparators).[37] Furthermore, under *Young*, which involved an employee unable to perform job functions due to pregnancy, comparators could include individuals unable to perform jobs for different reasons and based on different job functions.[38] The dissent also allowed that at the prima facie stage other factors could be relevant, "such as whether the plaintiff and the proposed comparators had the same supervisor or a

[27] 918 F.3d at 1232.
[28] 918 F.3d at 1233.
[29] 918 F.3d at 1235.
[30] 918 F.3d at 1237, *citing Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981).
[31] 918 F.3d at 1237.
[32] 918 F.3d at 1238.
[33] 918 F.3d at 1239-40.
[34] 918 F.3d at 1243.
[35] 918 F.3d at 1246 (emphasis added).
[36] 918 F.3d at 1250.
[37] 918 F.3d at 1249.
[38] 918 F.3d at 1249.

similar employment or disciplinary history, and whether the proposed comparator and the plaintiff had fairly comparable positions[.]"[39] All of that said, and however applied, the dissent maintained that the standard should only be treated in a generalized, not onerous, and minimal way.[40]

Finally, to demonstrate why Lewis established a prima facie case, the dissent set forth what made her comparators similar in all material respects. All were officers who were involuntarily placed on leave when their fitness for duty was in question. Each was placed on leave pursuant to a policy applicable at the time of their leave. Although the policy applicable to the comparators did not exist when Lewis was employed, like the policy applicable to Lewis, it emanated from the Department's authority to involuntarily place officers on leave pursuant to the City handbook. In addition, Lewis and her comparators had similar job titles, similar responsibilities, similar seniority, and were supervised by the same person (Chief Odom). Lewis's physical condition triggered the same employment decision as her comparators – leave. Yet, Lewis was terminated after 21 days while her comparators were given 90 and 449 days leave respectively. The dissent deemed this "plenty" to satisfy the "generalized" and "minimal" burden.[41]

Because the dissent found that Lewis met her burden, it examined the employer's proffered reasons and concluded that each had "holes" that would permit a jury to find pretext.

To the City's argument that the policy had changed by the time the comparators were placed on leave, the dissent responded (deeming itself to be construing the evidence in the light most favorable to Lewis) that the policies applicable to all were promulgated under the Department's authority to exercise its discretion to place an officer on leave when he or she was not fit. The dissent attributed this authority to the Police Chief and found that his discretion was exercised more favorably to the White males (and particularly so with the one whose leave well exceeded 90 days). Therefore, "[a] reasonable jury could find that the Department did not consistently exercise its authority in placing physically unfit officers on administrative leave and that the Department did not comply with its own policies. A reasonable jury could further conclude that these inconsistencies reveal a discriminatory motivation."[42]

The second nondiscriminatory reason offered by the Department – that Lewis's condition was permanent whereas the conditions of the other two officers were not – was not, according to the dissent, a legitimate justification in light of *Young*. Yet, even if it were, the dissent reviewed the record and found a dispute of fact as to whether the Department had any reason at the time to believe that Lewis's condition was permanent. In addition, there was evidence that the department had worked with others having heart conditions in modifying the Taser training to use a milder shock. Thus, a jury could conclude that a discriminatory motive caused Chief Odom to forgo this practice with Lewis.

Finally, the dissent reasoned that a jury could find to be pretextual the Department's arguments that Lewis's termination was legitimate because she failed to submit the documents required to authorize her leave, triggering termination under the applicable policy. A jury could conclude that the deadline was not communicated sufficiently to Lewis, and that everyone knew she intended to take FMLA leave (even if her paperwork was not timely submitted).[43]

The dissent concluded by decrying that a viable case such as the one before it would be foreclosed by an erroneously rigorous comparator standard. Citing recent studies that employment discrimination against African-Americans, Latino-Americans, Asian-Americans, and women has not subsided, the dissent concluded:

> Of course, employers usually do not post help-wanted signs reading "blacks need not apply," and they are generally astute enough not to ask women about plans to start a family. Instead, discrimination today often surreptitiously sits behind a veil of subtlety, with the boss handing out the plum assignments to male officers while relegating the "lady" detectives to "less aggressive" "children crimes." . . . Using codewords or subtlety does not make discrimination any less of a problem under Title VII. And because Title VII tolerates none of it, we should be particularly cautious before ratcheting up plaintiffs' "not onerous" prima facie burden, in violation of *McDonnell Douglas* and its progeny.[44]

Analysis

Due to the framework created by *McDonnell Douglas* and by the underlying proposition that discrimination is differential treatment, a plaintiff ultimately must show that others outside her protected class were treated more favorably. Thus, in employment discrimination litigation the plaintiff, through discovery, will cast a wide net to try to identify individuals outside her protected class who she can point to as being treated more favorably. Discovery disputes often arise about the scope of a request for personnel data concerning others who were disciplined and what is relevant to a plaintiff's claims. These disputes normally are resolved with the plaintiff getting more expansive data than the

[39] 918 F.3d at 1250.
[40] 918 F.3d at 1250.
[41] 918 F.3d at 1256.
[42] 918 F.3d at 1258.
[43] 918 F.3d at 1259.
[44] 918 F.3d at 1261.

defendant deems to be reasonably related to the issue at hand. Discovery favors more information over less, with the notion that relevance will be decided in the attempted use of the information at a later time.

This is how it no doubt played out in Lewis *v. Union City*. Lewis likely demanded information on officers who were placed on leave over an extended time period and for a variety of conditions. Ultimately, she was provided with information on officers placed on leave four years after her termination, and pursuant to policies that were not even in place at the time. Whether ordered by the court or by agreement of the parties, the information likely was produced over the defendant's objections. In other words, such evidence frequently is not proffered by the defendant to justify its actions vis a vis the plaintiff, but because the plaintiff has sought it to substantiate her claim.

Summary judgment is the point at which the shifting burdens of *McDonnell Douglas*, and comparator evidence, come into play. If the case survives such a motion, that burden-shifting construct no longer applies.

Yet, if the plaintiff, after discovery, has uncovered no comparator that suffered the same adverse action under the same policy during the same time period, declaring that she meets her prima facie case by obscuring such critical differences makes no sense. (Glossing over this evidence in the pretext stage, as the dissent does, compounds the error.) Furthermore, to say that a candid and factual examination of the comparators in the prima facie case allows the employer to proffer its legitimate reasons prematurely misunderstands how this evidence is deployed. In virtually all of the cases where there are strained comparators, the employer's reasons for the decision about the plaintiff will not have been remotely related to what it did in these cherry-picked other cases. The actual reason for the employer's decision will have been tied to the circumstances of the plaintiff's employment at the time the decision was made. The need to explain, to justify its decision, vis-à-vis the comparators only arises by the plaintiff's interjection of other cases. Making sure that the comparison is apt before requiring the employer to explain does, as the majority explains, prevent plaintiffs, courts, and ultimately juries from second guessing business decisions without justification.

In the end, the divided decisions in *Lewis* demonstrate the problem with standards of proof such as that reflected by *McDonnell Douglas*. Courts are capable of interpreting evidence and reaching outcomes in the light most favorable to their philosophy. According to the majority, delaying the factual comparison of plaintiff and her comparators by moving the qualitative assessment "out of the prima facie stage and into the pretext stage would allow the plaintiff to proceed—and potentially to win—without *any* good ground for presuming that discrimination has occurred. Doing so would effectively shift to the defendant the burden of *disproving* discrimination—which is precisely what the Supreme Court has forbidden."[45] Further, according to the majority, "it seems to us inevitable that Lewis's proposal would effectively eliminate summary judgment as a tool for winnowing out meritless claims. Indeed, forestalling summary judgment appears to be a feature of the not-useless standard, not a bug."[46]

By contrast, the philosophy of the dissenting judges is that a close examination of comparators at the prima facie stage means that plaintiffs "will have a difficult time budging the now off-kilter balance and surviving summary judgment."[47] Hence, "by locating a rigorous "similarly situated" requirement at the prima facie stage of the *McDonnell Douglas* framework, the Majority Opinion shrinks the number of potentially discriminated-against plaintiffs who will have an opportunity to see trial—or even to challenge their employers' proffered reasons for taking action against them."[48]

Given the detailed positions staked out by the Eleventh Circuit judges and the divergent standards being applied in the various Circuits, the U.S. Supreme Court may decide which of these philosophies is right in the not so distant future.

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RECENT DEVELOPMENTS

ADA

Employee's Disparate Treatment, Retaliation, and Failure to Accommodate Claims Failed; However, His Hostile Work Environment Claim Was Cognizable Under ADA

Fox v. Costco Wholesale Corp., Inc., 2019 U.S. App. LEXIS 6714 (2d Cir. Mar. 6, 2019)

Christopher Fox worked at Costco Wholesale Corp.'s Holbrook, New York warehouse in 1996. He suffered from Tourette's Syndrome and Obsessive-Compulsive

[45] 918 F.3d 1223.
[46] 918 F.3d 1226.
[47] 918 F.3d at 1231.
[48] 918 F.3d at 1232.

Disorder since birth. While working as a Greeter under the new management, Fox was reprimanded twice by Assistant Manager, Glenn Johnson, for leaving the Costco entranceway to move a customer cart outside and for leaving behind a cart. However, Johnson took no formal disciplinary action against Fox. Costco's management received two customer complaints about Fox's behavior in 2013 and 2014. Larry Resnikoff, General Manager, suspended Fox for three days without pay and transferred him to an Assistant Cashier position. Neither Fox's pay nor his benefits were reduced as a result. Once Fox began his position as an Assistant Cashier, other Costco employees made "hut-hut-hike" comments made for months when Fox experienced verbal tics which happened in plain view of the supervisors, but they failed to intervene. Fox was denied breaks to go home and take his medicine and go to the pharmacy. Fox was also reprimanded for yelling and for leaving his register to retrieve water. Fox brought claims against Costco under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12111 et seq., and New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 290 et seq., alleging hostile work environment, disparate treatment, failure to accommodate, and retaliation. The United States District Court for the Eastern District of New York determined that a rational fact-finder could not find evidence in the record to support sufficiently any of Fox's theories of recovery. Fox appealed to the Second Circuit, which affirmed in part, vacated in part, and remanded.

The Second Circuit affirmed the district court's grant of summary judgment in favor of Costco with respect to Fox's claims alleging disparate treatment, retaliation, and failure to accommodate. The court held that Fox failed to introduce evidence that the alleged material adverse employment actions he suffered (the reprimands, position transfer, and lack of breaks) were the result of his disability. The reprimands did not result in disciplinary action or a reduction in salary, benefits, or other responsibilities. Fox's job transfer from Greeter to Front-End Cashier did not constitute a demotion, decrease in benefits, decrease in salary, or worse job duties. Fox's claim that he was denied breaks to go home and take his medicine and go to the pharmacy, even if related to his disability, did not rise to the level of a material adverse employment action. Fox did not demonstrate that he was constructively discharged. Fox did not show that he "actually resigned," but rather he was on indefinite medical leave and had failed to make a prima facie case for disparate treatment. Fox's retaliation claims failed because he did not introduce evidence that he suffered an adverse employment action—and causally connected to—his engagement in a protected activity. Fox's ADA failure to accommodate claims also failed because he never asked for an accommodation while employed as a Greeter or as an Assistant Cashier. Fox did not identify a reasonable accommodation that Costco refused to provide.

The Second Circuit joined its sister Circuits and held that hostile work environment claims are cognizable under the ADA. Further, the court held that there was adequate evidence in the record for Fox's hostile work environment claim to survive summary judgment. The court held that a reasonable fact finder could conclude that the "hut-hut-hike" comments made for months by co-workers when Fox experienced verbal tics were sufficiently severe and pervasive to change the conditions of Fox's employment. The court could fairly infer these comments were mockery of his disability. Fox introduced evidence that his supervisors witnessed this conduct for months and did nothing, demonstrating a specific basis for imputing the objectionable conduct to Costco. Thus, Fox met his burden to defeat Costco's motion for summary judgment on his hostile work environment claim. Fox raised an issue of fact as to whether the frequency and severity of the mockery rose to the level of an objectively hostile work environment.

The Second Circuit stated that because NYSHRL claims were analyzed as ADA claims, Fox's state law claims for disparate treatment, retaliation, and failure to accommodate were properly dismissed. His state law hostile work environment claim was to be reinstated on remand.

AGE DISCRIMINATION

Employee's Age Discrimination Claim Was Properly Considered Under the New York City Human Rights Law

Rinsky v. Cushman & Wakefield, Inc., 2019 U.S. App. LEXIS 6999 (1st Cir. Mar. 8, 2019)

Yury Rinsky, a citizen of Massachusetts, brought suit against his former employer, the New York-based real estate firm Cushman & W akefield, Inc. ("C&W"), claiming that C&W impermissibly fired him because of his age and disability. C&W removed Rinsky's suit from the Massachusetts Superior Court to the United States District Court for the District of Massachusetts in Boston, which applied the New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code §§ 8-101-107. The jury then found that C&W discriminated against Rinsky on the basis of age and awarded him $1,275,000, comprised of $425,000 in compensatory damages and $850,000 in punitive damages. C&W appealed, arguing that the NYCHRL was inapplicable, that the district court judge incorrectly instructed the jury, and that there was insufficient evidence to support the jury's verdict.

The First Circuit affirmed the district court's judgment. The court held that the NYCHRL was applicable because the employee worked in NYC for 27 years, and he was

continuously employed in NYC, despite the fact that he worked remotely from Massachusetts in the days preceding his termination, the district court judge correctly instructed the jury, and that there was sufficient evidence to support the jury's verdict.

The court noted that the highest court in New York, the Court of Appeals, has held that when determining whether plaintiffs can bring a claim pursuant to the NYCHRL, the question is whether the impact of an alleged discriminatory decision was felt within New York City. Hoffman v. Parade Publ'n, 15 N.Y.3d 285, 933 N.E.2d 744, 746, 907 N.Y.S.2d 145 (N.Y. 2010); see also Vangas v. Montefiore Med. Ctr., 823 F.3d 174, 182—83 (2d Cir. 2016); Robles v. Cox & Co., 841 F. Supp. 2d 615, 624 (E.D.N.Y. 2012). The court stated that it was clear that Rinsky's residence in Massachusetts did not either preclude him from bringing a claim under the NYCHRL or support the conclusion that the impact of his termination was not felt in New York City. Nor did the fact that he teleworked from Massachusetts. The court stated that the NYCHRL must be "construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof." Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 109 (2nd Cir. 2013) (quoting Restoration Act § 7 (amending N.Y.C. Admin. Code § 8-130)). It would create a significant loophole in the statutory protection that the New York Court of Appeals deemed was provided to non-resident employees, Hoffman, 933 N.E.2d at 746, if by the chicanery of misleading or lulling employees into working remotely from outside New York City before terminating them, an employer could immunize itself from liability. Surely, in enacting the NYCHRL, the New York City Council did not countenance that such stratagems in service of prohibited discrimination would be beyond the reach of the statute. In short, the court stated that the district court did not err in determining that the NYCHRL applied.

The court stated that because the New York Court of Appeals has determined that the standard for recovering punitive damages under the NYCHRL should be less demanding than the federal Title VII standard, C&W's contention that the NYCHRL mandates a burden of clear and convincing evidence—a burden that is higher than even the rejected Title VII standard—fails under the weight of precedent and logic. See Chauca, 30 N.Y.3d 325, 67 N.Y.S.3d 85, 89 N.E.3d 475. In short, the court state that the suggested instruction was wrong as a matter of law, and the district court did not err in rejecting it.

The court stated that the district court noted "the lack of any indication in the record of an obvious, alternative, non-discriminatory explanation for Plaintiff's firing" and found "the jury permissibly inferred that Defendant's continued insistence that it fired Plaintiff for moving without permission was covering up an impermissible motive, even where there was little direct evidence of age discrimination." The court considering both C&W's burden to show conclusively the non-discriminatory reason for Rinsky's termination and its obligation to weight its review of the record "toward preservation of the jury verdict," the court concluded that the record provided an insufficient basis for the court to overturn the district court's denial of motion for judgment as a matter of law. Therefore, the court stated that the district court did not abuse its discretion, as the evidence substantially supported its finding that Rinsky satisfied the age discrimination analysis under Reeves/McDonnell Douglas.

ARBITRATION AGREEMENT

District Court Did Not Err When It Applied State Law in Analyzing the Validity of an Arbitration Agreement

Kropke v. Dunbar, 2019 U.S. App. LEXIS 8763 (9th Cir. Mar. 25, 2019)

The Trustees of the Southern California IBEW-NECA Pension Trust Fund (the "SoCal fund"), the Electrical Workers' Pension Trust Fund of Local Union No. 58, IBEW Detroit, Michigan, and the Michigan Electrical Employees' Pension Fund (collectively the "Michigan funds"), and numerous other pension trust funds entered into the Electrical Industry Pension Reciprocal Agreement ("the reciprocal agreement"), which in effect provided that when an employee (interchangeably referred to as a "traveler") temporarily works in an area covered by a participating IBEW local union pension fund, "an amount of money equal to all" pension contributions earned by the traveler would be transferred from the participating local union pension fund to the traveler's home fund. The Reciprocal Agreement contains an arbitration provision covering all disputes and disagreements "arising out of this Agreement." A dispute arose when the SoCal Fund refused to send a portion of the contributions earned by travelers to their home funds—the Michigan Funds. After an arbitrator ruled against the SoCal Fund and the district court confirmed the award, these appeals ensued.

The trustees SoCal Fund appealed from the order of the United States District Court for the Central District of California denying their motion to vacate an arbitration award in favor of the trustees of the Michigan Funds. The Michigan funds appealed from the district court's order denying their motion for attorney's fees against the SoCal Fund.

The court stated that the district court did not err when it applied ordinary California state law principles in analyzing the validity of the arbitration agreement. The court further stated that Employee Retirement Income Security Act of 1974 ("ERISA") does not preempt California law because

the state's general principles of contract formation applied in this case were not directed at ERISA plans, and ERISA plans are not essential to the operation of that law. The court stated that the Labor Management Relations Act did not preempt California law because breach of a collective bargaining agreement was not claimed here.

The SoCal fund asserted that there was no arbitration agreement at all because the Reciprocal Agreement provided that if there was a dispute it "may" be submitted for arbitration if a party so requests in writing. The court stated that was not an indication of a lack of agreement; rather it provided that any party to a dispute had the unilateral right to demand arbitration. The court noted that the SoCal Fund also pointed out that no particular set of arbitration rules were set forth in the agreement. However, the parties agreed that rules would "be promulgated by the Reciprocal Administrator," who was provided for in the Reciprocal Agreement. The court stated that sufficed. It was not unconscionable to confer that sort of authority upon the Reciprocal Administrator; the court stated that nothing in the record suggested that the terms of the arbitration for this dispute were overly harsh, oppressive, or one-sided. Insofar as the SoCal Fund complained that the Reciprocal Administrator participated in the arbitration as an "interested party," which the rules provided for, the court noted that the SoCal Fund agreed that he could do so. The SoCal Fund asserted that the district court erred when it confirmed the arbitrator's award rather than vacating it. But review of the arbitration award is "'both limited and highly deferential.'" The court disagreed with the SoCal Fund claims that the arbitrator manifestly disregarded the law and demonstrated evident partiality.

The court stated that the district court did not err when it denied the prevailing party's motion for attorney's fees under 29 U.S.C. § 1132(g)(1), as its order belied the assertion that it merely applied a bad faith standard.

ASSOCIATIONAL DISCRIMINATION

Internee's Intern Relationship with the Hospital Failed to Satisfy the Threshold-Remuneration Test as a Matter of Law

Sacchi v. IHC Health Servs., 2019 U.S. App. LEXIS 8999 (10th Cir. Mar. 26, 2019)

Karna Sacchi obtained an unpaid internship with IHC Health Services, Inc. (the "Hospital"), but her internship was terminated by Joy Singh before it was scheduled to finish. Sacchi then filed a complaint alleging: (1) associational discrimination and retaliation under the Americans with Disabilities Act ("ADA"), (2) sex and religious discrimination under Title VII of the Civil Rights Act, (3) age discrimination under the Age Discrimination in Employment Act ("ADEA"), (4) breach of contract, and (5) defamation against Singh. The United States District Court for the District of Utah dismissed Sacchi's federal claims pursuant to Fed. R. Civ. P. 12(b)(6) because it concluded that she was not an employee and therefore not protected under the antidiscrimination statutes. The district court also declined to exercise supplemental jurisdiction over her non-federal claims and dismissed them without prejudice. Sacchi appealed, asking the court to hold that, in an internship setting, access to professional certification, a path to employment, or both can constitute indirect, significant job-related benefits and thereby satisfy the "threshold-remuneration" test if those benefits are substantial and not incident to the internship. In the alternative, Sacchi asked the court to hold that most unpaid interns are "employees" under federal antidiscrimination statutes.

The Tenth Circuit affirmed the District court's judgment. The court concluded that Sacchi's intern relationship with the Hospital failed to satisfy the threshold-remuneration test as a matter of law for two reasons. First, the claimed benefits were not provided directly by the hospital, and they did not resemble traditional employment benefits like a pension or insurance. Second, the claimed benefits were attenuated: they would only be realized if subsequent events occurred independently of the internship relationship, thereby rendering them too insubstantial or insignificant.

The court stated that although an internship was required for Sacchi to sit for a professional exam, she still had to pass the exam to receive her child life certification. For her to have obtained a position thereafter, she still had to find an open position, apply for that position, and then be selected over all other applicants in what Sacchi noted was a competitive field. The court stated that merely because others had obtained positions after unpaid internships did not constitute a substantial or significant indirect benefit. Thus, the court even viewing the facts in the light most favorable to Sacchi, stated that, the claimed benefits were too attenuated and conditional to constitute substantial indirect benefits.

DISCRIMINATION

Employee Failed on Her Age Discrimination and Sexual-Orientation-Discrimination Claim as She Lost Her Job as Part of Bona Fide Reorganization

Villeneuve v. Avon Prods., 2019 U.S. App. LEXIS 8096 (1st Cir. Mar. 19, 2019)

María I. Villeneuve worked as a Caribbean Call Center Correspondent ("Caribbean CCC") at Avon Products,

Inc.'s Call Center. Concerned with Avon Puerto Rico's lack of growth, Avon's General Manager for Puerto Rico and Canada ordered a reorganization, which required a reduction in personnel. After reviewing the situation, Carmen Miranda, the Head of the Avon Customer Care Department, concluded that the Caribbean CCC's workload did not justify what Avon was paying Villeneuve. So Avon terminated Villeneuve when she was 47 years old, abolishing the Caribbean CCC job and transferring her duties to other positions. Villeneuve filed a lawsuit against Avon alleging that Avon had violated P.R. Laws Ann. tit. 29, § 185a ("Law 80") and P.R. Laws Ann. tit. 29, § 146 ("Law 100") by discriminating against her by firing her because of her age and her longstanding affective relationship with an attorney "of a different gender" who had sued Avon several times (the sexual-orientation-discrimination). Avon filed a motion to dismiss the sexual-orientation-discrimination claim against it by citing Fed. R. Civ. P. 12(b)(6). The United States District Court for the District of Puerto Rico granted Avon's motion and dismissed Villeneuve's sexual-orientation-discrimination claim. The district court later granted Avon's summary-judgment motion on age discrimination claim because Villeneuve failed to show a prima facie case of age discrimination under Law 100, and because Avon's reorganization was performed "with good cause" under Law 80. The court decided that Avon's evidence established Villeneuve was a legitimate casualty of a bona fide reorganization. Villeneuve appealed, to which the First Circuit affirmed the judgment.

The First Circuit held that Villeneuve plausibly pled that Avon fired her. But she did not plausibly plead that her firing constituted sexual-orientation discrimination in violation of Law 100, even after accepting her complaint's well-pleaded facts as true and construing them in the light most pleasing to her. The court explained that Villeneuve's key allegation was that Avon fired her because of her companion's litigious involvement with the company. So she had not plausibly pled sexual-orientation discrimination in her discharge. An employee's being in an affectionate relationship with a lawyer who had sued the employer simply was not a protected class under the statute. Therefore, the court concluded that Villeneuve's sexual-orientation-discrimination claim did not cross the plausibility line, and therefore, it led the district court's dismissal of that claim stand.

The First Circuit upheld the judge's decision to grant summary judgment for Avon on her unjust-discharge claim. The court held that given the summary-judgment evidence, a reorganization under provision (e) of Law 80 was precisely the situation here. Worried about Avon Puerto Rico's rate of growth, Avon initiated some cost-saving measures. Villeneuve, who was the only Caribbean CCC, lost her job because of the reorganization, as did several others, including a 29-year-old CCC. Avon's defense under provision (e) required no evidence of dire financial circumstances. Rather, it merely required proof that the employer let the employee go in a bona fide reorganization. Miranda's testimony showed that Avon had a reasonable basis to believe that Avon Puerto Rico needed a reorganization—thus supporting the bona fides of that reorganization and bringing the case's situation within the provision (e) example of just cause listed in Law 80. Therefore, the court concluded that Avon did not violate Law 80 by firing her even though she had more seniority than some of the CCCs Avon did not fire. Furthermore, the summary-judgment record adequately supported the conclusion that the Caribbean CCC and the CCC posts were not within the same occupational classification, despite both being part of the call center.

The First Circuit stated that Villeneuve failed to show that Avon's given reason, a bona fide restructuring, for firing her was a pretext for age discrimination. A temporary employee from a temp agency, who was younger than Villeneuve, had previously covered for Villeneuve during Villeneuve's vacations. She did perform Villeneuve's old duties after the firing, while also performing those of a CCC. She filled in while Avon transitioned those duties to others. Temporary employees from the temp agency that Villeneuve had complained about for passing remarks on her age had no part in the firing decision. She made no case-based effort to explain how these non-decisionmakers' remarks were sufficient to prove pretext. On Villeneuve claim that right before she got fired, she noticed that Avon had been hiring younger people and firing older people, the court held that the "people" she was referring to were temporary employees.

FLSA

Summary Judgment for Employer and Supervisor Was Proper on a Contractor's Fair Labor Standards Act Retaliation Claim

Engelhardt v. Qwest Corp., 2019 U.S. App. LEXIS 8691 (8th Cir. Mar. 22, 2019)

Plaintiff Walter Engelhardt sued Qwest Corporation, a subsidiary of CenturyLink, and Tim Buchholz, CenturyLink's operations director (collectively "defendants"), alleging that CenturyLink and Buchholz terminated him in violation of the Fair Labor Standards Act ("FLSA") and the Minnesota Whistleblower Act ("MWA"). He also sued for tortious interference with a prospective business relationship. Engelhardt claimed that CenturyLink and Buchholz terminated him in retaliation for legal action he had taken against the company. CenturyLink and Buchholz averred that they terminated Engelhardt for low

productivity. The United States District Court for the District of Minnesota granted summary judgment in favor of the defendants and dismissed the MWA claim for lack of standing. On appeal, Engelhardt argued that the district court erred in granting summary judgment because genuine issues of material fact remain as to CenturyLink and Buchholz's motives for terminating him; he also claimed that the district court erred in finding that he lacked standing under the MWA.

The Eighth Circuit affirmed the district court's grant of summary judgment for defendants on his FLSA retaliation claim, holding that there were no genuine issues of material fact as to defendants' motives for terminating him. The court stated that, defendants terminated Engelhardt low productivity, which was a legitimate and a non-retaliatory ground.

The court stated that Engelhardt had not identified any similarly situated employees who were treated differently. Specifically, he had not identified any contractors with similarly low productivity who had not been terminated. And he had not shown that CenturyLink and Buchholz's explanation for his termination had shifted. The court stated that various reasons stated in justification of Engelhardt's termination were not contradictory. Neither Engelhardt's late dispatching nor his calls to employees undermined the core rationale of poor production. Finally, the court stated that Engelhardt's attempts to demonstrate pretext by casting Buchholz as a vengeful and vindictive supervisor failed for lack of evidence.

The court also held that the district court did not err by determining that Engelhardt was not an "employee" as defined under Minn. Stat. § 181.931(2) and lacked standing to bring his claim under the MWA. Finally, the court stated that because neither CenturyLink nor Buchholz violated federal or state law, and because their interference was not independently tortious, Engelhardt's tortious interference with prospective business relations claim failed as well.

HOSTILE WORK ENVIRONMENT

Former Employer Was Properly Awarded Punitive Damages on Racially Hostile Work Environment Claim Against His Former Employer

Bryant v. Jeffrey Sand Co., 2019 U.S. App. LEXIS 7866 (8th Cir. Mar. 18, 2019)

Adrian Bryant worked from 2009 to 2013 for Jeffrey Sand Company as a deckhand on the Cora, a barge that dredged sand from the Arkansas River. Bryant was the only black employee on the barge. Jerry Skaggs, Bryant's direct supervisor, engaged in a pattern of racially-motivated abuse. Skaggs would give Bryant difficult tasks that he would not assign to the Cora's white employees. Bryant complained to his plant manager, Ken Bolton, twice and to the then-president of the company, Joe Wickliffe, four times regarding Skaggs's behavior. He received no response to his complaints. Bryant testified that the harassment persisted and that he continued to make complaints after May 2012. Several other employees told Bolton that they had heard second-hand about Skaggs using racial slurs. Another employee sent an anonymous email asserting that he did not hear Skaggs make racist comments personally, but heard Bryant complaining about it. Bolton did not interview Bryant as part of his investigation. The company took no disciplinary action against Skaggs. Jeffrey Sand fired Bryant shortly after the investigation into the email, purportedly for absenteeism. Bryant brought this suit under 42 U.S.C. § 1981 alleging a racially hostile work environment and retaliatory termination. The United States District Court for the Eastern District of Arkansas granted summary judgment in favor of Jeffrey Sand on the retaliation claim but allowed the hostile-work-environment claim to proceed to trial. The jury found in Bryant's favor and awarded him $1.00 in compensatory damages and $250,000 in punitive damages. The district court denied Jeffrey Sand's post-trial motions for judgment as a matter of law and to amend the award of punitive damages. It also granted Bryant's motion for $64,432.50 in attorneys' fees and $1,028.15 in costs. Jeffrey Sand appealed, to which the Eight Circuit affirmed the judgment.

The Eight Circuit held that the award of punitive damages was supported by the record. Bryant repeatedly complained to supervisors that Skaggs was using racial slurs. Those supervisors never interviewed Bryant in response to his complaints, even though Skaggs's comments evidenced a clear intent to discriminate against Bryant based on race. Even when another employee corroborated Bryant's allegations, the company did not take any action to discipline Skaggs or prevent further harassment. Jeffrey Sand also lacked any formal or informal policy prohibiting workplace discrimination. The jury could have reasonably concluded from these facts that Jeffrey Sand exhibited reckless indifference to Bryant's rights. The court also concluded that Bryant's § 1981 claim was timely under the applicable four-year statute of limitations. Several witnesses testified that Skaggs's abuse continued into the limitations period and that Jeffrey Sand was on notice of that abuse. It was alerted again to the issue in January 2013, when another employee sent an anonymous email asserting that he overheard the abuse. The jury reasonably could have concluded that the company's response to this complaint was inadequate and evidenced a reckless disregard for Bryant's protected rights continuing well into the limitations

period. Accordingly, the court found no error in the district court's denial of Jeffrey Sand's motion for judgment as a matter of law.

The Eight Circuit concluded that the jury's punitive damages award was constitutionally sound. The court held that Jeffrey Sand's actions were so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. The jury could not have been able to easily quantify the monetary value of Bryant's injuries. But that did not mean the indignities he suffered were insubstantial, or that a punitive damages award was unreasonable. Bryant brought his claim under § 1981, so Jeffrey Sand was on fair notice that the jury's award could exceed the Title VII cap. Considering the egregiousness of Jeffrey Sand's conduct, the company should have been aware that the trial could result in a substantial monetary award if the jury concluded that one was necessary to deter future misconduct.

On Jeffrey Sand's argument that the district court erred in awarding Bryant attorneys' fees, the Eight Circuit held that Jeffrey Sand did not produce evidence undermining the reasonableness of the rate. The district court's decision to accept the rate as reasonable, in light of its own experience and knowledge, was not an abuse of discretion.

REHABILITATION ACT

District Court's Instruction About Expert Witness's Evaluation by Jury Was Wrong and Prejudicial

Sansone v. Brennan, 2019 U.S. App. LEXIS 6753 (7th Cir. Mar. 6, 2019)

Anthony Sansone worked at the Postal Service in 1981. He was diagnosed with multiple sclerosis in 1991. He was confined to a wheelchair and needed a parking place with room to deploy his van's wheelchair ramp. For years, the Postal Service, his employer, provided him one. But in 2011, it took that spot away and failed to provide him with a suitable replacement. Sansone filed for disability retirement, which the Office of Personnel Management granted. Sansone sued the Service under the Rehabilitation Act, 29 U.S.C. § 791, et seq., for constructive discharge and failure to accommodate. The United States District Court for the Northern District of Illinois granted the Service's summary judgment motion on the constructive discharge claim, but it denied both parties' motions for summary judgment on the failure to accommodate claim. The case proceeded to trial, and Sansone won $300,000 in compensatory damages. After the verdict came in, the district court addressed Sansone's equitable claim for back and front pay. It awarded him $828,774—an amount covering the period between the date of his termination and the date on which he would have retired. The Service appealed to the Seventh Circuit, which affirmed in part, vacated in part and remanded.

On failure to accommodate claim, the Service argued that the district court telling the jury that "neither party can win this case solely because the other did not cooperate" was inconsistent with EEOC v. Sears, Roebuck & Co., which said that "when an employer takes an active, good-faith role in the interactive process, it will not be liable if the employee refuses to participate or withholds essential information." The Seventh Circuit read in context, these words stated that the jury cannot evaluate the sufficiency of one party's cooperation according to the expectations of the other. In other words, the Service's belief that Sansone did not cooperate did not mean that he did not cooperate—and vice versa. In sum, the court stated that the Service would have a point if the district court had told the jury that Sansone could win even if he shut down the interactive process, however, that was not what the district court said.

The Seventh Circuit held that the jury instruction erroneously invited the jury to disregard the opinion of the Service's expert, Diana Goldstein. Contrary to the district court's belief, the Service did not commit a flat-out violation of Fed. R. Evid. 703 by giving Goldstein its summary judgment motion. Rule 703 does not govern the information that experts can have; it governs the information on which they can base their opinions. It allows experts to rely on inadmissible facts or data in forming an opinion so long as experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject. The district court erred when it told the jury that the Service had acted inappropriately by giving Goldstein the summary judgment motion and suggesting that it would have excluded her testimony had it learned about the issue earlier. The prejudice was particularly acute given what had happened earlier in the trial. The district court interrupted the cross-examination of Goldstein to admonish her, expressing incredulity that she had read the summary judgment motion. The instructions therefore invited the jury to act on the skepticism that the district court had already sowed. In short, the instruction was erroneous and prejudicial. But because Goldstein's testimony went solely to compensatory damages, it remanded for a new trial on that issue only.

Further, the Seventh Circuit stated that the Service forfeited its argument that the district court erroneously awarded Sansone equitable relief in the form of back and front pay for the time after he retired as the Service failed to raise it.

RETALIATION

Doctor's Speech Expressing Concerns With County's Employees About Mishandling of Medical Clearance Process for One Firefighter Applicant Was Not Protected by First Amendment

King v. Bd. of Cty. Comm'rs, 2019 U.S. App. LEXIS 6387 (11th Cir. Mar. 1, 2019)

Dr. Nancy King worked as the occupational health director under contract for Polk County, Florida and for fifteen years was the primary person responsible for determining whether firefighter applicants were medically qualified. In 2014, the medical clearance process for one applicant, J, who was an African-American, was mishandled and King had strong feelings about how the process should have gone and who should have been making clearance decisions. She aired these feelings to her colleagues and, in two private meetings, with a deputy county manager, Lea Ann Thomas, and with the county manager, Jim Freeman, and also brought up the issue of public safety concerns she felt that J represented, working as a firefighter without a medical clearance and the issue of possible reverse discrimination lawsuits. Subsequently, her contract with the county was put out for bids through a Request for Proposals (RFP) process and her bid was not selected. The county pointed to 2013 email showing that the decision to institute the RFP process was made long before the confusion surrounding J began. King filed suit against the Board of County Commissioners and others, alleging that they violated her First Amendment rights by retaliating against her for engaging in protected speech and they also violated Florida state law. The United States District Court for the Middle District of Florida determined that King spoke as an employee, rather than a private citizen, for several reasons, including that she did not speak publicly and that her ordinary job duties were the motivation for her speech. The district court also determined that the 2013 email provided by the county foreclosed any dispute as to causation and showed that the decision to initiate the RFP process (the alleged retaliation) was made before the problems with J's medical clearance began. Thus, the district court granted summary judgment for defendants on the First Amendment claim and dismissed the state law claims without prejudice. King then moved for reconsideration alleging that she had newly discovered evidence. King submitted 2013 email and affidavits stating the 2013 email's understanding of Mike Kushner, the county's director of risk management, and Diane Mulloney, who worked for Kushner, as newly discovered evidence. The district court determined that this evidence was reasonably available to King prior to summary judgment and denied her motion for reconsideration. King appealed to the Eleventh Circuit, which affirmed the judgment.

The Eleventh Circuit stated that the district court properly granted summary judgment because King spoke in her role as an employee when she expressed concerns with county employees about J's hiring. Her speech was therefore not protected by the First Amendment. King spoke pursuant to her official job duties, the purpose of her speech was work-related, and she never spoke publicly. The starting point of King's speech was her official duties, which suggested that she was not speaking as a private citizen. The court further stated that, in her meetings with Thomas and Freeman, King spoke about J's medical qualifications, the process for hiring J and other firefighters, potential liability the county might face because of that process, and related concerns. In short, she spoke about precisely the types of things that one would expect given her role with the county, thus, her speech was plainly a subject at the center of her ordinary job duties. King never engaged in speech outside of her work. King's speech was made privately and precisely to the appropriate persons in her chain of command. The manner in which King raised her concerns indicated that she was acting more as a frustrated employee than as a citizen concerned about reverse discrimination and public safety. In combination with other aspects of her speech it reinforced that she was an employee discussing employment-related matters, not a private citizen engaging in protected speech. In sum, King spoke as an employee, raising an employment-related concern, in an employment setting. Thus, her speech was not protected under the First Amendment.

The Eleventh Circuit stated that reasonable diligence would have uncovered Kushner and Mulloney's opinions about a previously available email. King's late presentation of this evidence did not warrant reconsideration of the district court's alternate decision regarding causation.

TITLE VII

Federal Employees May Bring Retaliation Claims Under Title VII

Komis v. Sec'y of the United States DOL, 2019 U.S. App. LEXIS 7282 (3d Cir. Mar. 12, 2019)

Chrysoula J. Komis, a former federal employee, brought Title VII retaliation and retaliatory hostile work environment claims against the Secretary of Labor. Komis filed more than sixty Equal Employment Opportunity ("EEO") complaints while employed by the Department of Labor's Occupational Safety and Health Administration ("OSHA"). Allegedly in retaliation for those and other EEO complaints filed a decade earlier, Komis contended that her employer created a hostile work environment. Specifically, she alleged that her supervisors: denied her the ability to work

regularly from home; shifted her job duties to include more clerical work; reassigned her to a different position; and failed to promote her to Assistant Regional Administrator, instead selecting attorney Maureen Russo. Komis further alleged once Russo became her immediate supervisor, Russo improperly disciplined her in retaliation for making additional discrimination claims. In August 2008, Komis was issued a notice of proposed removal, informing her of OSHA's decision to terminate her employment and providing her an opportunity to respond. Komis left OSHA in September 2008 and filed the last of her EEO complaints, alleging constructive discharge. Komis sued the Secretary of Labor, alleging OSHA violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(a), citing a retaliation claim based on her nonselection for promotion and a retaliatory hostile work environment claim. the matter was tried before a Magistrate Judge. As noted, at the close of Komis's case, the trial judge granted the Secretary judgment as a matter of law on Komis's discrete retaliation claim. Komis did not appeal that judgment. The retaliatory hostile work environment claim went before a jury, which returned a verdict for the Secretary. Komis appealed that verdict, challenging the jury instructions.

The Sixth Circuit affirmed the judgment in favor of the Secretary. The court held that Federal employees may bring claims for retaliation under Title VII even though the federal-sector provision does not explicitly reference retaliation. The court was asked to consider whether the same standard governs federal- and private- sector retaliation claims, and what standard in particular applies to a federal retaliatory hostile work environment claim in light of the U.S. Supreme Court's decision in Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006). The court declined to resolve these questions stating that Komis could not prevail under any potentially applicable standard. Accordingly, the court stated that any error in the jury instructions was harmless.

WAGE DISCRIMINATION

Female Professor's Pay Disparity Claim Failed Under Equal Pay Act and Title VII as University Established That Pay Disparity Was Based on Factor Other Than Sex

Spencer v. Va. State Univ., 2019 U.S. App. LEXIS 7887 (4th Cir. Mar. 18, 2019)

Dr. Zoe Spencer, a sociology professor at Virginia State University, sued the University under the Equal Pay Act ("EPA") and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), for paying her less than two male professors in other departments, allegedly because she was a woman. Two male professors, Drs. Michael Shackleford and Cortez Dial, were former University administrators. While Spencer asserted that the difference in pay was due to her sex, the University provided a different explanation: Shackleford's and Dial's jobs differed from Spencer's and, as former administrators, their pay was set as a prorated portion of their previous salaries. After discovery, the United States District Court for the Eastern District of Virginia granted summary judgment for the University (and its former president, Dr. Keith Miller). Spencer appealed to the Fourth Circuit, which affirmed the district court's judgment.

The Fourth Circuit stated that though Spencer established a pay disparity, she failed to present evidence that created a genuine issue of material fact that Shackleford and Dial were appropriate comparators. In any event, unrebutted evidence showed that the University based Shackleford's and Dial's higher pay on their prior service as University administrators, not their sex. The court stated that Spencer's choice of Shackleford and Dial as comparators established the existence of a wage differential. Yet that same decision to pick Shackleford and Dial precluded her from establishing that she and they performed equal work requiring equal skill, effort, and responsibility. Spencer's broad generalizations about tasks and skills, which applied to virtually all teachers, failed to satisfy her burden to show equal work. The court stated that in contrast to Spencer's generalized tasks and skills, a litany of concrete differences underscored that Spencer did not perform work equal to that of Shackleford and Dial. Shackleford and Dial taught in different departments than Spencer did. Along with serving in different departments, the three professors taught at different class levels at the University. Nor did the professors work equal hours, as the record showed that Shackleford and Dial worked more than Spencer did week to week. Spencer's generalized claims could not establish that she engaged in equal work, which categorically doomed her attempt to establish wage discrimination under the EPA. Even if Spencer could meet her initial burden, her claim would still fail because the University established that the salary difference was based on a factor other than sex. There was no dispute that the wage difference at issue resulted from the University setting Shackleford's and Dial's pay at 75% of their previous salaries as administrators. In practice, the University generally paid former administrators who became professors "9/12ths" of their administrator salary which appeared to rest on the theory that professors work nine months out of the year, while administrators work year-round. Even if the

University erroneously applied its 9/12ths practice to overpay Shackleford and Dial, such an imprudent decision would still serve as a non-sex-based explanation for the pay disparity.

The Fourth Circuit stated that Spencer's broad generalizations could not show sufficient similarity to meet her burden under Title VII sex-based wage discrimination. Even if the court concluded that Spencer had established a prima facie case of Title VII wage discrimination, her case still could not withstand summary judgment. The University proffered a nondiscriminatory explanation for the wage disparity through its practice of paying administrators 9/12ths of their previous salary. Just as this practice satisfied the EPA's "factor other than sex" affirmative defense, it qualified as a legitimate, nondiscriminatory explanation under Title VII. Spencer could not supply any evidence that the University's explanation was merely pretextual for invidious discrimination. Even if the University erroneously or even purposely misapplied the policy, it was not proof of unlawful discrimination.

Further, the Fourth Circuit stated that because the district court correctly found that Spencer could not establish a prima facie case of retaliation, it did not address the merits of the University's defenses.

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