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ABA JOURNAL OF

Labor & Employment Law

The Journal of the ABA Section of Labor & Employment Law

The Editor's Page

As the outgoing Editor-in-Chief, I have had the opportunity to reflect on the education my fellow student editors and I have gained this past year while working on the *Journal* that would not have been possible without the contribution of the authors, the ABA, the hard work of the *Journal* staff and student editors, and the dedication of the Faculty Co-Editors. We are grateful for the authors who submit high-quality work for publication, providing in-depth, original analysis on specialized issues of labor and employment law. The *Journal* seeks to publish articles useful to practicing attorneys, but their articles also help us, as staff and student editors, deepen our understanding of an issue we may have only briefly discussed in the classroom by showing us how it affects labor and employment law practice on a daily basis.

We also appreciate the support from the ABA Section of Labor and Employment Law. The Section provides all of the resources we need to produce the *Journal*, including staff to assist with publication, printing, and mailing. The Section's Editorial Board offers guidance and serves as our liaison with the broader Section. Wendy Smith, our ABA Editor, works behind the scenes, assisting us in every way possible. The *Journal* relies heavily on these resources. It is a unique opportunity to work with such a high-quality support staff on an academic journal.

The second-year staff members—Brandon Blakely, Paul Hallgren, Jacob Harksen, Theodore Heckel, Samuel Johnson, Jordan Leitzke, Lauren Seawright, Luke Wolf, and Lauren Zenk—also deserve recognition for the hours they spent performing the first edit of each article. At times, this included searching for an original edition of a book from the 1800s, performing statistical analysis to check that a data set matched an author's assertion, or spending weekends comparing footnotes to Bluebook rules. Without the hard work of the staff members, the student and faculty editors could not adequately focus on their *Journal* responsibilities. The student editors also played a significant role in the *Journal*'s publication. Our note and article editors, Michael Lyon and Dana Swanson, worked with the faculty editors to help select articles for publication. Managing editors Chelsey Jonason, Benjamin Streckert, and Shuang Xu organized the staff during the editing process and reviewed our articles for substantive and technical accuracy before sending them to Tyler Adams, our lead managing editor, and myself. Tyler directed the production process with the editors and staff, and together we edited each article and coordinated with the faculty editors and the authors.

We are also grateful for the Faculty Co-Editors, Professors Stephen F. Befort and Laura J. Cooper, for investing the time, energy, and commitment to ensure the *Journal*'s end product provides accurate and useful guidance to practicing attorneys. Both professors have made strong impressions on the *Journal*'s staff and editors, including myself, throughout our law school experience. Professors Befort and Cooper spend hours each week deepening our understanding of style issues, helping us grow professionally as we edit attorneys' articles and write our own student notes, while also performing their *Journal* editorial roles. The articles in this issue, by a diverse group of practicing attorneys and law professors, demonstrate the broad range of articles we have had the opportunity to edit, learn from, and eventually rely on, as we begin our own work this fall in the legal profession.

In **The Supreme Court's Application of "Ordinary Contract Principles" to the Issue of the Duration of Retiree Healthcare Benefits: Perpetuating the Interpretation/Gap-Filling Quagmire**, Cornell Law School Professor Robert A. Hillman relies on his experience teaching and writing on contract theory to critique the Supreme Court's application of "ordinary contract principles" in *M & G Polymers USA, L.L.C. v. Tackett*. Hillman argues that instead of abandoning the *Yard-Man* principles, the Supreme Court should have treated them as probative, along with other evidence concerning the duration of healthcare benefits. Hillman asserts that the Supreme Court failed to consider relevant facts established in the lower court's record, relied on contract principles too general and abstract to be useful, and should have filled the contract's gap itself. He predicts that, because the Supreme Court failed properly to apply ordinary contract principles and clarify the Sixth Circuit's treatment of the duration of retiree healthcare benefits, future litigation is inevitable.

Walmart Stores, Inc. v. Dukes and *Comcast Corp. v. Behrend* unquestionably changed class certification in employment discrimination litigation, but lower courts' application of the holdings have been inconsistent. In **Recent Developments in Class Certification and Decertification After *Dukes* as the Supreme Court's Composition Changes**, management attorneys Grace E. Speights and Michael S. Burkhardt review lower court decisions applying and distinguishing *Dukes* and *Comcast*. The authors advise management attorneys how best to use pre-discovery motions to dismiss, strategic discovery planning, statistical and expert evidence, and arbitration agreements to increase their chances of defeating class certification. They also predict how the Supreme Court, with the addition of Justice Neil Gorsuch, will rule on future class certification cases.

In **The NLRB's Successorship Doctrine, Perfectly Clear Successors, Executive Order 13495, and Worker Retention Laws: What the Trump Administration Has Inherited**, management attorney Kenneth A. Jenero discusses the shift in successorship law during the Obama Administration. Jenero asserts that recent National Labor Relations Board (NLRB) decisions, Executive Order 13495, and the application of state and local "worker retention" statutes have made it virtually impossible in certain circumstances for a successor employer to avoid inheriting a predecessor's collective bargaining obligation. He also examines a line of NLRB decisions that narrowed the ability of successor employers lawfully to set initial terms and conditions of employment and predicts how a future Republican-appointed Board majority will alter successorship law.

Enactment of legislation encouraging employee whistleblowing means that more employment lawyers will become involved in whistleblower cases. In **Sarbanes-Oxley, Dodd-Frank, Retaliation, and Reward: Representing Clients in the Age of the Whistleblower**, Daniel J. Hurson relies on his experience as a whistleblower plaintiffs' lawyer to provide a practical guide detailing how to manage a potential whistleblower case. Through a hypothetical client's story, Hurson discusses whether and when a client should report violations internally, become a Dodd-Frank whistleblower, or file a Sarbanex-Oxley or Dodd-Frank retaliation claim, and highlights the most important factors attorneys should consider when making these determinations.

In **When Are Employers' Unilateral Changes Prohibited? A Look at *E.I. Du Pont*, *Minteq*, and *Graymont*: A Management Perspective on the Need for a Uniform Standard**, management attorney Jamie R. Adams discusses employers' frustration in determining whether they can lawfully make unilateral changes under a negotiated management rights clause. Adams advises employers that because the NLRB applies a "clear and unmistakable waiver" approach, and some circuit courts use a "contract coverage" standard, employers must determine which standard will apply in their jurisdiction before making unilateral changes. She offers specific examples of acceptable changes under each standard. Adams stresses that a uniform standard is necessary because parties' outcomes currently depend more heavily on litigation tactics than the parties' negotiations.

Management attorney Robert C. Nagle and union attorney Pamela Chandran identify potential ethical dangers of attorneys' social media use in **Attorney Misconduct on Social Media: Recognizing the Danger and Avoiding Pitfalls**. The authors explain how attorneys' social media use may violate ABA Model Rules on communication with represented and unrepresented parties and caution attorneys to use care to avoid spoliation of electronic evidence. They also discuss how advertising on social media may violate ethical constraints and provide acceptable advertising examples to help attorneys navigate these nuanced rules.

Most courts rely on the *McDonnell Douglas* burden-shifting framework when analyzing retaliation-for-taking-leave (RFTL) claims under the Family and Medical Leave Act (FMLA). In **Keeping Mothers in the Workplace: Shifting from *McDonnell Douglas* to Protect Employees Who Use FMLA Leave**, Chelsey Jonason, a 2017 University of Minnesota Law School graduate and *Journal* Managing Editor, argues that this test inadequately protects employees. Jonason recommends that courts instead apply the negative factor test because it better protects employees by destigmatizing family leave and is more consistent with the FMLA's policy and administrative interpretations. The article also offers a detailed chart comparing RFTL cases in U.S. Courts of Appeals and a chart identifying each circuit's test for analyzing RFTL claims.

Paige Haughton
Editor-in-Chief

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The website of the ABA Section of Labor and Employment Law includes cumulative indexes (author, title, and subject matter) of all issues of the *ABA Journal of Labor & Employment Law* and its predecessor title, *The Labor Lawyer*. The website also includes PDFs of all issues, commencing with Volume 12. Articles listed in the indexes are linked to the PDFs. Members of the Section may access the indexes and issues at:

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The Supreme Court's Application of "Ordinary Contract Principles" to the Issue of the Duration of Retiree Healthcare Benefits: Perpetuating the Interpretation/Gap-Filling Quagmire

Robert A. Hillman*

Introduction

The U.S. Supreme Court purported to apply "ordinary contract principles" in reversing the Sixth Circuit in *M & G Polymers USA, L.L.C. v. Tackett*.[1] The Sixth Circuit had held that plaintiffs, retired M & G employees, were entitled to lifetime healthcare benefits under their union's Pension, Insurance, and Service Award Agreement (hereinafter P&I agreement).[2] Justice Clarence Thomas, writing for a unanimous Court, concluded the Sixth Circuit had relied on a false set of "inferences" established in *International Union v. Yard-Man, Inc.*[3] to find that "in the absence of extrinsic evidence to the contrary, the provisions of [the collective bargaining agreement] indicated an intent to vest retirees with lifetime benefits."[4] The Supreme Court therefore re-

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1. 135 S. Ct. 926 (2015) (hereinafter *M & G*). At oral argument, Justice Sonia Sotomayor introduced the phrase "ordinary contract principles." Questioning the petitioner, she said, "You're recommending we apply ordinary contract principles, no?" Transcript of Oral Argument at 4, *M & G*, 135 S. Ct. 926 (No. 13-1010).

2. The plaintiffs represented a class of retired union workers from M & G's Point Pleasant Polyester Plant. They alleged violations of section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), as well as section 502(a)(1)(B) and section 502(a)(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(3). "To vest, in this context, means to remain binding 'beyond the expiration of the collective bargaining agreement.'" Tackett v. M & G Polymers USA, L.L.C. 733 F.3d 589, 596 (6th Cir. 2013) (hereinafter *Tackett II*).

3. 716 F.2d 1476 (6th Cir. 1983) (hereinafter *Yard-Man*).

4. *M & G*, 135 S. Ct. at 933.

manded the case, instructing the lower court to disregard the inferences and to apply "ordinary contract principles" to determine the parties' intentions with respect to the duration of retiree healthcare benefits.[5]

The Court's decision to remand was correct, but its discussion and application of "ordinary contract principles" was quite amateurish. The concurrence's analysis was better, but left unclear the appropriate judicial approach to ambiguity or omission in a contract.[6] Unfortunately, the decision caused uncertainty about what evidence may be considered in similar cases, including cases that go beyond the collective bargaining context.

This Article documents the Supreme Court's errors in applying "ordinary contract principles." In doing so, the Article suggests how courts should proceed in contract cases like *M & G*. Specifically, in applying "ordinary contract principles," the Court should have treated the "*Yard-Man* inferences"[7] as probative, along with all other evidence concerning the duration of healthcare benefits. Further, the Court should have framed the inquiry as first seeking to determine a reasonable interpretation of the P&I on the duration issue, instead of fixating on the "parties' intentions,"[8] which led the Court down the wrong path. Ultimately, the Court should have instructed the lower court that if the trier of fact could not determine the duration of healthcare benefits based on a reasonable interpretation of the agreement and circumstances, the court should fill the gap from available contract-law gap fillers. This approach would free future courts from the unhelpful detour of trying to find the "intention of the parties" when, as we shall see in *M & G*, the parties never reached agreement on the duration issue. This roadmap would have avoided the Supreme Court's repudiation of the "*Yard-Man* inferences," as if they were not an application of "ordinary contracts principles."[9]

I. *Yard-Man* and *M & G*

A. International Union v. Yard-Man, Inc.

Under the Employee Retirement Income Security Act (ERISA), which in part governs pension and welfare benefits under collective bargaining agreements (CBA), healthcare benefits, unlike pensions, do not automatically vest.[10] Instead, the duration of benefits depends on the terms of the collective bargaining agreement.[11] In *Yard-Man*,

5. *Id.*

6. Justice Ruth Bader Ginsburg wrote the concurring opinion, joined by Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan. *Id.* at 937 (Ginsburg, J., concurring).

7. *M & G*, 135 S. Ct. at 933.

8. *Id.*

9. *See infra* Part II.

10. 29 U.S.C. § 1051(1) (2012); *M & G*, 135 S. Ct. at 933. Under ERISA, the contract determines when a pension vests. *Id.*

11. 29 U.S.C. § 1102(a)(1).

the Sixth Circuit analyzed whether the employer breached the CBA by terminating retiree healthcare benefits.[12]

The Sixth Circuit affirmed the trial court's determination that the CBA at issue guaranteed lifelong health retiree benefits (but reversed on other grounds).[13] The court relied on "basic principles of contractual interpretation" to determine the "parties' intent."[14] The court identified a helpful hierarchy of relevant factors:

> [T]he court should first look to the explicit language of the collective bargaining agreement for clear manifestations of intent. The intended meaning of even the most explicit language can, of course, only be understood in light of the context which gave rise to its inclusion. The court should also interpret each provision in question as part of the integrated whole. If possible, each provision should be construed consistently with the entire document and the relative positions and purposes of the parties. As in all contracts, the collective bargaining agreement's terms must be construed so as to render none nugatory and avoid illusory promises. Where ambiguities exist, the court may look to other words and phrases in the collective bargaining agreement for guidance. Variations in language used in other durational provisions of the agreement may, for example, provide inferences of intent useful in clarifying a provision whose intended duration is ambiguous. [T]he interpretation rendered [should] not denigrate or contradict basic principles of federal labor law.[15]

The Sixth Circuit then applied this framework.[16] First, it identified pertinent language of the agreement, "[t]he Company will provide insurance benefits equal to the active group benefits . . . for the former employee and his spouse," but found that the language was ambiguous because it could have referred to the nature of retiree benefits or could have incorporated "some durational limitation as well."[17] The court then turned to the rest of the CBA for guidance.[18] The CBA expressly set forth a termination schedule for active employees' benefits.[19] But these were "under conditions—the layoff of seniority employees—typically inapplicable to retirees."[20] In addition, variations in the duration of active employee healthcare benefits based on seniority made it unlikely that retiree benefits depended on "the fortunes of active em-

12. 716 F.2d 1476, 1478 (6th Cir. 1983).

13. *Id.*

14. *Id.* at 1479.

15. *Id.* at 1479–80 (internal citation omitted). The applicable law is the general "federal labor law." Gregory Parker Rogers, *Rethinking* Yard-Man*: A Return to Fundamental Contract Principles in Retiree Benefits Litigation*, 37 EMORY L.J. 1033, 1041 (1988).

16. *Yard-Man*, 716 F.2d at 1480.

17. *Id.*

18. *Id.*

19. *Id.* at 1481.

20. *Id.*

ployees."[21] Further, Yard-Man continued to pay benefits to retirees beyond when they could have been discontinued for active employees, "indicat[ing] that it did not consider retiree benefits to be tied to the durational limitations of that active group."[22]

Upon retirees' deaths, the CBA also limited health insurance for the retirees' immediate families to the duration of the collective bargaining agreement, suggesting that retiree healthcare benefits, silent on duration, should be treated differently.[23] Further, the agreement included many specific additional limits on duration, including one dealing with "savings and pension plan programs."[24] The court reasoned that the absence of a specific duration clause for retiree health insurance benefits suggested that the parties had different intentions with respect to their duration, specifically that they vested upon retirement.[25] The Sixth Circuit was not troubled by the CBA's "routine duration clause" of three years in the CBA that, because of its generality, did not trump the other more specific evidence of intent.[26]

Perhaps most persuasive to the *Yard-Man* court, and a highly contentious issue in the Supreme Court, was that healthcare benefits were "permissive [and] not mandatory subjects of collective bargaining."[27] The court believed such delayed compensation ordinarily would not be left for future negotiation.[28] In a revealing passage, the court inferred that retirees likely traded current compensation for vested insurance benefits—"If [retirees] forego wages now in expectation of retiree benefits, they would want assurance that once they retire they will continue to receive such benefits regardless of the bargain reached in subsequent agreements."[29]

Some of the Sixth Circuit's arguments seem less persuasive.[30] However, *Yard-Man* generally gives the impression that the accumula-

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21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 1481–82.
25. *Id.* at 1482–83.
26. *Id.*
27. *Id.* at 1482. "Although ERISA imposes elaborate minimum funding and vesting standards for pension plans, it explicitly exempts welfare benefits plans from those rules." *M & G*, 135 S. Ct. at 933; *see also* Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Glass, 404 U.S. 157, 180 (1971) (retiree benefits not mandatory bargaining subject).
28. *Yard-Man*, 716 F.2d at 1482.
29. *Id.*
30. For example, the court reasoned that the promise of healthcare benefits when an employee turned sixty-five would be illusory for early retirees between the age of fifty-five and sixty-two because the CBA containing this promise lasted only three years. *Id.* at 1481. True, the promise would be worthless to early retirees, but as the Supreme Court pointed out, the promise was not illusory for employees who retire at sixty-five. A "promise that is 'partly' illusory is by definition not illusory." *M & G*, 135 S. Ct. at 936.

tion of CBA factors persuaded the court that the parties intended to vest the retirees' insurance benefits.

B. M & G Polymers USA v. Tackett *in the Lower Courts*

1. *Tackett v. M & G Polymers, USA, L.L.C. (Tackett I)*[31]

M & G purchased a polyester plant in 2000 and entered into a CBA and P&I agreement with the employees' union.[32] When M & G began to require employees to contribute toward their healthcare benefits, Tackett and other retirees representing a class of retired workers, along with the union, sued, claiming that the P&I agreement guaranteed them lifetime contribution-free healthcare benefits.[33] The disputed P&I language stated:

> Employees who retire on or after January 1, 1996 and who are eligible for and receiving a monthly pension under the 1993 Pension Plan . . . whose full years of attained age and full years of attained continuous service . . . at the time of retirement equals 95 or more points *will receive a full Company contribution towards the cost of [healthcare] benefits* described in . . . Exhibit B-1 . . . . Employees who have less than 95 points at the time of retirement will receive a reduced Company contribution.[34]

Exhibit B–1 described the disputed healthcare benefits with this introductory language: "Effective January 1, 1998, and for the duration of this Agreement thereafter, the Employer will provide the following program of hospital benefits, hospital-medical benefits, surgical benefits and prescription drug benefits for eligible employees and their dependents . . . ."[35]

M & G moved to dismiss the complaint, alleging in part that the P&I agreement did not confer lifetime contribution-free healthcare benefits.[36] M & G offered evidence of "side letter agreements" that it claimed were incorporated into the P&I agreement to cap M & G's contribution to the cost of the benefits.[37] The district court held that "the 'full Company contribution' language did not plausibly state a claim for vested health care benefits."[38]

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31. 561 F.3d 478 (6th Cir. 2009) (hereinafter *Tackett I*).

32. The union was United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC. *Id.* at 480. The plaintiffs alleged violations of section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), and section 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1132(a)(1)(B). *Tackett I*, 561 F.3d at 481.

33. *Id.*

34. *Id.* at 482.

35. *M & G*, 135 S. Ct. at 931.

36. *Tackett I*, 561 F.3d at 482.

37. *Id.*

38. *Id.* at 483.

The Court of Appeals disagreed.[39] In testing the sufficiency of the Tackett complaint, the Sixth Circuit stated that it would "appl[y] the principles first described" in *Yard-Man* and set forth the *Yard-Man* framework of evaluating the CBA's "explicit language" and, if ambiguous, "extrinsic evidence," each pertaining to the duration of health-care benefits.[40] Having implicitly concluded that the P&I agreement was ambiguous,[41] the court examined additional relevant language of the agreement for guidance.[42] Specifically, the court reasoned that the "limiting language," which required employees to contribute to their health benefits if they had insufficient seniority points to qualify for "a full Company contribution," meant employees who had sufficient points would receive lifetime benefits.[43] Further, the court stated that, because pension benefits vest under ERISA, "[l]anguage in a collective bargaining agreement that 'equate[es] eligibility for retiree health benefits with eligibility for a pension' suggests an intent to vest."[44]

The court also relied on the context of the P&I agreement bargaining: "[B]ecause retirement health care benefits are not mandatory or required to be included in an agreement, and because they are 'typically understood as a form of delayed compensation or reward for past services' it is unlikely that they would be 'left to the contingencies of future negotiations.'"[45] Relying on *Yard-Man*, the court found it "unlikely that [the union] would agree to language that ensures its members a 'full Company contribution,' if the company could unilaterally change the level of contribution."[46]

The court further reasoned that the applicability of the side letters was a fact issue to be decided at trial.[47] The court concluded that the complaint was "plausible" and not subject to dismissal.[48] One can see that *Tackett I* relied on the earlier *Yard-Man* roadmap of contract interpretation, but this was far from the end of the saga.

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39. *Id.* at 490.

40. *Id.* at 489.

41. "The qualifying language in *Tackett I* implied that the CBA language, though indicating intent to vest, contained enough ambiguity to permit examination of such additional evidence." Tackett v. M & G Polymers USA, 733 F.3d 589, 600 (6th Cir. 2013). The Sixth Circuit in *Tackett I* disagreed with the district court on the meaning of "full Company contribution." *Tackett I*, 561 F.3d at 490. The trial court had treated the language as a "potential contribution," but the Sixth Circuit stated that the language "suggests that the parties intended the employer to cover the full cost of health-care benefits for those employees meeting the age and term-of-service requirements." *Id.*

42. *Tackett I*, 561 F.3d at 490.

43. *Id.*

44. *Id.* at 489 (quoting McCoy v. Meridian Auto. Sys., Inc., 390 F.3d 417, 421 (6th Cir. 2004)).

45. *Id.* (quoting Yolton v. El Paso Tenn. Pipeline Co., 435 F.3d 571, 580 (6th Cir. 2006) (quoting Int'l Union v. Yard-Man, Inc., 716 F.2d 1476, 1481–82 (6th Cir. 1983))).

46. *Id.* at 490.

47. *Id.* at 482 n.1.

48. *Id.* at 490.

2. *Tackett v. M & G Polymers, USA, L.L.C. (Tackett II)*[49]

On remand from *Tackett I*, the district court declined to revisit the vesting issue, assuming it had been decided by *Tackett I*. The court granted a permanent injunction ordering that the plaintiffs receive retiree healthcare benefits for life.[50] M & G appealed, alleging two errors.[51] First, the trial court should have found that the side letters requiring contributions and capping benefits (and other like documents) were part of the P&I agreement.[52] Second, even without the letters, the P&I agreement did not grant retirees lifetime benefits.[53]

The Sixth Circuit in *Tackett II* affirmed the trial court's decision that the side letters were not part of the agreement, largely because "several parties with authority to bind M & G and the union rejected or disputed [the side] letter[s'] applicability."[54] The trial court erred, however, according to *Tackett II,* in relying too heavily on one sentence in *Tackett I* to find that the decision conclusively decided the vesting issue.[55] The Sixth Circuit wrote in *Tackett I* that "[t]he determination. . . . that the parties intended health care benefits to vest carries over to the ERISA . . . claim."[56] In *Tackett II*, however, the Sixth Circuit explained that it had not decided the vesting issue based on a "complete factual record" and that "*Tackett I* did not conclusively determine that Plaintiffs' retirement benefits had vested."[57]

This Article need not analyze whether the side letters should have been considered part of the P&I agreement.[58] Nevertheless, they are relevant to the issue of whether the retirees were guaranteed lifetime healthcare benefits.[59] An argument that did not surface clearly at any level of litigation was whether M & G's insistence that the side letters capped the plaintiffs' healthcare rights showed that M & G did not believe the P&I agreement alone reasonably could be read to cap benefits. At best, the side letters showed that M & G wanted to cap benefits, but the finding that the letters did not become part of the agreement suggests that M & G failed to achieve that goal.

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49. 733 F.3d 589 (6th Cir. 2013).

50. The district court's injunction restored the benefits based on the "current versions of the benefits plans they were enrolled in until 2007." The plaintiffs cross-appealed and sought benefits based on the pre-2007 agreement. *Id.* at 592–93.

51. *Id.* at 592.

52. *Id.*

53. *Id.*

54. *Id.* at 598. *See infra* notes 58, 197–99, and accompanying text for further discussion of side letters.

55. *Id.* at 596–97.

56. Tackett v. M & G Polymers, USA, L.L.C., 561 F.3d 478, 491 (6th Cir. 2009) (*Tackett I*).

57. *Tackett II*, 733 F.3d at 596–97.

58. "The letters were not reproduced in P&I booklets and allegedly not ratified as part of the local agreement." *Id.* at 595.

59. *Id.* at 598–99.

At any rate, in determining the P&I agreement's meaning, *Tackett II* confirmed the Sixth Circuit's earlier view that the "full contribution" language of the P&I agreement "indicated an intent to vest."[60] Because the language's meaning was ambiguous, however, the court entertained extrinsic evidence.[61] Ultimately, because of trial testimony, the linkage between healthcare benefits and pension benefits, the reasoning of *Tackett I*, and M & G's failure to provide evidence to rebut the "full contribution" language,[62] the court affirmed the trial court's vesting decision and granted a permanent injunction in favor of the plaintiffs.[63]

Nonetheless, *Tackett II* denied the plaintiffs cross-appeal with respect to the injunction's scope.[64] The plaintiffs had asserted that the trial court erred when it "ordered retirees and dependents previously enrolled in the pre-2007" plan to receive benefits under the 2007 plan that contained "increased prescription drug costs and annual deductibles."[65] Following precedent,[66] the court limited vested benefits by allowing "reasonable changes" to accommodate increased costs.[67] One can only think that the "reasonable changes" declaration was the court's attempt to craft a compromise, but more on this later.[68]

C. M & G Polymers USA, L.L.C. v. Tackett *(M & G in the Supreme Court)*[69]

M & G took *Tackett II* to the Supreme Court.[70] In a unanimous opinion written by Justice Clarence Thomas, with Justices Ruth Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan concurring, the Court first stated it would apply "ordinary principles of contract law" consistent with federal labor policy.[71] The Court then indicated it would look to the "parties' intentions" and the "plainly expressed intent" of the agreement as the appropriate "ordinary principles."[72]

The Court foreshadowed its decision by criticizing the Sixth Circuit for "appl[ying] the *Yard-Man* inferences to conclude that, in the absence of extrinsic evidence to the contrary, the provisions of the con-

60. *Id.* at 600.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 601.
65. *Id.* at 600–01.
66. Reese v. CNH Am. L.L.C., 574 F.3d 315, 326 (6th Cir. 2009).
67. *Tackett II*, 733 F.3d at 601.
68. *See infra* notes 180–89 and accompanying text.
69. 135 S. Ct. 926 (2015).
70. *Id.* at 930.
71. *Id.* at 933.
72. *Id.* The Court also stated: "'Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.'" *Id.* (citing 11 SAMUEL WILLISTON & RICHARD R. LORD, WILLISTON ON CONTRACTS § 30:6, Westlaw (4th ed. Database updated May 2016)).

tract indicated an intent to vest retirees with lifetime benefits."[73] In fact, those "inferences," according to the Court, were not "ordinary principles of contract law"[74] and the Court rejected them.[75]

The Court elaborated. First, the Court accused *Yard-Man* and its progeny of "placing a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements."[76] The Court found the Sixth Circuit's reliance on the context of collective bargaining agreements was "too speculative" and was derived from the court's "own suppositions" instead of the record.[77] Such speculations "distort[ed] the attempt to 'ascertain the intention of *the parties*.'"[78] Instead, the Sixth Circuit should have looked to the record for proof of "customs or usages."[79] To demonstrate an example of *Yard-Man*'s trip down the wrong path, the Court singled out the Sixth Circuit's "supposition[]" that "'when . . . parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree.'"[80]

Second, the Court said that *Yard-Man* "rest[ed] on a shaky factual foundation" in categorizing healthcare benefits as deferred compensation.[81] Without elaboration, the Court reasoned that ERISA healthcare benefits are "welfare plans" and "Congress specifically defined plans that 'resul[t] in a deferral of income by employees' as pension plans . . . ."[82]

Third, the Court criticized *Yard-Man* for discounting "general durational clauses" and especially criticized later Sixth Circuit cases that, according to the Court, created a default rule of vested healthcare benefits.[83] The Court thought that such an approach conflicted with the presumption that the written agreement constituted the entire agreement.[84]

Fourth, the Court articulated what it identified as relevant "traditional" contract principles that shed better light on the Court's goal of determining the parties' intentions.[85] For example, the Court ex-

73. *Id.*
74. *Id.*
75. *Id.* at 937.
76. *Id.* at 935. For a discussion of the many cases leading up to *Yard-Man* and beyond, see Rogers, *supra* note 15.
77. *M & G*, 135 S. Ct. at 935.
78. *Id.* (quoting WILLISTON ON CONTRACTS § 30:2, *supra* note 72).
79. *Id.*
80. *Id.* (quoting Int'l Union v. Yard-Man, Inc., 716 F.2d 1476, 1482 (6th Cir. 1983)).
81. *Id.* at 936.
82. *Id.*
83. *Id.*
84. *Id.* For a discussion of inferences and presumptions, see *infra* notes 100–09 and accompanying text.
85. *Id.* at 936–37.

plained that ambiguous writings do not create lifetime promises, and promises silent on duration "will ordinarily be treated . . . as 'operative for a reasonable time.'"[86] Further, contractual obligations cease when the contract terminates.[87] Perhaps overly influenced by these "principles," the Court then went so far as to volunteer that absent "explicit terms . . . when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life."[88] This language seemingly precluded plaintiffs from defeating a summary judgment motion regardless of the circumstances.

The Court then concluded that the Sixth Circuit in *Tackett I* and *II* based its decision largely on *Yard-Man* and its progeny[89] and remanded the case to the Sixth Circuit to review the duration issue without reliance on the *Yard-Man* inferences.[90] The Court singled out the Sixth Circuit's misdirected focus on context and the likelihood that the union "would not have agreed to language ensuring its members a 'full Company contribution' if the company could change the level of that contribution."[91] By ruling out the use of *Yard-Man* inferences to prove the parties intended benefits to last for life, the Court created a bit of a mystery on what the Sixth Circuit was to do on remand to review the case "under the correct legal principles."[92]

Justice Ginsburg wrote the concurrence joined by Justices Breyer, Sotomayor, and Kagan.[93] The concurrence also directed the Sixth Circuit on remand to search for the "intention of the parties."[94] However, the concurrence recognized that "clear and express" language is not necessary to show that the parties intended lifetime retiree health benefits.[95] Such benefits can be implied from the circumstances.[96] This position challenged the majority's assertion that "when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life."[97] The concurrence also singled out certain terms that would be relevant in determining the vesting issue.[98]

86. *Id.* at 936 (quoting 3A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 553 (2d ed. 1960)).

87. *Id.*

88. *Id.* at 937.

89. *Id.* ("[T]here is no doubt that *Yard-Man* and its progeny affected the outcome here.").

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* (Ginsburg, J., concurring).

94. *Id.*

95. *Id.* at 938.

96. *Id.*

97. *Id.* at 937 (majority opinion).

98. *Id.* at 938 (Ginsburg, J., concurring) ("Because the retirees have a vested, lifetime right to a monthly pension . . . a provision stating that retirees 'will receive' healthcare benefits if they are 'receiving a monthly pension' is relevant to this examina-

II. Problems with the Supreme Court Opinion

The Supreme Court misunderstood "ordinary contract principles"[99] and their application to the *M & G* dispute. It is important first to comment briefly on the Court's focus on the *Yard-Man* inferences. An inference arises when evidence reasonably supports the probability of the fact being proven—for example, the Sixth Circuit thought that a retirement benefit created the inference that the benefit lasts as long as the employee is retired.[100] Once an inference arises, the party offering the evidence has met its burden of production and can avoid summary judgment or a directed verdict.[101] A presumption, on the other hand, means that the party offering the evidence has satisfied its burden of persuasion, which shifts to the opposing party (at minimum) the burden of production on the issue.[102]

Much of the Supreme Court's opinion criticizes the Sixth Circuit's use of the *Yard-Man* inferences, but its primary objection appears to be that the Sixth Circuit used the inferences to create a presumption of lifetime retiree healthcare benefits.[103] For example, the Court reversed the Sixth Circuit's affirmance of the presumption that, "in the absence of extrinsic evidence to the contrary, the agreements indicated an intent to vest lifetime contribution-free benefits."[104] The Court's criticism of *Yard-Man*'s "thumb on the scale"[105] in favor of vesting also strongly suggests that the Court thought *Yard-Man* and its progeny shifted the burden of proof on the vesting issue. Further, Justice Ginsburg's concurrence interpreted Justice Thomas's opinion as rejecting the *Yard-Man* "presumptions": "Today's decision rightly holds that courts must apply ordinary contract principles, shorn of presumptions, to determine whether retiree health-care benefits survive the expiration of a collective-bargaining agreement."[106] Finally,

tion. . . . So is a 'survivor benefits' clause instructing that if a retiree dies, her surviving spouse will 'continue to receive [the retiree's health-care] benefits . . . until death or remarriage.'").

99. *Id.* at 935 (majority opinion).

100. *Id.* at 933 ("[T]he Court of Appeals applied the *Yard-Man* inferences to conclude that . . . the provisions of the contract indicated an intent to vest retirees with lifetime benefits.").

101. *See, e.g.*, Richard H. Field et al., Civil Procedure: Materials for a Basic Course 1328–33 (10th ed. 2010).

102. "[W]hen a designated basic fact exists, a certain presumed fact *must* be taken to exist *in the absence of adequate rebuttal*." *Id.* at 1340.

103. *See M & G*, 135 U.S. at 935. Ordinarily, the plaintiff has the burden of persuasion to prove its case. The presumption here would shift the burden of proof to M & G.

104. *Id.* at 932. In fact, the Court used terminology such as "inference," "presumption," and "supposition" almost interchangeably throughout the opinion.

105. *Id.* at 935.

106. *Id.* at 937 (Ginsburg, J., concurring).

the Court singled out post-*Yard-Man* cases that the Court believed had taken *Yard-Man* too far toward a presumption of vesting.[107]

Understanding the Court's evidentiary language and reasoning is important to explain how the Court went wrong in applying ordinary contract principles. The Court probably was correct that the inferences together were insufficiently compelling to create a presumption that shifted the burden of persuasion to M & G.[108] But the Court should not have entirely rejected the *Yard-Man* inferences. Instead, the Court should have explained that, as ordinary contract principles, the inferences created an issue for the trier of fact.[109]

Each of the Sixth Circuit's inferences was relevant to the duration of retiree healthcare benefits. Further, the inferences together, if not separately, were sufficiently probative to reach the trier of fact. This Part explains why this is so and how the Court lost its way.

A. The Court's Focus on the Parties' Intentions

Although courts interpreting contract language often invoke the "intentions of the parties" rubric,[110] the reality of how they proceed is quite different.[111] Courts generally enforce a reasonable interpretation of the language—an objective test—rather than an interpretation

107. *Id.* at 935 (majority opinion) (discussing Cole v. ArvinMeritor, Inc., 549 F.3d 1064, 1074 (6th Cir. 2008) and Noe v. PolyOne Corp., 520 F.3d 548, 555 (6th Cir. 2008)).

108. Courts create presumptions in part based on probability: "Most presumptions have come into existence primarily because the judges have believed that proof of fact B renders the inference of the existence of fact A so probable that it is sensible and time-saving to assume the truth of fact A until the adversary disproves it." 2 KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 343 (7th ed. 2013). *Yard-Man*'s reasoning alone, while probative, is not so probable that it should shift the burden of persuasion to M & G. For example, *Yard-Man*'s inference that retiree healthcare benefits can be a form of deferred compensation is not so probable that it calls for assuming the truth of the inference. Further, "a presumption will be superimposed on an inference in situations of special need in the proof process, such as where the opponent has unique access to evidence on the disputed fact. In [*M & G*], there is no suggestion of a need for the overkill of creating a presumption." E-mail from Kevin M. Clermont, Prof. of Law, Cornell Law Sch., to Robert A. Hillman, Prof. of Law, Cornell Law Sch., (Jan. 24, 2017, 5:15 EST) (on file with author).

109. *See generally* Reese v. CNH Indus. N.V., 143 F. Supp. 3d 609 (E.D. Mich. 2015). For a post-Supreme Court trial court decision in another retiree case, in which the court took this position on a motion to reconsider, see *infra* notes 202–06 and accompanying text.

110. ROBERT A. HILLMAN, PRINCIPLES OF CONTRACT LAW 287–88 (3d ed. 2014) (citing Portell v. AmeriCold Logistics, L.L.C., 571 F.3d 822, 824 (8th Cir. 2009)) ("'The cardinal principle of contract interpretation is to ascertain the intention of the parties and to give effect to that intent.' We read the contract as a whole and give the terms their 'plain, ordinary, and usual meaning.'") (quoting Dunn Indus. Group, Inc. v. City of Sugar Creek, 112 S.W.3d 421, 428 (Mo. 2003) (per curiam)).

111. *Id*. at 280 ("[O]ne of contract law's important goals is to facilitate freely made private agreements. It is therefore not surprising to find language in opinions that is consistent with this goal, even when courts are giving lip service to the idea when interpreting language.").

based on what either party subjectively thinks the language means.[112] "[T]he objective approach to interpretation . . . measures a party's language and conduct against the test of reasonableness and sanctions careless, reckless, or purposeful misleading language by finding an obligation even if the promisor did not intend one."[113] An exception occurs if the court finds that at the time of contracting both parties subjectively agreed to an objectively unreasonable meaning (for example, the parties intended 500 to mean 300).[114] However, this situation is obviously unusual. Although the "intentions of the parties" slogan is not harmful if the court applies the objective test, we will see that the Supreme Court, influenced by the "intentions" language, guides future courts to apply the objective test too narrowly.[115]

Courts disagree on the process and kinds of evidence necessary to determine a reasonable interpretation of contract language. In some jurisdictions, the "plain meaning rule," which prohibits extrinsic evidence,[116] prevails if the court determines that the language at issue is not ambiguous.[117] Under this approach, the court need go no further to establish meaning than reading the disputed term.[118] Courts applying the "contextual" approach, however, generally entertain extrinsic evidence to establish meaning, including preliminarily whether a writing is ambiguous.[119] Further, "[t]he entire agreement . . . should be

112. *See, e.g.*, Zell v. Am. Seating Co., 138 F.2d 641, 647 (2d Cir. 1943), *rev'd*, 322 U.S. 709 (1944) (per curiam) ("We ask judges or juries to discover that 'objective viewpoint'—through their own subjective processes."); *see also* Robert A. Hillman, *Contract Lore*, 27 J. CORP. L. 505, 510–12 (2002).

113. HILLMAN, *supra* note 110, at 280; *see also* Judge Learned Hand's observation in *Hotchkiss v. National City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911) ("A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. . . . If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.").

114. *See, e.g.*, Hield v. Thyberg, 347 N.W.2d 503, 504, 508 (Minn. 1984) ($15,000 meant $50,000).

115. *See infra* notes 125–34 and accompanying text.

116. Extrinsic evidence includes "all writings, oral statements, and other conduct by which the parties manifested their assent, together with any prior negotiations between them and any applicable course of dealing, course of performance, or usage." E. ALLAN FARNSWORTH, CONTRACTS 453 (4th ed. 2004).

117. *See, e.g.*, Pioneer Peat, Inc. v. Quality Grassing & Servs., Inc., 653 N.W.2d 469, 473 (Minn. Ct. App. 2002) (court decides on textual basis).

118. *See* Joshua M. Silverstein, *Using the West Key Number System as a Data Collection and Coding Device for Empirical Legal Scholarship: Demonstrating the Method via a Study of Contract Interpretation*, 34 J. L. & COM. 203, 253–61 (2016) (usefully describing textualists and contextualists).

119. *See, e.g.*, *id.* at 254–55 (explaining that contextualist courts often use evidence of prior negotiations, commercial circumstances, and trade usage (among other factors) to interpret a contract). The issue arises in other interpretative contexts as well: "Several substantive principles of interpretation—such as constitutional avoidance, use of legislative history, and *Chevron*—depend on an initial determination of whether a text is clear or ambiguous. But judges often cannot make that initial clarity versus ambiguity

read together in light of all the circumstances."[120] One can see that an agreement's context strongly influences courts' interpretations under the contextual approach and that the *Yard-Man* court favored this interpretive method.[121]

The debate continues over which interpretative method should prevail. Proponents of the plain meaning approach caution that courts make too many mistakes digesting extrinsic evidence, while contextualists maintain that words alone have no meaning in the absence of context.[122] The distinction between these schools is less important here because the P&I agreement in *M & G* lacked an express healthcare duration term.[123] Thus, the plain meaning rule could not apply. The Supreme Court recognized the value of "known customs or usages,"[124] suggesting that the Court was not completely averse to the contextualist strategy and reasonableness test, but the opinion took a narrow view of the probative evidence.

In fact, the Court's failure to acknowledge the reasonableness test and its fruitless search for the parties' intentions led the Court to narrow the scope of probative evidence and to an impoverished view of ordinary contract principles.[125] The Court said so itself. According to the Court, the *Yard-Man* inferences "distort[ed] the attempt 'to ascertain the intention of *the parties*.'"[126] If the Court had framed the inquiry as a test of reasonableness, however, the Court may have seen the "*Yard-Man* inferences" in a different light—as probative but not definitive—in a more complete contextual investigation.

Consider again the *Yard-Man* inferences: retiree healthcare benefits can be a form of deferred compensation; healthcare benefits likely last while the former employee is a retiree; tying healthcare benefits to pension benefits suggests that healthcare benefits vest.[127] These inferences, based on the nature and purpose of CBAs, the meaning of re-

decision in a settled, principled, or evenhanded way." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (book review). The concurrence in *M & G* appears to leave the determination of whether a contract is ambiguous to the court without the aid of extrinsic evidence (a parol evidence question): "But *when* the contract is ambiguous, a court may consider extrinsic evidence to determine the intentions of the parties." M & G Polymers USA, L.L.C. v. Tackett, 135 S. Ct. 926, 938 (2015) (Ginsburg, J., concurring) (emphasis added).

120. FARNSWORTH, supra note 116, at 453.

121. Int'l Union v. Yard-Man, Inc., 716 F.2d 1476, 1479 (6th Cir 1983) ("The intended meaning of even the most explicit language can, of course, only be understood in light of the context which gave rise to its inclusion.").

122. Silverstein, *supra* note 118, at 254–55.

123. *M & G*, 135 S. Ct. at 931.

124. *Id.* at 935.

125. *Id.* ("As an initial matter, *Yard-Man* violates ordinary contract principles by placing a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements. That rule has no basis in ordinary principles of contract law.").

126. *Id.* (quoting WILLISTON ON CONTRACTS § 30:2, *supra* note 72).

127. *Id.* at 936–37.

tiree benefits, and the language of the CBA as a whole, were at least relevant under ordinary contract principles.[128] For example, basic economic theory assumes that rational economic actors engaged in bargaining make trade-offs to maximize their returns. This supports the deferred compensation argument that the union may have bargained for non-mandatory lifetime healthcare benefits in exchange for less immediate compensation, regardless of the technical ERISA definitions the Court noted.[129] Similarly, tying one benefit, silent on duration, to a lifetime benefit is at least probative of whether the former also lasts a lifetime. And it should be remembered that an inference is not a presumption, it only means that the dispute should survive dismissal and permit a decision by the trier of fact.

The Supreme Court should not have objected that the Sixth Circuit's *Yard-Man* inferences in *Tackett I* and *II* did not come from the record. Although the record contained the text of the CBA that was silent on the duration of healthcare benefits, it included other probative language on duration.[130] By its very nature, purpose, and language, such an agreement has implications, including the *Yard-Man* inferences, which a court should consider even if the implications are insufficient to shift the burden of proof.[131]

To clarify, it may be helpful to consider other inferences and presumptions arising solely from the nature of the transaction. For example, in the absence of time-for-payment provisions, courts in construction cases find a duty to pay only after substantial performance.[132] More generally, absent a term defining the order of performance, the party whose performance takes longer usually must perform first.[133] In sales-of-goods agreements, "tender of payment is a condition to the seller's duty to tender and complete any delivery."[134]

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128. *Id.* at 936.

129. *See* Tackett v. M & G Polymers USA, L.C.C., 561 F.3d 478, 489 (6th Cir. 2009) ("[B]ecause retirement health care benefits are not mandatory or required to be included in an agreement, and because they are 'typically understood as a form of delayed compensation or reward for past services,' it is unlikely that they would be 'left to the contingencies of future negotiations.'") (quoting Yolton v. El Paso Tenn. Pipeline Co., 435 F.3d 571, 580 (6th Cir. 2006) (quoting Int'l Union v. Yard-Man, Inc., 716 F.2d 1476, 1481–82 (6th Cir. 1983))).

130. *M & G*, 135 S. Ct. at 936–37.

131. The parties in *M & G* bargained in the shadow of *Yard-Man* and other decisions finding lifetime retiree healthcare benefits. The Court did not discuss whether the holding in those cases alone should have raised an inference or even a presumption in favor of the plaintiffs on the theory that the parties likely intended to incorporate the holdings in their agreement. The nature of the bargaining in *M & G*, namely the lack of negotiating clarity, discussed *infra* notes 143–64, and the considerable differences in the language of the CBA in each case, which are the primary factors for determining intent, suggest otherwise.

132. *See, e.g.*, Stewart v. Newbury, 115 N.E. 984, 985 (N.Y. 1917).

133. *See* Edwin W. Patterson, *Constructive Conditions in Contracts*, 42 COLUM. L. REV. 903, 919 (1942).

134. U.C.C. § 2-511(1) (AM. LAW INST. & UNIF. LAW COMM'N 1994).

As previously noted, the Supreme Court apparently found the *Yard-Man* inferences insufficiently persuasive to form a presumption and to shift the burden of proof to M & G. However, the Court should not have taken the inferences off the table.

B. The Court's Arbitrary Identification of "Ordinary Contract Principles"

The Supreme Court selectively identified the "ordinary contract principles" the Sixth Circuit should have applied in *Tackett I and II*. Compare what the Supreme Court treated as disqualified *Yard-Man* inferences[135] to those the Court found acceptable. For example, the Court said that a "written agreement is presumed to encompass the whole agreement of the parties."[136] Further, promises silent on duration "will ordinarily be treated . . . as 'operative for a reasonable time.'"[137] In addition, "traditional rules of contractual interpretation require a clear manifestation of intent before conferring a benefit or obligation."[138] And finally, "when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life."[139]

The Court's set of "ordinary contract principles" is too general and abstract to be useful. The presumption that a written agreement encompasses the entire agreement does not further analysis if the entire agreement is ambiguous, contradictory, or silent on the disputed issue.[140] Further, the "whole-agreement" argument ignores the fact that the Sixth Circuit derived the *Yard-Man* inferences directly from the agreement. Further, a "reasonable" duration depends, at least in part, on the type of agreement, its purpose, and its circumstances. Thus, a "reasonable" duration can sometimes contemplate a lifetime. The clear-manifestation-of-intent principle is so broad that it is useless. Taken literally, any contract ambiguous or silent on a "benefit or obligation" would never be enforceable. The prohibition against inferring benefits for life when the contract is silent, although more specifically tied to the issues in *M & G*, is overbroad because it would seemingly bar all retiree claims from ever reaching the fact finder.

135. *See supra* notes 73–98, 129, and accompanying text.

136. M & G Polymers USA, L.L.C. v. Tackett, 135 S. Ct. 926, 936 (2015).

137. *Id.* (quoting CORBIN ON CONTRACTS § 553, *supra* note 86).

138. *Id.* (quoting Int'l Union v. Yard-Man, Inc., 716 F.2d 1476, 1481 n.2 (6th Cir 1983).

139. *Id*. at 937.

140. The Court complained that post-*Yard-Man* decisions created a default vesting rule that "distort[ed] the text of the agreement and conflict[ed] with the principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties." *Id.* at 936. But how the "whole agreement" treated duration of a retiree benefit was the issue in the case. A default rule one way or the other would therefore not conflict with the "whole agreement" rule.

Such rules of interpretation are not helpful in reaching a reasonable interpretation of the P&I.

Significantly, the Court omitted several relevant interpretive "principles" similar to those it did discuss, such as ambiguous language is interpreted against the drafter; parties intend common, not unusual, meanings of language; specific language takes precedence over general language; and interpretation that upholds a contract is preferred.[141] The problem with these so-called rules and the ones the Court singled out is that one suspects courts utilize them predominantly to support decisions reached on other, more specific grounds. If these general rules contradict a court's preferred decision, courts ignore them or apply a readily available counter-rule.[142] However, such rules should not be ignored. Instead, they should be treated precisely as the Supreme Court should have treated the *Yard-Man* inferences—as one of several tools to determine the meaning of language.

C. M & G *Is Better Analyzed as a Gap Case*

The trial court's summation of the plaintiffs' pertinent testimony and the evidence revealed in the various decisions demonstrate that the parties never reached agreement on the duration of retiree healthcare benefits.[143] The search for the "intentions of the parties" was therefore bound to fail.[144]

Testimony highlighted at retrial after *Tackett I* centered on whether the side letters that capped benefits and required retiree contributions were enforceable as part of the agreement, rather than on the meaning of the agreement itself.[145] However, the trial court's discussion of the testimony reveals the extent to which negotiations were

141. *Tackett III* points out that "[t]he Court did not purport to discuss *all* of the ordinary principles of contract law." Tackett v. M & G Polymers USA, L.L.C., 811 F.3d 204, 208 (6th Cir. 2016).

142. The use of rules and maxims in interpretation "is often more ceremonial (as being decorative rationalizations of decisions already reached on other grounds) than persuasive (as moving the court toward a decision not yet reached) . . . . Indeed, a court can often select from among pairs of opposing or countervailing rules that seem to conflict . . . ." FARNSWORTH, *supra* note 116, at 456–57; *see also* Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 852 (1964).

143. This is apparently very often the case in retiree-benefit negotiations. "[F]or the Sixth Circuit to be concentrating on intent evidence seems disingenuous. In most circumstances neither party considered the issue, thus making the search for evidence of intent an elusive one." Rogers, *supra* note 15, at 1054. Counsel for petitioner in the oral argument before the Supreme Court seemed to concede as much in arguing that the Court must look to "the operative default rules that—that we assume that if the parties didn't contract around." Transcript of Oral Argument at 8–9, *M & G*, 135 S. Ct. 926 (No. 13-1010).

144. In fact, the Supreme Court sometimes accepts this fact by trying to determine what to do "when a contract is silent as to the duration of retiree benefits . . . ." *M & G*, 135 S. Ct. at 937.

145. *See* Tackett v. M & G Polymers USA, L.L.C., 853 F. Supp. 2d 697, 703–09 (S.D. Ohio 2012).

ill-informed and haphazard. For example, union workers and officials testified to being unaware "of any employer contribution limit or cap"[146] and believed the union "never intended to have retirees pay a premium."[147] M & G's human resources director testified "that he was not trained in benefits administration and that he [had] only a basic understanding of ERISA requirements."[148] According to the director, M & G had never sent the requisite ERISA notice to retirees concerning possible benefit termination.[149] M & G's lawyer, in turn, testified that he relied on the untrained director "to be the primary architect" for the agreement.[150] Further, the lawyer testified "he never did any research" concerning the side letters' applicability and "he had never read the 2000 P&I agreement cover to cover."[151] At one point, the lawyer stated the side letters did not apply.[152] The trial court concluded:

> The factual history that the parties present could not be more different . . . . [T]he parties' decade-plus history of dealing with the cap letters and contributions does not present a model of negotiating clarity, much less competence . . . . [T]he significant confusion by the parties is odd . . . . [E]ven key actors were confused by what essentially hidden agreements applied in what context . . . . This is no way to run a business or a union . . . . [I]nvestors should know what company liabilities exist, unions at all levels should be clear on what they are negotiating, and retirees should know what agreements they are ratifying.[153]

Contradictory language in the agreement, as well as M & G's effort to prove the side letters were part of the agreement, also demonstrate that the parties did not agree on the duration issue.[154] Exhibit B–1, referenced in the P&I, included the following introductory language: "Effective January 1, 1998, and for the duration of this Agreement thereafter, the Employer will provide the following program of hospital benefits, hospital-medical benefits, surgical benefits and prescription drug benefits for eligible employees and their dependents . . . ."[155] By tying the benefits to the existing three-year CBA, the

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146. *Id.* at 703–04.

147. *Id.* at 705.

148. *Id.* at 708. The trial court called the director "curiously under-informed." *Id.* at 718.

149. *Id.* at 708.

150. *Id.* at 709.

151. *Id.*

152. *Id.* at 717.

153. *Id.* at 715, 717–18. A more charitable explanation for the duration gap is that the parties feared that pursuing the duration issue would defeat the agreement, but the facts recited in the various opinions do not support this explanation.

154. *Id.* at 719–20.

155. M & G Polymers USA, L.L.C. v. Tackett, 135 S. Ct. 926, 931 (2015). Of course, Exhibit B-1 may mean only that the particular description of the benefits lasts for duration of the CBA.

"duration" language suggests that the benefits would only last for three years. As referenced by the Supreme Court concurrence, other language, however, suggests that the healthcare benefits would last for the retirees' lifetime:

> Because the retirees have a vested, lifetime right to a monthly pension . . . a provision stating that retirees "will receive" health-care benefits if they are "receiving a monthly pension" is relevant to this examination. . . . So is a "survivor benefits" clause instructing that if a retiree dies, her surviving spouse will "continue to receive [the retiree's health-care] benefits . . . until death or remarriage."[156]

Recall, also, that M & G sought to prove that the side letters requiring contributions and capping benefits were part of the agreement.[157] This suggests M & G did not believe the P&I agreement alone reached those issues. Instead, M & G's effort shows it sought, but failed, to cap benefits.[158]

At oral argument, Justice Alito asked why the bargainers left the CBA silent on the duration of healthcare benefits.[159] In the absence of a satisfactory answer by respondents, Justice Scalia remarked, "I mean, this thing [the duration issue] is obviously an important feature. Both sides knew it was left unaddressed, so, you know, whoever loses deserves to lose for casting this upon us when it could have been said very clearly in the contract. Such an important feature."[160] In addition to Justice Scalia's and the trial court's intimation that incompetence was the answer,[161] both sides may have had a strategic reticence to raise the issue. Union and management lawyers familiar with collective bargaining, particularly on vesting of healthcare benefits, concede they are willing to live with uncertainty because of the dangers of even raising the issue during bargaining.[162] The union worries that if it raises the issue, but fails to get the company to agree to vesting, the CBA, by implication, will not include lifetime benefits.[163] This is so even if the union tries to clarify that it is only seeking an express provision for what it believes is implicit, namely, lifetime benefits. Simi-

156. *Id.* at 938 (Ginsburg, J., concurring).

157. *Tackett*, 853 F. Supp. 2d at 715.

158. *Id.* ("Defendants have engaged in after-the-fact company scrambling to find a way to impose unilaterally application of cap letters as a cost-savings measure that defies the agreements the caps puncture.").

159. Transcript of Oral Argument at 18, *M & G*, 135 S. Ct. 926 (No. 13-1010).

160. *Id.* at 22.

161. *See supra* notes 146–53 and accompanying text.

162. Responses to inquiries from the author. The lawyers preferred to remain anonymous. *See also* Jonathan Kane, *We Have to Give Them What? Negotiating the First Contract from the Employer's Perspective*, at 10, 2010 A.B.A. SEC. LAB. & EMP. LAW CONF., http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/annualconference/180.authcheckdam.pdf (demonstrating how healthcare negotiations during collective bargaining can lead to notable concessions).

163. *Tackett*, 853 F. Supp. 2d at 715.

larly, the company does not want to bargain for the expiration of healthcare benefits because, if it fails to get agreement, the implication will be that benefits vest. Each side may be content to rely on context and the implication of other terms in the CBA to establish its view of the healthcare benefits duration.

One can conclude that the parties here, and likely others in many additional cases involving disputes over the duration of retiree healthcare benefits, failed to reach agreement because of strategic decision-making and rather inept bargaining and drafting.[164] Therefore, under ordinary contract principles, the *M & G* Court should have focused neither on finding "the intentions of the parties" nor how to treat ambiguous language. Instead, the Court should have determined how to fill the contract duration gap.

Courts do not enforce contracts with a material gap or multiple gaps.[165] In large part, this ordinary contract principle results from courts' inability to fashion a remedy if an important term, such as the price of goods or the subject matter of an agreement, is missing.[166] Nevertheless, another ordinary contract principle allows courts to supply a missing contract term if the parties intended to contract and the gap or gaps are not too severe.[167] Clearly, the parties in *M & G* intended to contract, and the missing duration term should not invalidate the entire agreement.[168]

Courts employ a diversity of gap filling techniques. One approach considers "what the parties would have done" to align the court's decision most closely with the principle of freedom-of-contract. This approach also reduces the costs of contracting by creating a default rule that eliminates the need for future bargaining over that

164. *See* Rogers, *supra* note 15, at 1046 (discussing *Int'l Union v. Cadillac Malleable Iron Co.*, No. G82-75-CA1, 1982 WL 20483, at *4 (W.D. Mich. Apr. 28, 1982) ("the court acknowledged that the duration of retiree benefits had never been discussed during contract negotiations . . . .")).

165. *See, e.g.*, Champaign Nat'l Bank v. Landers Seed Co., 519 N.E.2d 957, 959–60 (Ill. App. Ct. 1988) ("The terms of a contract must be reasonably certain. Some terms may be missing or left to be agreed upon, but if the essential term or terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract.").

166. RESTATEMENT (SECOND) OF CONTRACTS § 33 (AM. LAW INST. 1981) ("[R]emedies for breach of contract must have a basis in the agreement of the parties.").

167. Zielinski v. Pabst Brewing Co., 463 F.3d 615, 619–20 (7th Cir. 2006) ("Filling gaps is a standard activity of courts in contract cases.").

168. Sometimes it is difficult to determine whether a court has filled a gap after concluding that the parties never reached agreement on an issue or the court has interpreted an agreement objectively. The *Yard-Man* and *Tackett* Sixth Circuit decisions are good examples. One explanation of the court's rationale in such decisions is that, according to a reasonable interpretation of the agreement, the retiree healthcare benefits vested. Another explanation of the rationale, however, is that the court supplied the duration term for the parties as a matter of gap-filling. The line is fine between the two processes and rarely should affect outcomes, although courts filling gaps may feel more freedom to innovate.

term.[169] Although courts struggle in determining what the parties would have preferred, this approach may be the most prominent gap filler.[170]

Another judicial gap-filling tool is establishing a "penalty default" to incentivize information sharing between contracting parties. For example, the famous case of *Hadley v Baxendale*,[171] involving delay in the carriage of a miller's broken crank shaft, is an example of a "penalty default," that

> penalizes the miller for failing to reveal the ramifications of tardy delivery (the loss of profits). The miller's penalty is that it cannot recover the lost profits. Further, were it not for the *Hadley* rule, the miller would have an incentive not to disclose. The information would lead the carrier to raise its price of carriage because it would be taking a greater risk (assuming that most millers do not suffer lost profits due to a carrier delay). In sum, penalty-default theorists assert that *Hadley* creates incentives for the miller to reveal information and for the carrier to select the appropriate level of precaution.[172]

Of course, identifying efficient gap-fillers is often challenging for courts. Cases on the duration of retiree healthcare benefits are no exception. A gap-filler that healthcare benefits vest could discourage employers from offering healthcare plans at all, especially as healthcare costs rise.[173] However, promises of retirement security help companies recruit and maintain a dedicated, efficient workforce. Retirement security also keeps retirees out of public assistance programs.[174]

Courts should also consider how to incentivize companies and unions to draft express duration clauses that avoid costly litigation. Unfortunately, courts faced with the duration issue have not sought to motivate parties in this direction.[175] Perhaps too many companies have relied on the "default rule" that "contractual obligation will cease, in the ordinary course, upon termination of the bargaining

169. HILLMAN, *supra* note 110, at 293–94 (citing RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 96–98 (7th ed. 2007).

170. *See id.* at 293–94 for additional discussion.

171. (1854) 156 Eng. Rep. 145.

172. HILLMAN, *supra* note 110, at 295; *see also id.* at 180–81 (discussing Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989)).

173. *See generally* Christine Eibner & M. Susan Marquis, *Employers' health insurance cost burden, 1996-2005*, MONTHLY LAB. REV. 28–44 (June 2008), https://www.bls.gov/opub/mlr/2008/06/art3full.pdf.

174. Tackett v. M & G Polymers USA, L.L.C., 853 F. Supp. 2d 697, 710 (S.D. Ohio 2012) ("[I]t is in the public interest to transfer the burden of coverage to the private company that included such coverage in its bargaining and not to keep much of the burden of providing health care coverage on the public by forcing numerous retirees and their dependents to rely upon public assistance programs.").

175. See *generally* Rogers, *supra* note 15, for a discussion of cases following *Yard-Man*; *see also infra* notes 196–212 and accompanying text for cases after *M & G*.

agreement."[176] This strategy is risky because it requires parties to predict whether their circumstances fit into the "ordinary course."[177]

A third gap-filling tool is for courts to construct what they believe is a fair gap-filler. Courts may consider the case's equities, including bargaining power, wrongful conduct, and the potential gains and losses of each party, with the goal to ensure that each party receives its fair bargain.[178] A court here seeks to avoid creating a windfall for one party and a catastrophe for the other.[179]

In light of this discussion, re-consider *Tackett II*. On the one hand, the Sixth Circuit found the retirees were entitled to lifetime healthcare benefits, but on the other, it held that the retirees would receive these benefits subject to "reasonable changes" in costs.[180] The court observed that such changes were necessary to accommodate increased healthcare costs.[181] "Reasonable changes," however, would not reduce benefits to zero.[182] The court took both parties' interests into account and arguably provided the fairest solution, especially compared to other gap-filling techniques. Of course, determining what constitutes "reasonable changes" may challenge courts in some cases.[183]

Precedent exists for such a compromise in other contexts. For example, in *Haines v. City of New York*,[184] the city had agreed with certain villages that were polluting streams forming part of the city's water supply to build and maintain a sewage treatment facility.[185] Decades later, the municipalities sued, alleging the agreement required the city to expand the facility to accommodate the unanticipated dramatic increase in the need for sewer lines caused by the municipalities' population growth.[186] The New York Court of Appeals reached a compromise, holding that the city was obligated to maintain the plant, but not to expand the facility.[187] The court did not perpetually bind the city to accommodate population increases, nor did it find the agreement terminable at the city's will.[188] The court thus filled the gap by fashioning an equitable solution.[189]

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176. Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 207 (1991).
177. *See infra* notes 190–201 and accompanying text.
178. HILLMAN, *supra* note 110, at 296–97.
179. *Id.* at 296.
180. Tackett v. M & G Polymers, USA, L.L.C., 733 F.3d 589, 600–01 (6th Cir. 2013).
181. *Id.* at 601.
182. *Id.* at 600–01.
183. *See, e.g.*, Reese v. CNH Indus. N.V., 143 F. Supp. 3d 609, 626–30 (E.D. Mich. 2015).
184. 364 N.E.2d 820 (N.Y. 1977).
185. *Id.* at 821.
186. *Id.* at 821–22.
187. *Id.* at 822.
188. *Id.* at 822–23.
189. *Id.*; *see also* City of Yonkers v. Otis Elevator Co., 844 F.2d 42, 47–49 (2d Cir. 1988); RESTATEMENT OF EMPLOYMENT LAW § 2.06 (AM. LAW INST. 2015) ("An employer may prospectively modify or revoke its binding policy statements if it provides reasonable ad-

III. The Sixth Circuit's Challenge on Remand

The Sixth Circuit faced a challenge on remand. Part of the problem, as already noted, was the Supreme Court's lack of clarity on whether it objected to the *Yard-Man* inferences as together forming a presumption of lifetime benefits or objected to each inference individually.[190] Put another way, was there any role left for contextual evidence concerning the now-defunct inferences? What exactly did the Court mean by stating that the Sixth Circuit wrongly allowed *Yard-Man* inferences to "put a thumb on the scale"?

Another issue was what portions of the *Yard-Man* reasoning depended upon rejected "inferences?" For example, *Yard-Man* contrasted the many duration terms in the CBA concerning such things as insurance and family benefits with the absence of a retiree healthcare duration term.[191] According to the Sixth Circuit, this suggested the duration of retiree healthcare benefits should be treated differently from the terminable insurance and family benefits.[192] The Supreme Court did not expressly reject this reasoning. *Yard-Man* also pointed to management's course of dealing, suggesting that retiree healthcare benefits vested: "Yard-Man's own course of conduct in continuing retiree insurance benefits after plant closure beyond the point at which insurance benefits could have been terminated for active employees indicates that it did not consider retiree benefits to be tied to the durational limitations of that active group."[193] This was also not discussed by the Supreme Court.

A third issue was whether the Court's rejection of the *Yard-Man* inferences meant the lower courts would have to revisit the side letters' legal significance. A close reading of the district court's description of trial testimony suggests the district court correctly disposed

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vance notice of, or reasonably makes accessible, the modified statement or revocation to the affected employees.").

190. *See* M & G Polymers USA, L.L.C. v. Tackett, 135 S. Ct. 926, 934–35 (2015); *see also supra* text accompanying notes 103–07.

191. Int'l Union v. Yard-Man, Inc., 716 F.2d 1476, 1481 (6th Cir. 1983).

192. *Id.*

> [T]he insurance provisions limit health insurance coverage for a retiree's spouse and dependent children in case of the retiree's death to expiration of the collective bargaining agreement. While this limitation does not preclude an intent to also terminate the retiree's benefits with the expiration of the collective bargaining agreement in any event, it is more reasonable to infer that the spouse-dependent child provision was meant as an exception to the anticipated continuation of benefits beyond the life of the collective bargaining agreement.

Id.

193. *Id.*; *see also* Rogers, *supra* note 15, at 1047–48 (the company in *Cadillac Malleable Iron* "had always paid insurance benefits to retirees during strikes . . . .").

of this issue,[194] but *M & G* argued that the decision was made in the "shadow of *Yard-Man*" and should be revisited.[195]

Following the Supreme Court's decision, the Sixth Circuit in *Tackett III* remanded the case to the district court for the third time.[196] The Sixth Circuit thought it was unclear whether the district court's earlier side letter decision had been influenced by *Yard-Man*.[197] Therefore, the trial court had to determine once again "whether the [side] letters, or other documents, are part of the Agreement or may otherwise serve as extrinsic evidence."[198] The Sixth Circuit directed the district court to "use ordinary principles of contract law" to assess whether the side letters were part of the CBA, whether to entertain extrinsic evidence, and, ultimately, whether the retiree healthcare benefits vested.[199]

The questions raised by the Supreme Court's decision—was the Court rejecting the inferences because together they created a presumption? What *Yard-Man* reasoning, if any, survived the opinion?—were not resolved by the Sixth Circuit's remand instructions to the district court. In effect, the Sixth Circuit largely punted, with one exception. *Tackett III* appears to recognize the limited role of the agreement's general duration clause:

> [W]hile the Supreme Court's decision prevents us from presuming that "absent specific durational language referring to retiree benefits themselves, a general durational clause *says nothing* about the vesting of retiree benefits," we also cannot presume that the *absence* of such specific language, by itself, evidences an intent *not* to vest benefits or that a general durational clause says *everything* about the intent to vest.[200]

In other words, absent a specific term on the duration of healthcare retiree benefits, a general duration clause is merely probative evidence.[201]

Two additional post-*M & G* cases also illustrate the confusion wrought by the Court. In *Reese v. CNH Industrial N.V.*,[202] still another case involving the duration of retiree healthcare benefits, the district court first held that *M & G* required the court to reverse a previous

194. Tackett v. M & G Polymers USA, L.L.C., 811 F.3d 204, 210 (6th Cir. 2016) (hereinafter *Tackett III*) ("On its face, the district court determined, independent of *Yard-Man* or its inferences, that the cap letters were not part of the Agreements.").

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id*. As discussed previously, *supra* notes 58–60 and accompanying text, M & G's efforts to show that the side letters limited the plaintiffs' healthcare rights suggested that M & G did not believe that the P&I agreement alone did so.

199. *Tackett III*, 811 F.3d at 210.

200. *Id.* at 209; *see also* Gallo v. Moen Inc., 813 F.3d 265, 268 (6th Cir. 2016) (relying in part on a general duration term).

201. *Tackett III*, 811 F.3d at 209.

202. 143 F. Supp. 3d 609 (E.D. Mich. 2015).

district court decision in favor of retirees.[203] On reconsideration, however, the district court held that it had been "too hast[y]" and that the Supreme Court did not intend to "require clear and express vesting language to find the parties' intent to vest."[204] The court specifically responded to whether there was any role left for contextual evidence related to the former inferences:

> [This] [c]ourt erred in reading *Tackett* as "suggest[ing] that courts should not rely on language tying eligibility for contribution-free healthcare benefits to the receipt of pension benefits." All that *Tackett* holds or suggests is that a court may not *infer* from such tying language that the parties intended retiree health insurance benefits to vest. Such language does not lose all significance, however. In other words, *Tackett* does not hold that courts must ignore language that under *Yard-Man* and its progeny inferred an intent to vest. To the contrary, *Tackett* advises courts to apply "ordinary principles of contract law"; and under those principles, "'the intention of the parties'" is "gathered from the *whole instrument* . . . ."[205]

Based on this reasoning, among other things, the court reinvigorated the argument tying healthcare benefits to vested pension benefits and the assertion that the general duration clause "does not dictate automatically that the agreement's general durational clause applies" to retiree benefits.[206]

In *Gallo v. Moen Inc.*,[207] however, the Sixth Circuit reversed a trial court holding in favor of vested retiree healthcare benefits based on the Supreme Court's "repudiation" of *Yard-Man* and its progeny.[208] The opinion reads as if the *Yard-Man* inferences no longer have any place in a decision on vesting and refers to the general duration term as a default rule that controls "[i]n the absence of specific language in the retiree healthcare provisions."[209] A strong dissent thought the majority placed "a thumb on the employer's scale"[210] by ignoring the context, including the "reality" first discussed in *Yard-Man* that negotiations involve "give and take" over salary and benefits.[211] The dissent thought the *Yard-Man* inferences remained alive and well as probative evidence of the meaning of the CBA.[212]

203. *Id.* at 610.
204. *Id.* at 612.
205. *Id*. at 613 (internal citation omitted).
206. *Id.*
207. 813 F.3d 265 (6th Cir. 2016).
208. *Id.* at 267.
209. *Id.* at 271–72.
210. *Id.* at 275 (Stranch, J., dissenting).
211. *Id.* at 277.
212. The Supreme Court declined to hear an appeal of this case. Gallo v. Moen, Inc., 813 F.3d 265 (6th Cir. 2016); *see also* Sloan v. Borgwarner, Inc., No. 09-cv-10918, 2016 WL 7107228, at *12–13 (E.D. Mich. Dec. 5, 2016).

Conclusion

An analysis of the *M & G* case leads to the following conclusions. First, despite the Supreme Court's criticism of *Yard-Man*, no one should doubt that the *Yard-Man* strategy of interpretation (as opposed to the conclusions reached) reflects ordinary contract principles. In the absence of an express term, the *Yard-Man* approach mandates a close look at the contract and its circumstances.[213]

Second, the important, but unresolved, controversy over whether the textual or contextual approach to interpretation best reduces the cost of contracting is not relevant here. None of the decisions examined here maintained that the P&I agreement expressly determined the vesting issue. A contextual investigation was inevitable.

Third, under these circumstances, the Court should have remanded the case to the Sixth Circuit without rejecting the *Yard-Man* inferences, but with instructions that the inferences do not create a presumption in favor of vesting.[214] Put another way, the inferences, at least along with other evidence such as the trial testimony, were sufficient to get the case to the trier of fact, but not to create a presumption in favor of vesting.

Fourth, the Court should have instructed the Sixth Circuit that if a reasonable interpretation of the evidence demonstrated that the parties never reached agreement on the vesting issue, the court must fill the gap. A good argument can be made that the most acceptable gap-filler was the Sixth Circuit's equitable solution in *Tackett II* that the retirees' healthcare benefits lasted their lifetimes, but could be reasonably adjusted based on circumstances, such as the costs of providing the benefit and the company's balance sheet.[215] This approach, notwithstanding its complexity, would balance the uncertainties confronting businesses with the concerns of retirees who must "fear[] the loss of their family's healthcare coverage."[216]

Unfortunately, the Supreme Court's attempt to clarify the Sixth Circuit's treatment of the duration of retiree healthcare benefits failed. More litigation is likely inevitable in retiree healthcare benefits cases and beyond because, in truth, *M & G* is "both an example" of the interpretation and gap filling quagmire "and a perpetuation of it."[217] The

213. *See supra* note 121 and accompanying text.

214. In the *M & G* oral argument before the Supreme Court, respondents were apparently content with a remand: "[I]f the Court wants to be sure that the judgment below is, in fact, based on normal principles of contract interpretation, we are perfectly comfortable with a remand for that purpose." Transcript of Oral Argument at 26, M & G Polymers USA, L.L.C. v. Tackett, 135 S. Ct. 926 (2015) (No. 13-1010).

215. Tackett v. M & G Polymers, USA, L.L.C., 733 F.3d 589, 600–01 (6th Cir. 2013).

216. *Gallo*, 813 F.3d at 277.

217. David Hoffman pointed this out after reading a draft of this article. E-mail from David A. Hoffman, Prof. of Law, U. of Pa. Law Sch., to Robert A. Hillman, Prof. of Law, Cornell Law Sch., (Aug. 12, 2016, 3:41 EST) (on file with author). For an article

M & G case should also alert lawyers who are considering an important issue at the bargaining stage to be more cognizant of the likely litigation costs of declining to raise the issue and to include an express term in the agreement.

situating the *M & G* decision within a larger trend in the Supreme Court, see Peter J. Wiedenbeck, *Untrustworthy: ERISA's Eroded Fiduciary Law*, at 39–43 (Wash. Univ. in St. Louis Law Sch. Legal Studies Research Paper No. 16-11-01, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2865752.

Recent Developments in Class Certification and Decertification After *Dukes* as the Supreme Court's Composition Changes

Grace E. Speights* &
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Introduction

When the Supreme Court decided *Wal-Mart Stores, Inc. v. Dukes* in 2012,[1] many heralded it as the end of large nationwide employment discrimination class actions. Two years later, the Supreme Court again waded into the class action fray, albeit not in the employment context, in *Comcast Corp. v. Behrend*.[2] While *Dukes* was obviously a monumental decision, it hardly ended employment class actions. *Comcast* has also failed to bring certainty to class action litigation, receiving almost as many interpretations as there are judges (and commentators).

In light of Justice Antonin Scalia's passing and the confirmation of Judge Neil Gorsuch of the U.S. Court of Appeals for the Tenth Circuit to replace him, some suggest that class action jurisprudence will continue to follow an increasingly pro-employer trend.[3] This Article examines the impact of these recent developments and provides practical guidance for addressing class actions.

In some ways, *Dukes* has lived up to its billing. Most courts, including courts facing "mini-*Dukes*" cases following the Supreme Court's

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1. 564 U.S. 338 (2011).
2. 133 S. Ct. 1426 (2013).
3. *See* Thomas J. Barton, *Trump's Supreme Court Nominee Gorsuch Will Likely Be Key Vote in Class Action Waiver Dispute*, NAT'L L. REV. (Feb. 16, 2017), http://www.natlawreview.com/article/trump-s-supreme-court-nominee-gorsuch-will-likely-be-key-vote-class-action-waiver.

decision, no longer certify large-scale discrimination class actions based on the exercise of discretion from many different managers. In other areas, however, *Dukes* has not had its expected impact.

The Supreme Court appeared to change the class action landscape once again in *Comcast*, holding that Federal Rule of Civil Procedure 23(b)(3)'s predominance requirement was not met when the plaintiffs' damages model failed to match their only viable theory of class-wide liability.[4] However, the reaction of lower courts to *Comcast* has been wildly inconsistent. The plaintiffs' bar has also shifted strategies in response to *Dukes* and *Comcast*.[5] One such challenge arose in the context of mandatory arbitration agreements prohibiting employee class actions. Plaintiffs' counsel have argued successfully in some cases that such provisions violate the National Labor Relations Act (NLRA), but circuit courts are divided and results have not been uniform.[6]

Plaintiffs' counsel increasingly utilize Rule 23(c)(4) to certify classes under Rule 23(b)(3) for liability purposes, without applying the predominance requirement to damages. Decisions on this topic may set the stage for a significant Supreme Court decision in the class action context. A pronouncement regarding the proper use of Rule 23(c)(4) could be forthcoming now that Justice Gorsuch is serving on the Court. Justices Ruth Bader Ginsburg and Stephen Breyer's dissent in *Comcast*, joined by Justices Sonia Sotomayor and Elena Kagan, suggests that those four Justices would approve of the approach, even in the Rule 23(b)(3) context.[7] If the Supreme Court permits the liberal use of Rule 23(c)(4) to certify classes, class actions that can overcome *Dukes*'s robust commonality requirement will likely continue to be certified.

This Article provides a detailed look at existing case law, an analysis of where employment class actions may be headed, and practical strategies employers can use in the current legal landscape. Part I examines significant developments in employment class action jurisprudence since *Dukes*. The authors analyze decisions applying or distinguishing *Dukes*'s holding while devoting particular attention to *Comcast*, the Court's "follow-up" to *Dukes*. Part II explores the future

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4. *Comcast*, 133 S. Ct. at 1433.

5. *See* Dustin Massie, Note, *Too Soon for Employers to Celebrate?: How Plaintiffs Are Prevailing Post-*Dukes, 29 ABA J. LAB. & EMP. L. 177, 183–98 (2014) (examining plaintiffs' changing litigation strategies post-*Dukes*).

6. *Compare* Cellular Sales of Mo., LLC v. NLRB, 824 F.3d 772, 776 (8th Cir. 2016) (upholding arbitration agreement with class-action waiver), *and* D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 362 (5th Cir. 2013) (same), *with* Morris v. Ernst & Young LLP, 834 F.3d 975, 990 (9th Cir. 2016) (invalidating arbitration agreement with class-action waiver), *and* Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1161 (7th Cir. 2016) (same).

7. *Comcast*, 133 S. Ct. at 1436–37 (Ginsburg & Breyer, JJ., dissenting) ("[W]hen adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate.").

of employment discrimination class actions. The authors consider the increasing use of various tactics to defeat class certification, including pre-discovery motions, discovery limitations, expert testimony and statistics, and arbitration agreements.

I. The Legal Landscape Five Years After *Wal-Mart v. Dukes*

Dukes was undeniably a watershed employment discrimination class action case. It was not, however, the end of company-wide employment class actions as some predicted.[8] *Dukes* has certainly made it easier for employers to argue that a class action fails to satisfy Rule 23's requirements, but creative plaintiffs have found ways around *Dukes*—or at least convinced courts to grant them discovery before deciding class certification. While many courts followed or expanded upon *Dukes*, others distinguished it on grounds that range from arguably principled to questionable.

A. *Cases Denying Class Certification Under* Dukes

Numerous courts followed *Dukes* and denied class certification in discrimination and wage-and-hour class actions, although most have done so only after allowing extensive discovery.[9]

1. *Bell v. Lockheed Martin*

Bell v. Lockheed Martin Corp.,[10] one of the first decisions to follow *Dukes*, was a putative gender discrimination class action.[11] Shortly after *Dukes*, Lockheed moved to deny class certification.[12] Although the parties had conducted significant discovery, the discovery period was not yet concluded.[13] Accordingly, Lockheed focused its motion to deny class certification on the face of the pleadings, arguing that

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8. *See* Massie, *supra* note 5, at 180–82.

9. *See, e.g.*, Davis v. Cintas Corp., 717 F.3d 476, 487 (6th Cir. 2013) (affirming denial of class certification in Title VII gender discrimination action); Tabor v. Hilti, Inc., 703 F.3d 1206, 1230 (10th Cir. 2013) (same); Bolden v. Walsh Constr. Co., 688 F.3d 893, 899 (7th Cir. 2012) (reversing class certification order in Title VII racial discrimination case); Bennett v. Nucor Corp., 656 F.3d 802, 816 (8th Cir. 2011) (affirming denial of class certification in Title VII racial discrimination case); Odle v. Wal-Mart Stores Inc., No. 3:11-cv-2954-O, 2012 WL 5292957, at *11 (N.D. Tex. Oct. 15, 2012) (dismissing mini-*Dukes* case based on tolling issue and not reaching commonality), *rev'd on other grounds*, 747 F.3d 315 (5th Cir. 2014); Hagler v. True Mfg. Co., No. 4:12CV328MLM, 2012 WL 1025672, at *5 (E.D. Mo. Mar. 26, 2012) (refusing to certify Family Medical Leave Act class action because plaintiffs could not plausibly satisfy commonality requirement); *see also, e.g.*, Wong v. AT&T Mobility Servs. LLC, No. CV 10-8869-GW(FMOx), 2011 U.S. Dist. LEXIS 125988, at *5 (C.D. Cal. Oct. 20, 2011) (common issues did not predominate in wage-and-hour action); Cruz v. Dollar Tree Stores, Inc., Nos. 07-2050 SC, 07-4012 SC, 2011 WL 2682967, at *9 (N.D. Cal. July 8, 2011) (reversing certification in wage-and-hour misclassification case based on *Dukes*).

10. No. 08-6292 (RBK/AMD), 2011 WL 6256978 (D.N.J. Dec. 14, 2011).

11. *Id.* at *1.

12. *Id.* at *2.

13. *Id.*

Dukes prevented the plaintiffs from establishing commonality.[14] Because *Lockheed* was filed before *Dukes*, the plaintiffs made no effort to distinguish their case's theory from that of the plaintiffs in *Dukes*. The plaintiffs in *Lockheed* challenged policies affording managers discretion to deviate from recommendations for starting salary, merit increases, and promotional increases, as well as a discretionary posting policy.[15] The court concluded that these policies did not create common questions "subject to common answers":

> The women in the proposed class worked in different geographic locations, were in different departments, had different titles, and reported to different supervisors . . . . [They] attempt to raise discrimination claims that depend on the discretion of individual managers in each of Lockheed's facilities. . . . This is precisely the type of allegation that the *Dukes* Court rejected when it explained that for a plaintiff to satisfy the commonality standard, the claim "must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the *same* supervisor."[16]

Lockheed counsels that employers should move to dismiss class allegations based on the face of the pleadings at the earliest stage of the case at which a legal argument for dismissal becomes viable.

2. *Dukes* on Remand

On remand to the Northern District of California,[17] the *Dukes* plaintiffs asked Judge Charles Breyer to certify a smaller class of approximately 150,000 women working in Wal-Mart's "California Regions."[18] Judge Breyer denied an early motion to dismiss the plaintiffs' revised motion for class certification, finding the plaintiffs were entitled to initial discovery based upon the new allegations, coupled with the evidentiary burden the Supreme Court created in *Dukes*.[19]

After another year of discovery, the parties briefed class certification again.[20] Relying heavily on *Dukes*, Judge Breyer denied class certification for several reasons.[21] First, the plaintiffs' attempt to use aggregated statistics across the challenged regions, instead of store-level statistics, was inconsistent with *Dukes*.[22] Drilling down on the statistics revealed no proof of any discrimination in many stores and districts and no "significant proof" of a "general policy of discrimination"

14. *See id.* at *5.
15. *Id.* at *6.
16. *Id.* at *8 (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (emphasis added)).
17. Dukes v. Wal-Mart Stores, Inc., 964 F. Supp. 2d 1115 (N.D. Cal. 2013).
18. *Id.* at 1117.
19. *Id.* at 1118.
20. *Id.*
21. *Id.* at 1127.
22. *Id.* at 1120.

when viewed as a whole.[23] Second, the plaintiffs' additional anecdotal evidence regarding Wal-Mart's "common culture" did not constitute significant proof of a general policy of discrimination.[24] For example, the small group of "top level" management identified by the plaintiffs had fifty-six members, and there was no evidence to suggest that more than a few of those managers were biased.[25] Third, the "specific employment practices" identified by the plaintiffs in support of their disparate impact claims were either (1) not common policies that applied across the class; or (2) not truly policies at all, but simply attempts to "repackage" the delegated discretion argument rejected by the Supreme Court.[26]

Throughout his opinion, Judge Breyer noted that, while there were now fewer plaintiffs, there was no rhyme or reason why this new group had been selected and nothing to tie them together.[27] He explained, "[r]ather than identify an employment practice and define a class around it, Plaintiffs continue[d] to challenge the discretionary decisions of hundreds of decision makers, while arbitrarily confining their proposed class to corporate regions that include[d] stores in California, among other states."[28] Because simply reducing the number of plaintiffs and confining them to a single region could not resolve the problems the Supreme Court identified, Judge Breyer denied class certification on both plaintiffs' disparate treatment and disparate impact claims.[29]

3. *Ladik v. Wal-Mart Stores, Inc.*

In *Ladik v. Wal-Mart Stores, Inc.*,[30] Judge Barbara Crabb of the U.S. District Court for the Western District of Wisconsin faced another "mini-*Dukes*" class action on behalf of all female Wal-Mart employees in the region.[31] As in the California mini-*Dukes* action, Wal-Mart filed a motion to dismiss the class allegations as incapable of satisfying Rule 23(a)(2)'s commonality requirement based on the face of the complaint.[32] Unlike Judge Breyer, however, Judge Crabb held that the plaintiffs' class allegations failed as a matter of law and dismissed them without permitting discovery.[33] Judge Crabb found that, despite decreasing the size of the proposed class, the plaintiffs had merely "created a smaller version of the same problem" present in *Dukes* by

23. *Id.* at 1120–21.
24. *Id.* at 1122–24.
25. *Id.* at 1123.
26. *Id.* at 1125–27.
27. *Id*. at 1127.
28. *Id.*
29. *Id.*
30. 291 F.R.D. 263 (W.D. Wis. 2013).
31. *Id.* at 264.
32. *Id.*
33. *Id.* at 264–65.

failing to identify any common question capable of resolution on a class-wide basis.[34] Instead, the plaintiffs essentially claimed that Wal-Mart permitted its managers to exercise subjective discretion in making promotion and compensation decisions.[35] While the plaintiffs argued that it was premature to decide class certification without discovery, Judge Crabb held that *Ladik* was the "rare case in which it is clear from the pleadings that the plaintiffs may not proceed as a class."[36]

Lockheed and the mini-*Dukes* cases are somewhat unique in that their allegations are nearly identical to the specific claims rejected in *Dukes*. By contrast, plaintiffs who have filed class action claims after *Dukes* generally try repackaging allegations similar to those in *Dukes* (i.e., individual discretion as the cause of discrimination) into a common question that can pass Supreme Court muster.

B. Cases Distinguishing Dukes

While *Dukes* increased the frequency with which courts deny class certification, some judges have distinguished *Dukes* and certified employment class actions. The cases certifying classes after *Dukes* include at least one effectively ignoring the Supreme Court's holding, and others articulating at least an arguable basis for distinguishing *Dukes*, most notably *McReynolds v. Merrill Lynch Pierce, Fenner & Smith, Inc.*[37]

1. Effectively Ignoring *Dukes*

In *Ellis v. Costco Wholesale Corp.*,[38] a salient case effectively ignoring *Dukes*, the district court initially certified a company-wide gender discrimination class action under Rule 23(b)(2).[39] On appeal, the Ninth Circuit vacated in part and remanded the certification order for further consideration in light of *Dukes*.[40]

Like *Dukes*, *Ellis* primarily alleged that certain Costco policies resulted in disproportionately fewer women being hired into two positions: general manager (GM) and assistant general manager (AGM).[41] The court's attempts to distinguish Costco's policies from the policies at issue in *Dukes* are unconvincing. For example, the court distinguished Wal-Mart's lack of a policy requiring posting of positions from Costco's policy that all management positions other than GM and AGM must be posted, which the court equated with a policy against posting for the GM and AGM positions.[42] The court further distinguished *Dukes* on the questionable grounds that there were

34. *Id.* at 270.
35. *Id.* at 270–71.
36. *Id.* at 272–73.
37. 672 F.3d 482 (7th Cir. 2012).
38. 285 F.R.D. 492 (N.D. Cal. Sept. 25, 2012).
39. *Id.* at 496.
40. *Id.* at 496–97.
41. *Id.* at 496.
42. *Id.* at 511 n.7.

fewer class members—approximately seven hundred—and fewer positions at issue, and thus found the class would be more cohesive.[43] Next, the court relied on the same type of expert "social framework" analysis rejected in *Dukes* to determine that Costco's centralized culture could result in various managers exercising discretion in a common way to disadvantage women.[44] Finally, the district court examined aggregate, nationwide statistics to determine that a gender disparity existed, while refusing to consider region-by-region analysis or Costco's proffered alternative reasons for the disparity.[45] Despite *Dukes*, the court did not require the plaintiffs to tie statistical disparities to specific challenged policies.[46] Based on the above reasoning, the district court determined that the plaintiffs had satisfied Rule 23(a)'s commonality requirement.[47] The district court then certified the class for the plaintiffs' disparate impact and disparate treatment claims, including their compensatory and punitive damages claims, using a Rule 23(b)(2) and (b)(3) hybrid approach.[48]

The Ninth Circuit declined defendant's interlocutory request for Rule 23(f) review of the class certification decision.[49] There can be no question that *Ellis* contradicts both *Dukes* and *Comcast*. While *Ellis* may be an outlier, it is a cautionary tale for any employer that believes *Dukes* spelled the end of company-wide discrimination class actions.

2. Distinguishing *Dukes*

Some courts distinguished *Dukes* and granted motions for class certification in employment cases.[50] For example, *McReynolds v. Mer-*

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43. *Id.* at 509.
44. *Id.* at 520–21.
45. *Id.* at 521–28.
46. *Id.* at 531–33.
47. *Id.* at 533.
48. *Id.* at 545.
49. Order Denying Appeal, Ellis v. Costco Wholesale Corp., No. 12-80188 (9th Cir. Jan. 16, 2013).
50. *See, e.g.*, Brown v. Nucor Corp., 785 F.3d 895 (4th Cir. 2015) (discussed below); McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 487–92 (7th Cir. 2012) (discussed below); Parra v. Bashas', Inc., 291 F.R.D. 360, 373–76 (D. Ariz. 2013) (distinguishing *Dukes* based on existence of specific compensation policies); Cronas v. Willis Grp. Holdings, LTD, No. 06-Civ-15295, 2011 WL 6778490, at *5 (S.D.N.Y. Dec. 19, 2011) (granting Rule 23(b)(2) class certification in settlement context based on apparent conclusion that monetary relief provided pursuant to settlement agreement was "calculable by formula" and thus distinguishable from *Dukes*); Delagarza v. Tesoro Ref. & Mktg. Co., No. C-09-5803, 2011 WL 4017967, at *5–8, *15 (N.D. Cal. Sept. 8, 2011) (distinguishing *Dukes* and granting class certification in a wage-and-hour class action); United States v. City of New York, 276 F.R.D. 22, 33–34 (E.D.N.Y. 2011) (refusing to decertify Rule 23(b)(2) liability class based on *Dukes* in Title VII case because "[t]he Supreme Court did not have occasion to decide whether a district court may order (b)(2) certification, under Rule 23(c)(4), of particular issues raised by disparate impact or pattern-or-practice disparate treatment claims that satisfy (b)(2)'s requirements").

rill Lynch, Pierce, Fenner & Smith, Inc.[51] was a putative class action on behalf of African American financial advisors alleging racial discrimination in violation of Title VII and section 1981. The district court denied class certification, and the plaintiffs appealed to the Seventh Circuit.[52] The plaintiffs alleged that they suffered racial discrimination and racially disparate impact from Merrill Lynch's "teaming" and "account distribution" policies.[53] Merrill Lynch's teaming policy allowed financial advisors in the same office to form teams at their own discretion.[54] The account distribution policy governed how accounts were redistributed when a financial advisor left Merrill Lynch.[55] It considered a financial advisor's revenue, clients, and retained investments to determine who would receive transferred accounts.[56] The plaintiffs alleged that these policies disparately affected African American financial advisors because they frequently led to their exclusion from successful teams, and the account distribution policy resulted in successful teams receiving accounts.[57] The court described the plaintiffs' theory as a "vicious cycle."[58]

Merrill Lynch argued that (1) individual managers had discretion regarding application of the teaming and account distribution policies and (2) any discrimination would have resulted from individual decisions by brokers forming teams and managers distributing accounts.[59] Judge Richard Posner acknowledged that managers had some discretion,[60] and that absent the teaming and account distribution policies, "there would be racial discrimination by brokers or local managers, like the discrimination alleged in *Wal-Mart*."[61] However, Judge Posner continued his analysis:

> But assume further that company-wide policies authorizing broker-initiated teaming, and basing account distributions on past success, increase the amount of discrimination. The incremental causal effect (overlooked by the district judge) of those company-wide policies—which is the alleged disparate impact—could be most efficiently determined on a class-wide basis.[62]

Judge Posner distinguished *Dukes* by holding that the teaming and account distribution policies were company-wide and applied to all

51. 672 F.3d 482 (7th Cir. 2012).
52. *Id.* at 484.
53. *See id.* at 489.
54. *See id.* at 488.
55. *Id.*
56. *Id.* at 488–89.
57. *Id.* at 489–90.
58. *Id.* at 490.
59. *See id.* at 489–90.
60. *Id.* at 489.
61. *Id.* at 490.
62. *Id*.

members of the purported class.[63] Therefore, he concluded, whether those policies had a disparate impact on African American financial advisors was a common question capable of class-wide resolution.[64]

The plaintiffs in *McReynolds* originally moved for certification pursuant to both Rule 23(b)(2) and (b)(3) and asked for issue certification under Rule 23(c)(4) regarding existence of a disparate impact.[65] On appeal, the plaintiffs temporarily abandoned their request for 23(b)(3) certification, and Judge Posner did not disturb the district court's holding on the issue.[66] Further, Judge Posner acknowledged that the plaintiffs' individual requests for backpay could not be certified under Rule 23(b)(2).[67] Nonetheless, he granted class certification pursuant to Rule 23(b)(2) and (c)(4) to determine whether challenged policies had a disparate impact and if injunctive relief was warranted.[68]

Judge Posner explained why his issue certification approach overcame the district court judge's concerns about the "feasibility and desirability of class action treatment":

> Obviously a single proceeding, while it might result in an injunction, could not resolve class members' claims. Each class member would have to prove that his compensation had been adversely affected by the corporate policies, and by how much. So should the claim of disparate impact prevail in the class-wide proceeding, hundreds of separate trials may be necessary to determine which class members were actually adversely affected by one or both of the practices and if so what loss each class member sustained—and remember that the class has 700 members. But at least it wouldn't be necessary in each of those trials to determine whether the challenged practices were unlawful.[69]

Judge Posner concluded by stating that "[w]e have trouble seeing the downside" of the issue certification approach.[70]

In 2015, the Fourth Circuit reversed a decision to decertify an action under similar circumstances to *McReynolds*. The court placed significant weight on statistical and broad-sweeping anecdotal evidence.[71] In *Brown v. Nucor Corp.*,[72] African American steel workers brought claims under section 1981 and Title VII alleging a racially hostile work environment and discriminatory job promotion practices. The plaintiffs based their claims on a pattern or practice of racially disparate treatment and facially neutral policies causing a disparate im-

63. *Id.* at 489.
64. *Id.* at 491.
65. *Id.* at 483.
66. *Id.*
67. *Id.* at 492.
68. *Id.* at 491.
69. *Id*. at 490–91.
70. *Id*. at 492.
71. *See* Brown v. Nucor Corp., 785 F.3d 895, 914 (4th Cir. 2015).
72. *Id.*

pact.[73] The District Court for South Carolina decertified the class, citing *Dukes* to demonstrate a lack of commonality.[74] In particular, the court determined that statistical evidence was insufficiently rigorous and that common issues did not predominate.[75] The Fourth Circuit disagreed:

> Here, for a liability determination in a disparate treatment claim, the workers' statistical and anecdotal evidence, especially when combined, thus provide precisely the "glue" of commonality that *Wal-Mart* demands. Such a claim requires proof of a "systemwide pattern or practice" of discrimination such that the discrimination is "the regular rather than the unusual practice." The required discriminatory intent may be inferred upon such a showing.[76]

The Fourth Circuit also noted that the class at issue was significantly smaller than in *Dukes*.[77]

Notably, *Nucor Corp.* included a strongly worded dissent from Judge Steven Agee.[78] Judge Agee was particularly skeptical of the plaintiffs' statistical evidence. He said courts must test relevant statistical evidence at the certification stage and not "defer to Plaintiffs' experts and assume legal significance because the statistical evidence crosses the two-standard-deviation threshold."[79] He also dismissed the difference in class size, noting that such a distinction was not at the heart of *Dukes*.[80] Much like *Ellis*, which cautions that courts may choose to ignore *Dukes*'s key holding to allow certification of employment class actions, these cases demonstrate how courts may go to great lengths to distinguish *Dukes* to allow plaintiffs to proceed with discovery.

C. *The Supreme Court's Follow-Up to* Dukes: *Comcast Corp. v. Behrend*

While the lower courts wrangled with *Dukes*, the Supreme Court reentered the class action fray in an antitrust case, *Comcast Corp. v. Behrend*.[81] Unlike *Dukes*, *Comcast* left open as many questions as it answered. Commentators widely expected the Court to "decide the issue of the applicability of *Daubert* in class certification proceed-

73. *Id.* at 898.

74. Brown v. Nucor Corp., No. 2:04-22005-CWH, 2012 WL 12146620, at *12–16 (D.S.C. Sept. 11, 2012), *rev'd,* 785 F.3d. 895 (4th Cir. 2015).

75. *See Nucor*, 785 F.3d at 908–09.

76. *Id.* at 914 (citations omitted).

77. *Id.* at 909–10.

78. *See id.* at 922 (Agee, J., dissenting).

79. *Id.* at 935 (emphasis omitted). "The duty to test the relevant statistical evidence attaches at the class certification stage." *Id.* at 936.

80. *Id.* at 943.

81. 133 S. Ct. 1426 (2013).

ings."[82] Instead, the Supreme Court decided the case based on its application of Rule 23(b)(3)'s predominance requirement to the damages model of the plaintiffs' expert.[83] The Court held that, because the damages model did not match the plaintiffs' theory of liability and could not establish damages on a class-wide basis, the plaintiffs failed to meet Rule 23(b)(3)'s predominance requirement.[84] The dissent thought the Court should never have decided the case, that the decision was wrong, and that the majority opinion "br[oke] no new ground on the standard for certifying a class action" under Rule 23(b)(3).[85]

Some courts have embraced a broad understanding of *Comcast*. The D.C. Circuit's interpretation, for example, is as succinct as it is sweeping: "No damages model, no predominance, no class certification."[86] Other courts found *Comcast* readily distinguishable, agreeing with the dissent that the decision broke no new ground[87] and that a class-wide damages model is not a prerequisite to class certification under Rule 23(b)(3).[88] Finally, some courts found a middle ground, certifying classes despite *Comcast*, by addressing only liability and leaving damages determinations for subsequent proceedings.[89]

A closer look at *Comcast* helps explain how it fosters divergent judicial interpretations. *Comcast*'s dissent has additionally become extremely important in light of the Court's changing composition. It may offer the strongest look into how class certification issues will play out in a post-Scalia Supreme Court.

1. The District Court Decision

In 2003, cable subscribers brought a class antitrust action against Comcast in the Eastern District of Pennsylvania on behalf of all cus-

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82. Ellen Meriwether, Comcast Corp. v. Behrend*: Game Changing or Business as Usual?*, 27 ANTITRUST 57, 60 (2013).

83. *Comcast*, 133 S. Ct. at 1432–33.

84. *Id*. at 1433–34.

85. *Id*. at 1435–36 (Ginsburg & Breyer, JJ., dissenting).

86. *In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 253 (D.C. Cir. 2013).

87. *See* Johnson v. Nextel Commc'ns, 780 F.3d 128, 139 n.11 (2d Cir. 2015) ("*Comcast* did not alter this Circuit's Rule 23(b)(3) predominance inquiry.").

88. *See, e.g.*, Leyva v. Medline Indus. Inc., 716 F.3d 510 (9th Cir. 2013) (distinguishing *Comcast* in a wage-and-hour case because individual damages would be easily calculable).

89. *See In re* Deepwater Horizon, 739 F.3d 790, 817 (5th Cir. 2014), *reh'g denied*, 756 F.3d. 320 (5th Cir. 2014) ("[N]othing in *Comcast* mandates a formula for classwide measurement of damages in all cases. Even after *Comcast*, therefore, this holding has no impact on cases such as the present one, in which predominance was based not on common issues of damages but on the numerous common issues of liability."); Butler v. Sears, Roebuck & Co., 727 F.3d 796, 800–01 (7th Cir. 2013) (distinguishing *Comcast* in a consumer class action because class could be certified for purposes of liability, leaving damages for individual determination); *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 859–60 (6th Cir. 2013) (same); Jacob v. Duane Reed, Inc., 293 F.R.D. 578, 592–93 (S.D.N.Y. 2013) (similar decision in wage-and-hour context).

tomers in the Philadelphia region.[90] The plaintiffs alleged that Comcast engaged in various unfair business practices to monopolize the area[91] and then exploited the monopoly by charging higher prices in the region than it would have been able to otherwise.[92]

When the plaintiffs moved for class certification, the district court held that, to satisfy Rule 23(b)(3)'s predominance requirement, they needed to demonstrate "that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members, and that there is a common methodology available to measure and quantify damages on a class-wide basis."[93] Through their experts, the plaintiffs presented four different theories of antitrust impact.[94] The district court thoroughly analyzed each theory[95] and determined that only one, the "overbuilder" theory, was capable of proof on a class-wide basis.[96]

The district court next examined whether the plaintiffs met their burden to show a common methodology for determining damages.[97] The plaintiffs' damages expert submitted a damages model incorporating all four theories of anti-trust impact.[98] Comcast argued that because the damages model did not study the effects of the "overbuilder" theory separately from the other theories, it could not prove that a common methodology existed to determine damages on a class-wide basis.[99] The district court held, however, that this difficulty did not undermine the expert's methodology.[100] Accordingly, the district court found that the plaintiffs demonstrated the existence of a "common methodology available to measure and quantify damages on a class-wide basis."[101] Based on this determination, the district court held that the plaintiffs met Rule 23(b)(3)'s predominance requirement and certified the class.[102]

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90. *See* Behrend v. Comcast Corp., 264 F.R.D. 150, 153, 157 (E.D. Pa. 2010).
91. *Id.*
92. *Id.* at 157.
93. *Id.* at 153–54. The district court had already held in an earlier opinion that the class met all of the other Rule 23(a) and 23(b)(3) requirements.
94. *Id*. at 162.
95. *Id.* at 162–81.
96. *Id*. at 174.
97. *Id.* at 181–91.
98. *See id.* at 190.
99. *Id.*
100. *Id.*
101. *Id.* at 191.
102. *Id.* ("The [plaintiffs have] demonstrated that the appropriate geographic market can be the Philadelphia [designated marketing area], as well as at least one theory of antitrust impact, and a common damages methodology.").

2. The Third Circuit's Decision and Comcast's Petition for Certiorari

On appeal to the Third Circuit, Comcast argued, inter alia, that the district court "made clearly erroneous factual findings by relying on Plaintiffs' expert for proof of class-wide antitrust impact."[103] Comcast attacked the expert's damages model and the fact that it did not isolate the "overbuilder" theory from the three other theories the district court rejected.[104] The Third Circuit was not persuaded. The court held that Comcast's arguments were "attacks on the merits of the methodology with no place in the class certification inquiry."[105] The Third Circuit explained that the plaintiffs need only "assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations."[106] The Third Circuit affirmed the district court's order certifying the class.[107]

Comcast petitioned the Supreme Court to review "whether a district court may certify a class action without resolving 'merits arguments' that bear on Rule 23's prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3)."[108] The Supreme Court granted certiorari, but to resolve a different issue: "Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."[109]

3. The Supreme Court's Decision

The Supreme Court reversed the certification and remanded to the Third Circuit.[110] While this outcome was not a surprise, the basis of the decision was unexpected. After the Supreme Court restated the question presented to focus on the admissibility of expert testimony, the parties' submissions revealed that admissibility of the plaintiffs' damages expert's report was not a proper issue for review because Comcast had not raised such a challenge.[111] The Court held, however, that it could still evaluate whether the plaintiffs' damages

103. Behrend v. Comcast Corp., 655 F.3d 182, 191 (3d Cir. 2011).
104. *Id.* at 202.
105. *Id.* at 206–07.
106. *Id.* at 206.
107. *Id.* at 207.
108. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1435 (2013) (Ginsburg & Breyer, JJ., dissenting) (citation omitted).
109. *Id.* at 1431 n.4 (citation omitted).
110. *Id.* at 1435.
111. *Id.* at 1437 (Ginsburg & Breyer, JJ., dissenting).

model satisfied Rule 23(b)(3)'s predominance requirement, even if Comcast had conceded admissibility of the model.[112]

The Court found that the expert's model could not establish a common methodology for determining damages on a class-wide basis because it was inconsistent with the plaintiffs' only valid theory of class-wide liability.[113] The Court found it dispositive that the expert admitted that his model could not distinguish damages caused by the "overbuilder" theory and by the three rejected theories.[114] While the model need not provide exact calculations at the class certification stage, "any model supporting a 'plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anti-competitive effect of the violation.'"[115] The Supreme Court rejected the lower court's conclusion that the plaintiffs need only offer some method of measuring damages, "no matter how arbitrary the measurements may be."[116] The Court explained that adopting such a low bar to establish a methodology for proving class-wide damages "would reduce Rule 23(b)(3)'s predominance requirement to a nullity."[117] Therefore, the Supreme Court rejected the Third Circuit's holding that the validity of the expert's model was a merits question not resolvable at the class certification stage.[118] The Supreme Court thus reversed and remanded the case.[119]

4. The Dissent

In dissent, Justices Ginsburg and Breyer, joined by Justices Sotomayor and Kagan, asserted that the majority was not only wrong on the merits, but should not have heard the appeal.[120] The dissent maintained that because admissibility of the expert's damages report was not properly before the Court, it should have "dismiss[ed] the writ as improvidently granted."[121]

The dissent's analysis of the lower court's holding that damages must be measurable on a class-wide basis to meet Rule 23(b)(3)'s predominance requirement became more important after Justice Scalia's death.[122] The majority adopted the lower court's premise because neither party contested the issue on appeal, although it stopped short of adopting it as a correct statement of the law.[123] The dissent thought

112. *Id.* at 1431 n.4.
113. *Id*. at 1433.
114. *Id*. at 1433–34.
115. *Id.* at 1433 (citation omitted).
116. *Id*.
117. *Id*.
118. *Id.*
119. *Id.* at 1435.
120. *Id.* at 1435–36 (Ginsburg & Breyer, JJ., dissenting).
121. *Id*. at 1435.
122. *Id.*
123. *Id*. at 1430.

this premise contradicted the "'black letter rule' that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members."[124] The dissent listed numerous appellate decisions and treatises standing for the proposition that "individual damages calculations do not preclude class certification under Rule 23(b)(3)."[125] The dissent concluded that the plaintiffs' failure to challenge the district court's predominance standard was an "oddity" unique to this case and another reason the Court should have dismissed the writ of certiorari.[126] The dissent sought to limit the precedential impact of *Comcast*, stating that it "breaks no new ground on the standard for certifying a class action under [Rule] 23(b)(3)."[127]

5. Interpretations of *Comcast* in the Lower Courts

Thus far, *Comcast* has functioned like an inkblot test for the lower courts.[128] Their analysis of the majority and dissent has led to remarkably disparate interpretations.[129] Lower court interpretations are generally divisible into three categories: (1) interpretations of *Comcast* as foreclosing Rule 23(b)(3) class actions unless damages for all class members can be demonstrated by a single model; (2) decisions distinguishing *Comcast* and requiring plaintiffs demonstrate only that damages arising from the defendant's illegal conduct are readily calculable; and (3) decisions recognizing that *Comcast* raised the bar for demonstrating individual damages questions, which do not predominate over questions common to the class, but instead rely on Rule 23(c)(4) to grant class certification on liability.

D. Courts Interpreting Comcast *Broadly*

Some courts have interpreted *Comcast* to hold that a class cannot be certified under Rule 23(b)(3) unless a single model can prove damages for all class members without requiring individual calculations.[130] In the antitrust context, the D.C. Circuit took *Comcast* to mean, "[n]o damages model, no predominance, no class certification."[131] Likewise, in *Johnson v. Nextel Communications*,[132] the Second Circuit vacated a class certification for lack of commonality.[133]

124. *Id.* at 1437.
125. *Id.*
126. *Id.*
127. *Id.* at 1436.
128. *But see* Alex Parkinson, Comment, Comcast Corp. v. Behrend *and Chaos on the Ground*, 81 U. CHI. L. REV. 1213 (2014).
129. *See generally id.*
130. *In re* Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 253 (D.C. Cir. 2013).
131. *Id.*
132. 780 F.3d 128 (2d Cir. 2015).
133. *Id.* at 132.

Johnson involved a putative class action against a law firm for breach of fiduciary duty, malpractice, and breach of contract.[134] The defendant law firm had represented putative class members alleging employment discrimination and challenging the propriety of an agreement mandating a dispute resolution process.[135] The Second Circuit vacated the district court's class certification, finding that class members would require a case-by-case inquiry to determine whether each had waived protections against conflicts of interest, whether state law governed each retainer agreement, and whether damages needed to be calculated individually.[136] The court held that "[b]ecause liability for a significant bloc of the class members and damages for the entire class must be decided on an individual basis, common issues do not predominate over individual ones and a class action is not a superior method of litigating the case."[137] Other courts deciding wage-and-hour and similar claims have denied certification based on similar reasoning.[138] Employers and other defendants will continue to argue for this broad interpretation of *Comcast*.

E. *Courts Interpreting* Comcast *Narrowly*

Other courts took both *Comcast*'s majority and dissent at their words that the decision "turns on the straightforward application of class-certification principles" and "breaks no new ground."[139] These courts rely on pre-existing precedent permitting certification of Rule 23(b)(3) classes if damages are easily ascertainable and their calculation would not predominate over common questions. For example, in *Leyva v. Medline Industries, Inc.*,[140] a wage-and-hour matter, the Ninth Circuit distinguished *Comcast* based on a determination that individual damages would be easily calculable, albeit not through a single class-wide model.[141] In overturning the district court's decision, the Ninth Circuit noted that "damages determinations are individual in nearly all wage-and-hour class actions" but courts nonetheless routinely certify such classes.[142] Plaintiffs primarily advance the argument that *Comcast* did not alter pre-existing precedent.

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134. *Id.* at 133.

135. *Id.* at 132.

136. *Id.* at 146 (discussing predominance).

137. *Id*. at 148.

138. *See, e.g.*, Cowden v. Parker & Assocs., No. 5:09-323, 2013 WL 2285163, at *7 (E.D. Ky. May 22, 2013) (denying certification to class of insurance agents seeking to recover commissions and fees); Forrand v. Fed. Express Corp., No. 08-1360, 2013 WL 1793951, at *4 (C.D. Cal. Apr. 25, 2013) (denying certification to class of FedEx workers claiming they were not paid for all hours worked).

139. Comcast Corp. v. Behrend, 133 S. Ct.1433, 1437 (2013).

140. 716 F.3d 510, 514 (9th Cir. 2012).

141. *Id.*

142. *Id.* at 513; *see also* Parra v. Bashas', Inc., 291 F.R.D. 360, 393 (D. Ariz. 2013) (distinguishing discrimination case from *Comcast* because plaintiffs could determine their backpay "through a computer program" based on objective factors); Barbosa v. Car-

F. Courts Avoiding Comcast *with Rule 23(c)(4)*

While *Comcast*'s meaning is debatable, it is clear—except to courts that treat it as a nullity—that the holding raised the Rule 23(b)(3) predominance bar regarding individual damages. Recognizing this reality, many courts adopted a third approach to *Comcast* that avoids damage considerations as part of Rule 23(b)(3)'s predominance requirement. The courts use Rule 23(c)(4) to certify only the liability issue.[143] Both *In re Whirlpool Front-Loading Washer Products Liability Litigation*[144] and *Butler v. Sears Roebuck*[145] were consumer class actions alleging that certain washing machines were defective. In both cases, the courts recognized that *Comcast* precluded them from certifying a Rule 23(b)(3) class if questions regarding individual damages would predominate over common questions regarding washing machine design. Accordingly, both courts in both cases used Rule 23(c)(4) to certify the issue of liability without considering whether individual damages questions prevented certification under Rule 23(b)(3).[146] In *Jacob v. Duane Reade, Inc.*,[147] another wage-and-hour misclassification case, the court followed *Whirlpool* and *Sears Roebuck* and certified a class action on the issue of liability under Rule 23(c)(4), but de-certified the class for purposes of determining damages in light of *Comcast*.[148]

This third approach has generated a great deal of attention, but there are serious questions about its continued viability. First, circuits are already split on whether it is appropriate to use Rule 23(c)(4) for this purpose.[149] Second, the Supreme Court provided some indirect guidance on the scope of *Comcast* by vacating and remanding several circuit court rulings for further consideration in light of *Comcast*, including *Whirlpool*, *Sears Roebuck*, and a wage-and-hour class and collective action.[150] If the Supreme Court grants certiorari in a lawsuit presenting the Rule 23(c)(4) issue, the resulting decision may be an-

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gill Meat Sol. Corp., 297 F.R.D. 431, 443 n.2 (E.D. Cal. July 2, 2013) (distinguishing *Comcast* to certify settlement class in wage-and hour-case).

143. *See* Butler v. Sears Roebuck, 727 F.3d 796, 800 (7th Cir. 2013); *In re* Whirlpool Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 860–61 (6th Cir. 2013); Jacob v. Duane Reade, Inc., 293 F.R.D. 578, 593–94 (S.D.N.Y. 2013).

144. 722 F.3d 838, 860–61 (6th Cir. 2013).

145. 727 F.3d 796, 800 (7th Cir. 2013).

146. *See id.* at 800, 802–03; *Whirlpool*, 722 F.3d at 860–61.

147. 293 F.R.D. 578, 593–94 (S.D.N.Y. 2013).

148. *Id.* at 593.

149. *See* Hohider v. United Parcel Service, Inc., 574 F.3d 169, 200–01 n.25 (3d Cir. 2009) (split between circuits holding Rule 23(c)(4) applies only if entire matter satisfies Rule 23(b)(3)'s predominance requirement and circuits holding that only the individual issue identified must meet predominance requirement).

150. Ross v. RBS Citizens, N.A., 667 F.3d 900 (7th Cir. 2012). There was no subsequent decision by the lower courts because the parties settled and the appeal was voluntarily dismissed. Ross v. RBS Citizens, N.A., No. 10-3848 (7th Cir. July 3, 2014), Dkt. No. 58.

other watershed for employment law class actions, and class actions in general.

G. The Supreme Court's Post-Scalia Opinions

During the October 2015 term, the Supreme Court addressed several cases challenging class certification, in each refusing to impose additional restrictions on the process. These decisions make evident that, following Justice Scalia's passing, the Supreme Court lacks a majority voting bloc on the issue and only further emphasize Justice Gorsuch's importance to class action jurisprudence.

1. *Tyson Foods, Inc. v. Bouaphakeo*

In *Tyson Foods, Inc. v. Bouaphakeo*,[151] a class of employees sought compensation for time spent "donning and doffing" workplace protective gear. The Supreme Court granted certiorari to address whether an expert witness's estimate of overtime hours constituted a representative sample upon which class certification could rest.[152] Writing for the Court, Justice Anthony Kennedy found that representative proof from a sample, based on an expert witness's estimation of average time employees spent donning and doffing protective gear, could show predominance of common questions of law or fact.[153] The Court refused to "announce a broad rule against the use in class actions of representative evidence," noting that the permissibility of such evidence "turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable to prove or disprove the elements of the relevant cause of action."[154] In this case, the Court allowed statistical evidence because "respondents sought to introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records."[155] The Court noted that in cases of employers' failure to keep records, the Fair Labor Standards Act allowed the use of averages and representative evidence.[156] The Court further distinguished *Tyson Foods* from other recent cases by noting that *Dukes* "does not stand for the broad proposition that a representative sample is an impermissible means of establishing class wide liability."[157]

Notably, *Tyson*, maintaining a circuit split, failed to address whether uninjured class members could recover damages as part of

151. 136 S. Ct. 1036 (2016); *see also* Thomas R. Goldstein, *Supreme Court Review*, 32 ABA J. LAB. & EMP. L. 157, 160 (2017) (discussing *Tyson Foods* and its implications).
152. *Tyson Foods Inc.*, 136 S. Ct. at 1042–43.
153. *Id.* at 1045.
154. *Id.* at 1046.
155. *Id.* at 1047.
156. *Id.*
157. *Id.* at 1048.

the class action.[158] Justice Kennedy acknowledged that "the question whether uninjured class members may recover is one of great importance," but stated that it was not "a question yet fairly presented by this case, because the damages award has not yet been disbursed, nor does the record indicate how it will be disbursed."[159] In a concurring opinion, however, Chief Justice John Roberts expressed "concern that the district court may not be able to fashion a method for awarding damages only to those class members who suffered an actual injury."[160]

2. *Campbell-Ewald Co. v. Gomez*

In *Campbell-Ewald Co. v. Gomez*,[161] the Supreme Court ruled that an unaccepted offer of judgment did not render the plaintiff's complaint and petition for class certification moot.[162] The plaintiff's putative class action against an advertiser alleged that it violated the Telephone Consumer Protection Act by instructing or allowing a third-party vendor to send unsolicited text messages to his cell phone.[163] Prior to the deadline for the plaintiff's motion for class certification, the defendant proposed to settle the plaintiff's individual claim and filed an offer of judgment pursuant to Rule 68.[164] The plaintiff did not accept the offer.[165] Writing for the Court, Justice Ginsburg held that "an unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect."[166]

H. Mandatory Arbitration Agreements and the NLRA

One of the most salient tactics plaintiffs' attorneys have recently utilized involves challenging mandatory employee arbitration agreements containing class and collective action waivers. Following a 2012 ruling by the National Labor Relations Board (NLRB), multiple courts have addressed the propriety of such waiver agreements.[167]

158. *See, e.g.*, Erwin Chemerinsky, *A Class Action Shift*, 52-SEP TRIAL 54, 54 (Sept. 2016).

159. *Tyson Foods*, 136 S. Ct. at 1050.

160. *Id.* (Roberts, C.J., concurring).

161. 136 S. Ct. 663 (2016).

162. *Id.* at 666.

163. *Id.* at 667.

164. *Id.*; *see* FED. R. CIV. P. 68 (defendant may offer to allow judgment on specified terms instead of going to trial).

165. *Gomez*, 136 S. Ct. at 668.

166. *Id.* at 670 (citation omitted).

167. The National Labor Relations Board (NLRB) held that employees' collective pursuit of legal claims is "concerted activity for mutual aid or protection" protected by Section 7 of the National Labor Relations Act. D.R. Horton, Inc., 357 N.L.R.B. 2277, 2277, 2288–89 (2012). Accordingly, the NLRB found that an employer cannot, as a mandatory condition of employment, require employees to agree to arbitration agreements that waive their ability to join claims or pursue class or collective actions. *Id.* at 2289. The Second, Fifth, and Eighth Circuits explicitly rejected the NLRB's position on mandatory arbitration agreements. *See* Patterson v. Raymours Furniture Co., No. 15-2820-cv,

This resulted in a circuit split concerning whether class action waiver clauses violate Section 7 of the NLRA and its provisions protecting employees' rights to engage in concerted activities for collective bargaining or other mutual aid or protection.[168] Until the Supreme Court rules on the NLRB's position, employers face uncertainty, and plaintiffs' choice of forum will determine the enforceability of class action waivers in mandatory arbitration agreements.

II. Class Actions in the Current Legal Landscape: What Does the Future Hold for Employment Class Actions?

The future of class action litigation depends largely upon the composition of the Supreme Court. The critical role of Justice Gorsuch cannot be understated, as the Supreme Court's rulings from this term demonstrate. While *Tyson Foods* and *Campbell-Ewald* left multiple issues open to future interpretation, neither opinion can be deemed a defeat for class action plaintiffs. With Justice Gorsuch's arrival, employers can expect further favorable rulings.

The following sections briefly discuss litigating class actions in this new legal environment, including early motions to dismiss or deny certification of, or to strike class claims, planning and conducting discovery, and handling statistical and other expert evidence to defeat class certification. We also offer some best practices in preparing arbitration agreements for employees. These strategies will certainly need to be adjusted as case law continues to develop.

A. *Pre-Discovery Motions to Dismiss or Strike Class Claims or Deny Certification*

Employers have encountered mixed results filing pre-discovery motions to dismiss, deny certification, or strike plaintiffs' class claims.[169]

2016 WL 4598542 (2d Cir. Sept. 14, 2016); Cellular Sales of Mo., LLC v. NLRB, 824 F.3d 772 (8th Cir. 2016); Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1015 (5th Cir. 2015); D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013); Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013). However, the Ninth and Seventh Circuits largely accepted the NLRB's position. *See* Morris v. Ernst & Young, LLP, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016); Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016).

168. *See* 29 U.S.C. § 157 (2012).

169. There are multiple ways to style an early motion targeting class claims. Defendants can label them as motions to strike class claims pursuant to Rule 23(d)(1)(D), as motions to deny class certification pursuant to Rule 23(c)(1)(A), or as motions to dismiss class claims pursuant to Rule 12(b)(6). The title of the motion does not matter unless the jurisdiction or judge prefers a certain mechanism. It may be sensible to include all of these procedural bases in the body of the brief. Employers must clarify, however, that they seek to eliminate the class claims as legally insufficient on the face of the pleadings, with no need for discovery. In turn, plaintiffs will argue these procedural avenues are inappropriate for use at such an early pre-discovery stage.

Some courts have granted these motions based on *Dukes*.[170] Other courts, relying on *Dukes*, allowed plaintiffs discovery before responding to the motions.[171]

By virtue of its focus on expert evidence and damages models, *Comcast* does not naturally lend itself to use in an early motion to dismiss. In some cases, however, especially those involving compensation discrimination, *Comcast* may support arguments that individual damages questions predominate over any common questions. Plaintiffs (and many courts) will believe this argument is premature; in some cases predominance problems will be apparent from the nature of the claim on the face of the pleadings.

Despite these difficulties, it is certainly worth pursuing pre-discovery motions to eliminate class claims because they present employers an opportunity to avoid years of expensive discovery that could lead to enhanced or redefined claims and filing of unrelated lawsuits (e.g., wage-and-hour claims). It is important to plaintiffs' class action litigation to use potentially high discovery costs to pressure employers to settle, so employer tactics that preclude discovery are especially useful.

Just because a class is smaller or less geographically expansive than *Dukes* does not mean employers cannot attack it in an early motion to dismiss.[172] At its core, *Dukes* was not about the size or scope of the class; it was about the specific policies at issue.[173] Employers should attack the complaint as insufficient if plaintiffs fail to identify specific policies or how policies caused alleged discrimination.[174] It is

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170. *See, e.g.*, Ladik v. Wal-Mart Food Stores, Inc., 291 F.R.D. 263, 272–73 (W.D. Wis. 2013) (dismissing class claims without discovery in mini-*Dukes* case, but describing decision as a "rare case" in which early dismissal was appropriate); Semenko v. Wendy's Int'l, Inc., No. 12-cv-0836, 2013 WL 1568407, at *11 (W.D. Pa. Apr. 12, 2013) (granting motion to strike class claims prior to allowing discovery); Hagler v. True Mfg. Co., No. 4:12CV328MLM, 2012 WL 1025672, at *5 (E.D. Mo. Mar. 26, 2012) (dismissing class claims based on *Dukes* despite plaintiffs' claim of entitlement to discovery).

171. *See, e.g.*, Dukes v. Wal-Mart Stores, Inc., 964 F. Supp. 2d 1115, 1125–26 (N.D. Cal. 2013) (denying motion to dismiss class claims because *Dukes* rested on rejection of plaintiffs' evidence of commonality); Chen-Oster v. Goldman, Sachs & Co., 877 F. Supp. 2d 113, 119 (S.D.N.Y. 2012) (denying in part motion to strike class allegations and allowing discovery); Barghout v. Bayer Healthcare Pharm., No. 11-cv-1576, 2012 WL 1113973, at *11 (D.N.J. Mar. 30, 2012) (denying motion to strike class allegations as premature, in part because discovery had not been conducted).

172. *See Dukes*, 964 F. Supp. 2d at 1117–18 (denying class certification because "though Plaintiffs insist that they have presented an entirely different case from the one the Supreme Court rejected, in fact it is essentially a scaled-down version of the same case with new labels on old arguments").

173. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 355 (2011) (policy of allowing discretion by local supervisors "is just the opposite of a uniform employment practice that would provide the commonality needed for a class action").

174. *See, e.g.*, Barrett v. Forest Labs., Inc., No. 12-CV-5224 (S.D.N.Y. Feb. 4, 2013), Dkt. No. 29 at 24–26 (moving to dismiss class claims in part based on plaintiffs' failure to identify specific policies or how policies affected them).

also beneficial to analyze whether the plaintiffs' central allegation merely repackages the individual discretion theory at the heart of *Dukes*.[175] If the plaintiffs' case focuses on the individual discretion theory, their class claims should be subject to dismissal without discovery.

Pre-discovery motions to dismiss or to deny certification of class claims, even if denied, can still serve a purpose. *Dukes* and *Comcast* have very specific requirements regarding the types of claims that can be certified. An early motion gives employers the opportunity to (1) educate the judge regarding these requirements, (2) force the plaintiffs to amend pleadings to state claims that at least facially pass muster, and (3) eliminate claims (and discovery on those claims) that do not satisfy *Dukes* and *Comcast*.[176] An early motion limiting discovery or forcing plaintiffs to identify a specific theory of the case advances resolution of the claim.

B. Structuring or Controlling Fact Discovery

If an early motion fails, employers should look to benefit from the Rule 16 conference and the case management order. Employers should aim to structure discovery in stages to target alleged common policies and attempt to build a record early to support denial of class certification. To the extent possible, or if resolution of a key factual dispute can be staged first, employers should seek a more structured case management order that provides for early, targeted discovery before broad nationwide discovery can commence.[177] Nothing prevents a court from deciding a motion to deny certification before discovery ends if an employer can show that no further discovery is necessary or that discovery on a targeted issue demonstrates class certification will not be warranted.[178]

Dukes requires specificity in identifying company-wide policies that could have a disparate impact on employees, and this holding should persuade a judge to structure discovery in an orderly fashion

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175. *See Dukes*, 964 F. Supp. 2d at 1126–27 (rejecting plaintiffs' argument that claims were based on common policies establishing subjective criteria because they merely repackaged delegated discretion); Bolden v. Walsh Constr. Co., 688 F.3d 893, 898 (7th Cir. 2012) (numerous policies identified by plaintiffs were all merely policies allowing individual manager discretion).

176. *See Barrett*, No. 12-CV-5224, Dkt. No. 38 at 1–3 (plaintiffs required to amend pleadings to be more specific in response to early motion to dismiss).

177. *See, e.g.*, Barnes v. Hershey Co., No. 3:12-cv-01334 (N.D. Cal. July 24, 2013), Dkt. No. 95 (in collective action context, employer using joint case management plan to limit discovery to single issue common to members of class, which, if decided early in employer's favor, would require decertification).

178. *See, e.g.*, Bell v. Lockheed Martin Corp., No. 08-6292 (RBK/AMD), 2011 WL 6256978, at *8 (D.N.J. Dec. 14, 2011) (court dismissed class claims when it was clear they could not be sustained after plaintiffs completed significant discovery into employer policies, even though discovery period had not ended).

designed to test specific policies or practices.[179] Plaintiffs often rely on aggregated statistical disparities, without identifying specifically any policies that allegedly cause them. Plaintiffs should have to identify specific policies at issue and present a causal link between the policies and the alleged disparity. More importantly, targeted discovery can expose whether the true policy at issue is only an exercise of managerial discretion.[180]

Employers should focus on individual plaintiffs' claims. If individual plaintiffs' claims are not consistent with their theory of a class-wide disparate impact or pattern and practice of discrimination, they cannot establish commonality or typicality. If the plaintiffs point to a policy that allegedly has a disparate impact, employers should develop a record to show that the policy did not cause harm or affect all named plaintiffs in the same way.[181] In *Jones v. National Council of Young Men's Christian Associations*, for example, the employer argued that the promotion-based class claims should be dismissed because one named plaintiff received both promotions for which she applied, while another named plaintiff had never even applied for a promotion.[182] Similarly, if specific managers take the allegedly discriminatory action against named plaintiffs, employers should develop a factual record that the managers acted within their discretion.

Finally, employers should attack all potential common questions, especially if they are in a circuit that permits liberal use of Rule 23(c)(4). A court invoking Rule 23(c)(4) can effectively ignore the argument that claims for backpay cannot be certified based on *Dukes*, or that individualized damages inquiries destroy predominance, per *Comcast*, if there is even one common question.[183] It is beneficial to develop a record that allows an analysis of each question individually. Many supposedly common questions are simply repackaged individual discretion arguments, while others are not applicable to the entire class.[184]

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179. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 357 (2011) ("Other than the bare existence of delegated discretion, respondents have identified no 'specific employment practice'—much less one that ties all their 1.5 million claims together. Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice.").

180. *See, e.g.*, *Bolden*, 688 F.3d at 898 (reviewing fourteen policies plaintiffs identified, but determining they "boil down to the policy affording discretion" to individual supervisors).

181. *See, e.g.*, Jones v. Nat'l Council of Young Men's Christian Ass'ns, No. 09 C 6437, slip op. at 62–64 (N.D. Ill. Sept. 5, 2013) (magistrate's report recommending dismissal of class claims).

182. *Id*.

183. *See, e.g.*, McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012); Jacob v. Duane Reed, Inc., 293 F.R.D. 578 (S.D.N.Y. 2013).

184. *See* Dukes v. Wal-Mart Stores, Inc., 964 F. Supp. 2d 1115, 1125–26 (2013).

C. *Statistics and Use of Experts to Defeat Certification*

If an employer cannot eliminate a class case on a pre-discovery motion or an early motion to deny certification based on plaintiffs' failure to identify common policies or practices, statistical evidence will be crucial to defeating class certification at the close of discovery. Statistical evidence has always been very important to employment class actions, but *Dukes* and *Comcast* reinforce its significance.

Dukes counsels employers to drill down to the local level when examining supposed effects of policies and practices that plaintiffs have challenged:

> Even if they are taken at face value, these studies are insufficient to establish that respondents' theory can be proved on a classwide basis. In *Falcon*, we held that one named plaintiff's experience of discrimination was insufficient to infer that "discriminatory treatment is typical of [the employer's employment] practices." A similar failure of inference arises here. As Judge Ikuta observed in her dissent, "[i]nformation about disparities at the regional and national level does not establish the existence of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level." *A regional pay disparity, for example, may be attributable to only a small set of Wal-Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends.*[185]

If the plaintiffs claim that a nation-wide policy or practice affected all class members in the same way, employers can and should use data to test that assertion. On remand in *Dukes*, Judge Breyer noted that while some store districts within the class showed large disparities, other districts showed none, destroying the claim that any practice or policy commonly affected class members.[186] If a policy affects multiple stores differently, it cannot supply a common answer to a classwide contention. Thus, the plaintiffs would fail to show commonality. Using an expert report to show differences among various regions, hierarchies, stores, supervisors, or other subdivisions will undermine plaintiffs' attempt to rely on aggregate statistics to establish existence of a common policy or practice.

Employers should also study the effects of specific challenged policies because plaintiffs often rely on aggregated bottom-line numbers. *Dukes* and *Comcast* both require greater specificity. If an employer can demonstrate that other factors, and not the challenged policy, create

185. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 356–57 (2011) (emphasis added) (internal citations omitted).

186. *See Dukes*, 964 F. Supp. 2d at 1120–21.

the statistical disparity, employers' counsel can break the causal link.[187]

Employers can also use *Comcast* to force plaintiffs to match their liability theory to their damages theory. Despite the many different interpretations of *Comcast*, one undeniable holding is that to certify a class under Rule 23(b)(3), plaintiffs must demonstrate that their damages theory is congruent with their liability theory. Employers should argue for the broadest interpretation of *Comcast*—that it requires a single class-wide damages model. Even if a court adopts a more limited interpretation of *Comcast*, however, demonstrating that plaintiffs cannot separate damages based on their theory of liability from effects of other factors creates a strong argument that the case cannot be certified under Rule 23(b)(3).[188]

D. Drafting Employee Arbitration Agreements

While it is impossible to determine how the circuit split regarding mandatory arbitration agreements for employees will play out, there are several factors employers should consider in drafting such provisions. As an initial matter, it is important to remember that arbitration should be an alternate forum allowing the parties to pursue all substantive claims and remedies that they could otherwise pursue in court. The employer should pay for all costs associated with arbitration, with the exception of a modest contribution by the employee for the filing fee (e.g., $200). These agreements should also rely on the rules of a respected arbitration tribunal (Judicial Arbitration and Mediation Services or American Arbitration Association) with only limited exceptions. Agreements should include multi-step alternative dispute resolution with voluntary internal claim resolution processes, sometimes including mediation, before allowing arbitration.

Employers should consider how accessible to make the arbitration agreements for employees' review. It should be clear and conspicuous to employees. Inclusion of such provisions in employee handbooks may be deemed insufficient. While an employee signature may not be required, it is better to have employees sign the agreement. Depending on state law, consideration is often necessary, whether in the form of continued at-will employment or additional consideration. Further, any arbitration agreement should be mutually binding on employers and employees. This mutuality must be explicit. Finally, em-

187. *See* Tabor v. Hilti, Inc., 703 F.3d 1206, 1229 (10th Cir. 2013) (holding that even if policy had an overall disparate impact on women, company's "haphazard" application of policy meant that plaintiffs could not establish commonality).

188. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1435 (2013) ("In light of the model's inability to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of overbuilding, Rule 23(b)(3) cannot authorize treating subscribers within the Philadelphia cluster as members of a single class.").

ployers should consider permitting employees to opt out of arbitration because such provisions make such agreements appear voluntary and less coercive. Yet, employers must keep in mind that optional arbitration provisions may ultimately cover far fewer employees, undermining the very purpose of having an arbitration agreement.

Conclusion

The Supreme Court's decisions in *Dukes* and *Comcast* unquestionably changed employment discrimination litigation. Lower courts have inconsistently applied these cases and their progeny, leading to irregular employment class action jurisprudence. Clarification will likely come only through further Supreme Court guidance.

Regardless of the Court's direction, employers already possess an arsenal of strategies to protect their interests in the face of employment class actions. Employers can position themselves to defeat class certification by using pre-discovery motions, strategic discovery, expert witnesses, statistical evidence, and arbitration agreements. Of course, employment class action jurisprudence is rapidly changing, and the full impact of *Dukes*, *Comcast*, and other decisions—and their impact on employers and plaintiffs—will become clearer over time.

The NLRB's Successorship Doctrine, Perfectly Clear Successors, Executive Order 13495, and Worker Retention Laws: What the Trump Administration Has Inherited

Kenneth A. Jenero*

Introduction

Over the past six years, Obama appointees have controlled the National Labor Relations Board (NLRB or Board). During this period, the "Obama Board" issued many highly publicized, pro-labor decisions.[1] These decisions reversed or significantly revised longstanding precedent that survived prior changes in administrations and partisan Board composition.[2] President Obama and the Board also decided other, less noticed cases which nevertheless have far-reaching consequences for employers. One example concerns the NLRB's "successorship" and "perfectly clear" successor doctrines and their intersections with federal, state, and local laws, rules, and executive orders that limit a successor employer's discretion in hiring and setting new terms and conditions of employment.[3] Successorship issues arise, for

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1. *See, e.g.*, Specialty Healthcare & Rehab. Ctr., 357 N.L.R.B. 934, 944–46 (2011) (opening door to union organizing of "micro-units"); Browning-Ferris Indus., 362 N.L.R.B. No. 186, slip op. at 17–19 (Aug. 27, 2015) (changing standard for determining whether two companies are "joint employers"); Purple Communc'ns, Inc., 361 N.L.R.B. No. 126, slip op. at 14 (Dec. 11, 2014) (employees given presumptive right to use employer's e-mail system during non-working time to engage in union organizing and other activities protected by Section 7 of the National Labor Relations Act); Lincoln Lutheran of Racine, 362 N.L.R.B. No. 188, slip op. at 2 (Aug. 27, 2015) (employer's obligation to check off union dues continues after expiration of collective bargaining agreement).

2. *See* cases cited *supra* note 1. The Obama Board also charted new territory and effectively rejected other longstanding precedent by adopting its "quickie election" rules over the objection of Republican Board members. Representation-Case Procedures, 79 Fed. Reg. 240 (Dec. 15, 2014) (codified at 29 C.F.R. pts. 101, 102, 103 (2016)).

3. GVS Props., LLC, 362 N.L.R.B. No. 194, slip op. at 5 (Aug. 27, 2015).

example, if a corporation merges with, or purchases the assets of, an entity with a unionized work force, or when the government awards a new employer a contract previously performed by a unionized firm.[4]

Through a series of recent Obama Board decisions, President Obama's Executive Order 13495, and the application of state and local "worker retention" statutes, it is virtually impossible for a successor employer to avoid inheriting a predecessor's collective bargaining obligation.[5] In addition, the Board has further narrowed the circumstances in which a successor employer can lawfully set initial terms and conditions of employment for the predecessor's employees, which will remain in effect until new terms are reached through collective bargaining.[6] These developments are particularly significant for contractors bidding on federal service contracts previously performed by unionized contractors.

This Article addresses the shift in successorship law under the Obama administration, including several decisions issued by the Board in 2015 and 2016, and the related impact of E.O. 13495, which took effect in January 2013. A full discussion of E.O. 13495 is beyond the scope of this Article. In a nutshell, however, it (1) requires most contractors awarded federal service contracts over $150,000 to give qualified employees of the predecessor contractor, who otherwise would lose their jobs, a right of first refusal for employment with the successor contractor; and (2) prevents the successor contractor from hiring new employees to perform services under the contract until this right has been extended to the predecessor's employees.[7]

E.O. 13495 does not limit the terms on which a successor contractor may offer employment to the predecessor's employees, but the Service Contract Act (SCA) does.[8] Under SCA Section 4(c), a successor contractor to a covered federal contract may not pay a service employee less than the wages and fringe benefits that the employee would have received under the predecessor's contract.[9] This includes "accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations."[10]

To be clear, the SCA does not require a successor contractor to (1) recognize or bargain with the predecessor employees' union, (2) follow any non-wage or non-fringe benefit provisions of the predecessor's collective bargaining agreement, (3) provide the same fringe benefits as the

4. *See e.g.*, *id.*, slip op. at 1–2.

5. Exec. Order No. 13495, Nondisplacement of Qualified Workers Under Service Contracts, 74 Fed. Reg. 6103 (2009); *see also* 41 U.S.C. § 6707(c) (2012).

6. *See, e.g.*, *GVS Props.*, 362 N.L.R.B., slip op. at 3–4.

7. *See* Exec. Order No. 13495, 74 Fed. Reg. 6103, 6105 (2009).

8. *Id.*; *see generally* 41 U.S.C. §§ 6701–6707 (2012).

9. 41 U.S.C. § 6707(c)(1).

10. *Id.*

predecessor, or (4) adopt the predecessor's benefit plans. It only prohibits a successor contractor from paying predecessor employees less than the dollar equivalent of the wages and fringe benefit package they received under the previous contract.[11] However, as discussed below, the interplay of the Obama Board's interpretation of the NLRB's successorship rules, and the limitations imposed by E.O. 13495 and the SCA, create unique challenges for federal service contractors.

Like President Obama's other labor and employment initiatives, the recent shift in successorship law is subject to reversal under President Trump's administration. However, it remains to be seen whether, and how quickly, President Trump or a Republican-controlled Board will change the law in this area. Meanwhile, the law developed under the Obama administration will remain intact and cannot be ignored when making and implementing decisions that implicate the NLRB's successorship rules.

Part I of this Article provides background on the Board's successorship rules. Part II.A discusses the impact of state and local worker retention statutes on the Board's application of its successorship doctrine. Part II.B addresses how E.O. 13495 and the SCA affect the successorship and "perfectly clear" successor analysis. Part II.C discusses several recent decisions that have made it more difficult for employers to avoid a "perfectly clear" successor finding. Part III anticipates how an NLRB with a majority of Republican-appointed members will impact successorship doctrine.

I. Background on NLRB's Successorship Rules

Under longstanding National Labor Relations Act (NLRA) precedent, if an employer is a "successor," it must recognize and bargain with any union that represented the predecessor's employees.[12] For this purpose, an employer is considered a "successor" if: (1) there is substantial continuity in the predecessor's and successor's business operations (e.g., products, services, plant, equipment, workforce, jobs, supervisors, working conditions, etc.), and (2) the predecessor's employees constitute a majority of the new employer's work force in a separate and appropriate bargaining unit.[13]

In *NLRB v. Burns International Security Services, Inc.*,[14] the Supreme Court held that a successor employer is not bound by the substantive terms of a collective bargaining agreement negotiated by the predecessor and is ordinarily free to set initial terms and condi-

11. *Id.*
12. National Labor Relations Board, Basic Guide to the National Labor Relations Act 24 (1997), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf.
13. *See* Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 28 (1987).
14. 406 U.S. 272 (1972).

tions of employment unilaterally.[15] The Court explained that the duty to bargain will not normally arise before the successor sets initial terms because it is not usually evident that the union will retain majority status in the new workforce until the successor has hired a full complement of employees.[16] The Court recognized, however, that "there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms."[17]

In *Spruce Up Corp.*,[18] the Board stated that the "perfectly clear" caveat was restricted to circumstances in which the "new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment,"[19] or when the employer "has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment."[20] Although *Burns* and *Spruce Up* held that an employer must negotiate before fixing terms if it intends to retain *all* of the predecessor's employees, the Board has clarified that the relevant inquiry is whether the successor "[p]lanned to retain *a sufficient number* of predecessor employees to make it evident that the Union's majority status would continue" in the new workforce.[21]

Several recent Obama Board decisions have sharply limited the circumstances in which employers may lawfully avoid not only successorship status, but also a finding that they are "perfectly clear" successors that cannot unilaterally set initial terms and conditions of employment. One decision allowed a local worker-retention statute to trump successor employers' flexibility under federal labor law.[22] Other decisions address the impact of federal restrictions under E.O. 13495 and the SCA.[23] They also show how the Obama Board has expanded the circumstances in which an employer's hands will be tied by a "perfectly clear" successor finding.

15. *Id.* at 273.
16. *Id.* at 294–95.
17. *Id.*
18. 209 N.L.R.B. 194, 195 (1974), *enforced*, 529 F.2d 516 (4th Cir. 1975).
19. *Id.* at 195.
20. *Id.*
21. Galloway Sch. Lines, Inc., 321 N.L.R.B. 1422, 1426–27 (1996) (emphasis added); Spitzer Akron, Inc., 219 N.L.R.B. 20, 22 (1975), *enforced*, 540 F.2d 841 (6th Cir. 1976); *see also* Adams & Assocs., Inc., 363 N.L.R.B. No. 193, slip op. at 4 (May 17, 2016); Hosp. Pavia Perea, 352 N.L.R.B. 418, 418 n.2 (2008).
22. GVS Props., LLC, 362 N.L.R.B. No. 194, slip op. at 2 (Aug. 27, 2015).
23. *See, e.g.*, Data Monitor Sys., Inc. 364 N.L.R.B. No. 4 (May 31, 2016).

II. Obama Board's Recent Successorship Decisions

A. *Impact of State and Local Worker Retention Statutes*

In *GVS Properties, LLC*,[24] an employer acquired several properties in New York City.[25] The prior owner had subcontracted the daily service, maintenance, repair, and upkeep of the properties to a unionized contractor with a collective bargaining agreement.[26] Under the New York City Displaced Building Service Workers Protection Act (DBSWPA),[27] the purchaser had to (1) retain its predecessor's employees for a ninety-day transition period; (2) recognize seniority when laying off employees not needed to provide services at the buildings; (3) offer a right of first refusal to any laid off employees if positions again became available during the transition period; and (4) not discharge any of the predecessor's employees, except for cause, during the transition period.[28] The DBSWPA also required the successor employer to provide written performance evaluations for each retained employee at the end of the ninety-day transition period and, if his or her employment had been satisfactory, to offer continued employment under the terms and conditions established by the successor employer or as required by law.[29]

When it purchased the properties, the new owner distributed a letter to the union-represented employees announcing it would self-

24. *GVS Props.*, 362 N.L.R.B. No. 194.

25. *Id.*, slip op. at 1–2.

26. *Id.*

27. N.Y.C. Admin. Code § 22-505 (2017).

28. *GVS Props.*, 362 N.L.R.B., slip op. at 2.

29. N.Y.C. Admin. Code § 22-505 (2017). In *California Grocers Ass'n v. City of Los Angeles*, 254 P.3d 1019 (Cal. 2011), the California Supreme Court held that the NLRA did not preempt the City of Los Angeles Grocery Worker Retention Ordinance (L.A. Ord. No. 177,231, adding ch. XVIII, L.A., Cal., Mun. Code § 181.00 *et seq.*). The Los Angeles Ordinance was very similar to the DBSWPA at issue in *GVS Properties*. Among other things, it required employers succeeding to ownership of grocery stores of 15,000 square feet or larger to hire the predecessor's employees for a ninety-day transition period and prohibited successors from discharging employees without cause during the transition period. *Id.* The California Supreme Court noted that the Los Angeles Ordinance was like those adopted by states and municipalities throughout the United States that regulate the ability of certain employers summarily to replace the workforce upon acquiring a new business. *California Grocers Ass'n*, 254 P.3d at 186. *See, e.g.*, Cal. Lab. Code §§ 1060–65 (2002) (janitors and building maintenance workers); Cal. Lab. Code §§ 2500–22 (2016) (grocery workers); Gardena, Cal., Mun. Code ch. 5.10 (2006) (grocery workers); S.F., Cal., Police Code art. 33D (2006) (grocery workers); Santa Monica, Cal., Mun. Code ch. 5.40 (2006) (grocery workers); Berkeley, Cal., Mun. Code ch. 13.25 (2006) (marina workers); Emeryville, Cal., Mun. Code ch. 32, art. I, § 5-32.1.1(b) (2008) (hotel workers); L.A., Cal., Mun. Code §§ 183.00 *et seq.* (2006) (hotel workers); Oakland, Cal., Mun. Code ch. 2.36 (2004) (hospitality workers); San Jose, Cal., Mun. Code §§ 25.11.700 *et seq.* (2008) (airport workers); N.Y.C. Admin. Code § 22-505 (2016) (building service workers); Phila., Pa., Mun. Code ch. 9-2300 (2000) (service contract workers); Providence, R.I., Code of Ordinances §§ 2-18.5, 14-16 (2009) (hospitality workers and building service workers, respectively); D.C. Official Code, §§ 32-101 *et seq.* (1994) (health care, food service, and janitorial workers).

manage the properties and the employees would no longer be employed by the previous contractor.[30] The letter also stated that (1) "if the employees wished to continue working at the properties, they should inform [the new owner's] manager of operations," (2) "all of the terms and conditions of employment" under their prior employer were "revoked and nullified in their entirety," (3) the new owner "was setting new terms and conditions of employment," and (4) the employees' continued "employment would be on a temporary and trial basis for 90 days, after which time [the new owner] would determine its permanent staffing needs."[31] The new owner also enclosed a memorandum describing the new terms and conditions of employment.[32] The announced wages, hours, and benefits significantly differed from those in the predecessor's collective bargaining agreement.[33]

The day after the purchase, the new owner hired seven of eight bargaining unit employees and permanently laid off the eighth.[34] Less than three weeks later, the union requested the new owner to recognize and bargain with it as the employees' exclusive representative.[35] The new owner refused.[36] It argued "the request was premature because it would not employ a substantial and representative complement of employees until after expiration of the 90-day transition period mandated by the DBSWPA, when it would determine whether the unit employees would be offered permanent employment."[37] After the ninety-day transition period, the new owner "discharged three of the unit employees and hired four new employees."[38] It refused to recognize or bargain with the union because former union-represented employees no longer comprised a majority of its workforce.[39]

The union's resulting unfair labor practice charge required the NLRB to decide the appropriate time to determine successorship status if a state or local worker-retention statute requires employers to retain the predecessor's employees for a set period of time.[40] Specifically, the issue was whether the successorship determination should be made when the new employer assumes control over the business and hires the predecessor's employees pursuant to the retention statute or after the end of the mandatory retention period.[41] The Board

30. GVS Props., LLC, 362 N.L.R.B. No. 194, slip op. at 2 (Aug. 27, 2015).
31. *Id.*
32. *Id.*
33. *Id.*, slip op. at 2, n.8.
34. *Id.*, slip op. at 2.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*, slip op. at 2–3.
41. *Id.*, slip op. at 3.

majority concluded that the appropriate time for determining successorship status was when the new employer "assumed control over the predecessor's business and hired the predecessor's employees," even though it was required to do so by a worker-retention statute.[42] Accordingly, it held that the new employer unlawfully refused to recognize and bargain with the union because it had the required "successor majority" at the appropriate time.[43]

The majority rejected the idea that the successorship determination could not be made until after the DBSWPA-mandated retention period had ended.[44] This notion was based, in part, on *Fall River Dyeing & Finishing Corp. v. NLRB*,[45] in which the Supreme Court emphasized the central role the successor's conscious and intentional decision-making played in finding successorship status under the NLRA:

> [T]o a substantial extent the applicability of *Burns* rests in the hands of the successor. If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of § 8(a)(5) is activated. This makes sense when one considers that the employer *intends* to take advantage of the trained work force of its predecessor.[46]

Member Harry J. Johnson III noted in dissent that delaying the successorship determination until after the mandatory retention period ended and the employer achieved a stable and representative complement of employees of its choosing would best serve the careful balance struck by the Supreme Court in *Burns* and *Fall River*, without unduly burdening unions.[47]

The majority attempted to square its decision with Supreme Court precedent by finding the new owner "made the 'conscious' decision required by *Burns* and *Fall River* when it purchased the buildings and took over the predecessor's business with actual or constructive knowledge of the requirements of the DBSWPA."[48] The majority stated: "[W]e find that the [new owner's] decision to take over the business of the predecessor and assume responsibility for the management of the buildings was tantamount to a decision to retain the predecessor's employees, at least for the period required by the DBSWPA."[49] However, as Member Johnson observed: "The coercive nature of the regulation

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42. *Id.*
43. *Id.*, slip op. at 4.
44. *Id.*, slip op. at 3, 11 (position advanced by both new owner and dissenting Board member, Harry I. Johnson, III).
45. 482 U.S. 27 (1987).
46. *GVS Props., LLC*, 362 NLRB No. 194, slip op. at 8 (citing Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 40–41 (1987)).
47. *Id.*, slip op. at 10.
48. *Id.*, slip op. at 3.
49. *Id.*, slip op. at 3 n.13.

. . . necessarily negates the voluntariness upon which the successorship doctrine is based. Compliance with the DBSWPA is not a voluntary choice—if an employer does not obey its commands, it faces monetary penalties and other enforcement mechanisms."[50] Johnson also noted that by finding that "an employer makes a voluntary decision to hire its predecessor's employees when it decides to purchase a business that is subject to a local worker retention statute," the majority "erroneously conflat[ed] the decision to purchase a business with the decision to compose its work force."[51]

The majority also rejected Member Johnson's argument that its decision impermissibly gave state and local jurisdictions control over successor obligations under federal law, threatened federal preemption of state and local worker retention laws, and denied employer rights the U.S. Supreme Court had carefully articulated and protected in *Burns* and *Fall River*.[52] Member Johnson also suggested that the majority's decision could further curtail successor employer rights under the "perfectly clear" exception to the general rule that successors are free to set initial terms and conditions of employment.[53] As Johnson noted, "It is perfectly clear that employers governed by the DBSWPA and like statutes will have to retain all of their predecessor's employees."[54] Therefore, even if those statutes "do[] not mandate retention of employees under the same terms and conditions of employment they enjoyed with the predecessor, a successor will have no opportunity to exercise the *Burns* right to set new terms unless it does so prior to contracting to purchase the [predecessor's] business."[55]

The majority responded by noting that nothing in its decision implied, let alone held, "that all new employers subject to worker retention statutes are 'perfectly clear' successors," and that it was not obliterating the *Burns* right of successor employers to set their employees' initial terms.[56] The majority emphasized that under *Burns* and *Spruce Up*, an employer can escape application of the "perfectly clear" successor exception by, among other things, "clearly announc[ing] its intent to establish a new set of conditions prior to inviting former employees to accept employment."[57] That, according to the majority, was "precisely what happened here when the [new employer] simultaneously offered employment and announced new terms and conditions of employment."[58]

50. *Id.*, slip op. at 8.
51. *Id.*, slip op. at 9.
52. *Id.*, slip op. at 10.
53. *Id.*, slip op. at 9.
54. *Id.*, slip op. at 10.
55. *Id.*
56. *Id.*, slip op. at 5.
57. *Id.*
58. *Id.*, slip op. at 6.

Interestingly, however, the "perfectly clear" successor issue was not directly presented to, or decided by, the Board in *GVS* because the union had not challenged the new employer's unilateral implementation of changed terms and conditions of employment.[59] Thus, *GVS*'s holding makes clear that employers that hire all or substantially all of a unionized predecessor's employees (even if only temporarily) under a state or local worker retention statute mandate may be unable to avoid a successorship finding creating an NLRA bargaining obligation.[60] Whether such employers also will be treated as "perfectly clear" successors, unable unilaterally to set the initial terms upon which employment will be offered, was left to future cases. However, given the direction in which the Obama Board has moved successorship law, employers succeeding to operations or contracts subject to state or local worker retention laws should proceed cautiously.

B. Impact of E.O. 13495 and the SCA

In *Data Monitor Systems, Inc.*,[61] a federal contractor was awarded a contract to supply transportation services at Wright Patterson Air Force Base in Fairborn, Ohio.[62] The new contractor replaced a unionized contractor subject to collective bargaining agreements covering its maintenance, transportation, supply, and personal property employees.[63] These agreements required the employer to consider seniority when making layoff and scheduling decisions.[64]

The new contractor won the federal contract on July 18, 2014.[65] The contract provided for a transition period from August 1 to 31, during which the new contractor was to become familiar with Base operations and interview and hire employees.[66] Performance under the contract was scheduled to start on September 1.[67]

During the contract transition period, the predecessor contractor informed its employees that it had lost the contract, the new contractor would take over the contract effective September 1, and employment applications were available for those wishing to work for the new contractor.[68] Employees also were told that the new contractor would conduct employment interviews on August 6, 7, and 8, and that they should complete their applications and sign up for a specific interview time on one of those days.[69]

59. *See id.*
60. *See id.*
61. 364 N.L.R.B. No. 4 (May 31, 2016).
62. *Id.*, slip op. at 1.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*

The new contractor interviewed all of the predecessor's employees who signed-up for interviews[70] and told them that hiring decisions would be announced shortly thereafter.[71] When interviews were completed,[72] the new contractor told the predecessor employees' union that it would not hire the same number of employees as its predecessor.[73] The contractor stated it would hire the best applicants and would not use seniority as a basis for deciding whom to retain.[74] The new contractor ultimately offered employment to only sixty of approximately ninety predecessor employees.[75]

There was no dispute whether the new contractor was a NLRA successor required to recognize and bargain with the union.[76] There was a substantial continuity in the predecessor's and successor's business operations, and the predecessor's employees constituted a majority of the new contractor's workforce at the Base.[77] The parties disputed, however, whether the new contractor could unilaterally set the initial terms and conditions of employment for the predecessor employees.[78] In its unfair labor practice charge, the union asserted the new contractor had lost that right because it became a "perfectly clear" successor when it distributed employment applications to the predecessor employees without simultaneously announcing changes to existing terms and conditions of employment.[79] The charge also alleged that, by failing to use seniority when laying off and assigning hours of work to unit employees, the new contractor unlawfully changed terms and conditions of employment without bargaining.[80]

The NLRB's General Counsel argued that because all prior successors had distributed applications and invited employees to sign up for interviews without disrupting service delivery or employment, the employees perceived this as a routine process and thought their employment would continue uninterrupted with the new contractor.[81] The General Counsel also noted that the new contractor was subject to E.O. 13495, which required it to offer a right of first refusal of suitable employment to those predecessor employees whose employment would be terminated as a result of the award of the successor contract.[82] Thus, based on past experiences with various successor employers

70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*, slip op. at 2.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*

and E.O. 13495's obligation, the new contractor's invitation to the predecessor employees to submit applications essentially became a job offer.[83] According to the General Counsel, because the new contractor failed clearly to announce its intent to establish new conditions before extending "job offers," it was a "perfectly clear" successor.[84]

The Board disagreed and held that these facts did not make the new contractor a "perfectly clear" successor because the distribution of applications to the predecessor employees was not the equivalent of an offer of employment.[85] Furthermore, the new contractor had not "either actively or, by tacit inference" misled the predecessor employees into believing that they would be retained without changes in wages, hours, or terms and conditions of employment.[86]

The Board noted that, at the time the new contractor invited the predecessor employees to obtain applications and sign up for an interview, it "was in the preliminary stages of the hiring process."[87] It had not yet decided how many employees it needed under the contract or which predecessor employees it intended to hire.[88] The application documents themselves reflected that the new contractor had not yet made hiring decisions, emphasized the worker's status as "applicants," and did not in any way indicate that simply completing the application guaranteed employment with the new contractor.[89] Thus, the Board concluded that because the new contractor "did not, in any way, communicate or demonstrate an intent to retain the employees, [it] was under no obligation to make a simultaneous announcement of its intent to change terms and conditions of employment in order to avoid 'perfectly clear' successor status."[90]

The Board also found "that the obligations imposed by E.O. 13495 did not warrant a contrary result in the circumstances presented here."[91] Unlike the worker retention statute in *GVS Properties*, E.O. 13495 does not require the new contractor to retain any predecessor employees for any time period.[92] Instead, E.O. 13495 merely required the new contractor to offer predecessor employees the right of first refusal of suitable employment.[93] Moreover, it permitted the new contractor to hire fewer employees than the predecessor and generally

83. *Id.*
84. *Id.*
85. *Id.*, slip op. at 3–4.
86. *Id.*, slip op. at 3 (citing NLRB v. Spruce Up Corp., 209 N.L.R.B. 194, 195 (1974), *enforced*, 529 F.2d 516 (4th Cir. 1975)).
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*, slip op. at 4.

gave the new contractor authority to choose whom to hire.[94] Therefore, although E.O. 13495 effectively sealed the new contractor's fate as a successor, it did not automatically make it a "perfectly clear" successor.[95]

Data Monitor's facts showed that, at the time employment applications were distributed to the predecessor employees, the new contractor had not yet determined which employees would receive a right of first refusal.[96] "Nor did it know which employees, if any, would accept jobs once offers were made."[97] The Board thus concluded that the contractor's distribution of application packets and invitations to apply "cannot be viewed as the equivalent of affirmatively offering employees the right of first refusal."[98]

Data Monitor must be viewed in light of its rather unique facts. The new contractor's staffing plan called for the hiring of only two-thirds of the predecessor employees.[99] Because the new contractor did not need all or substantially all of the predecessor employees to service the contract, it legitimately used the application and interview process to assess employees' relative qualifications and identify employees to receive the right of first refusal required by E.O. 13495.[100] As such, it emphasized the individuals' status as "applicants" and avoided making any representations that would lead them to believe that completing applications was simply an administrative formality to ensure continued employment.[101]

This is substantially different from the typical scenario in which the new contractor will need to hire most, if not all, predecessor employees to meet its staffing requirements. In such a scenario, the new contractor knows, from the time the contract is awarded, it will offer a right of first refusal to all or substantially all of the predecessor employees. Thus, if a new contractor wants to avoid "perfectly clear" successor status under existing Board law, it must announce its intent to change terms and conditions of employment by no later than the time it affirmatively offers predecessor employees the right of first refusal required by E.O. 13495.[102] However, even that may be too late under new direction in which the Obama Board has moved the "perfectly clear" successor analysis.

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94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*, slip op. at 9.
100. *Id.*, slip op. at 9–10.
101. *Id.*
102. *Id.*, slip op. at 2.

C. *Shift in Time for Determining Perfectly Clear Successor Status*

Under *Burns* and *Spruce Up*, an employer's status as a perfectly clear successor generally is determined at the time it "invit[es] former employees to accept employment."[103] To avoid a "perfectly clear" successor finding, an employer typically must announce its intent to establish new employment conditions before or at the time it extends employment offers to predecessor employees.[104] However, in three 2016 cases—*Adams & Associates, Inc.*,[105] *Creative Vision Resources, LLC*,[106] and *Nexeo Solutions, LLC*[107]—the Board shifted the temporal focus to a potentially much earlier time: when the successor expresses an intent to retain the predecessor employees.[108]

In all three cases, the Board found that the employers' announcement of intent to change employment conditions was not timely.[109] That made them perfectly clear successors unable to set unilaterally the initial terms and conditions on which employment would be offered to predecessor employees.[110] *Adams & Associates* was unanimously decided by three Democratically appointed Board members. A Democratically appointed majority decided *Creative Vision* and *Nexeo Solutions*, eliciting dissents from the lone Republican appointee.[111]

In *Adams & Associate*s, the administrative law judge (ALJ) found the employer was a NLRA successor, but not a "perfectly clear" successor.[112] The successor employer received a federal contract to provide residential, counseling, career preparation, career transition, recreation, and wellness services at a Job Corps Center in Sacramento, California.[113] The prior contractor had a collective bargaining agreement with the American Federation of Teachers.[114] In filling positions, the successor contractor was required to follow E.O. 13495 by offering a right of first refusal to the predecessor's qualified employees.[115]

103. NLRB v. Spruce Up Corp., 209 N.L.R.B. 194, 195, *enforced*, 529 F.2d 516 (4th Cir. 1975).

104. *Id.*

105. 363 N.L.R.B. No. 193 (May 17, 2016).

106. 364 N.L.R.B. No. 91 (Aug. 26, 2016).

107. 364 N.L.R.B. No. 44 (July 18, 2016).

108. *Adams*, 363 N.L.R.B., slip op. at 2; *Creative Vision*, 364 N.L.R.B., slip op. at 3; *Nexeo*, 364 N.L.R.B., slip op. at 6.

109. *Adams*, 363 N.L.R.B., slip op. at 4–5; *Creative Vision*, 364 N.L.R.B., slip op. at 5; *Nexeo*, 364 N.L.R.B., slip op. at 6–7.

110. *Adams*, 363 N.L.R.B., slip op. at 5; *Creative Vision*, 364 N.L.R.B., slip op. at 7; *Nexeo*, 364 N.L.R.B., slip op. at 13.

111. *Adams*, 363 N.L.R.B., slip op. at 1; *Creative Vision*, 364 N.L.R.B., slip op. at 7 (Member Miscimarra, dissenting); *Nexeo*, 364 N.L.R.B., slip op. at 15 (Member Miscimarra, dissenting).

112. *Adams*, 363 N.L.R.B., slip op. at 1.

113. *Id.*

114. *Id.*

115. *Id.*, slip op. at 14.

Early in the transition process, the successor contractor informed the predecessor's employees it would offer a right of first refusal, with certain exceptions, to eligible and qualified employees who worked on the predecessor's contract during its last thirty days.[116] The successor contractor also informed the employees (1) it might reduce the size of the current workforce and, therefore, only a portion of the existing eligible workforce might receive employment offers; and (2) if the successor contractor believed an employee's job performance had been unsatisfactory, the employee would not receive an employment offer.[117]

The successor contractor gave qualified incumbents the right to apply for positions before outside applicants were considered.[118] The successor contractor interviewed incumbent applicants and offered positions to those determined to be qualified.[119] To accept employment, the employees needed to sign and return offer letters to the successor contractor before commencing work.[120] The offer letters: (1) specified the employees' wage rates, which were the same as those of the predecessor; (2) stated that employees would receive all benefits provided by the successor, as defined in its human resources policies; (3) set forth employees' schedules, which for some differed from their schedules with the predecessor; (4) stated that the successor reserved the right to adjust work schedules for business necessity or to meet program service needs; and (5) stated that employment would be "at-will," "there is no written or implied contract for continued employment," and the company "is free to terminate your employment at any time for any reason except as may be prohibited by law."[121]

Before commencing work, all successful applicants also were required to sign employment agreements.[122] The employment agreements provided, among other things, that (1) employment would be at-will, (2) employees would be subject to the successor's disciplinary policies and procedures, and (3) employees would be required to resolve employment-related disputes through mandatory arbitration.[123]

Hiring decisions were made throughout the contract transition period.[124] Decisions were based on various considerations, including completed interview evaluation forms, annotated employee lists containing the predecessor's recommendations, and instructions from the successor's corporate office.[125] When the successor contractor

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*, slip op. at 2.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*, slip op. at 14.
125. *Id.*

began operating the Job Corps Center, a majority of its employees had been bargaining unit employees of the predecessor.[126] The ALJ found the new contractor was a NLRA successor and was obligated to recognize and bargain with the employees' union representative.[127]

However, the ALJ rejected the General Counsel's argument that the new contractor was a "perfectly clear" successor that violated the NLRA by setting initial terms of employment without bargaining with the union.[128] According to the ALJ, the new contractor did not actively or tacitly indicate that all employees would be retained. Furthermore, although the new contractor had to comply with E.O. 13495, the regulatory framework applicable to the transition did not mandate that all predecessor employees be retained. E.O. 13495's right of first refusal did not mandate blanket offers to all employees. The applicable regulations permitted a successor to refuse to offer employment to incumbent employees when, for example, there was credible information of unsatisfactory job performance with the prior contractor.[129]

The ALJ also found that, even if the new contractor had evinced an intention to hire all incumbent applicants, it had clearly announced its intent to establish new conditions.[130] The ALJ noted that, prior to beginning operations, the new contractor had formulated its own operation plan and told employees there would be a reduction in staff.[131] In addition, the new contractor set forth in all hiring agreements wages, shifts, mandatory arbitration for employment disputes, at-will employment, a new disciplinary system, and new insurance.[132] Accordingly, the ALJ concluded: "Based on these facts, I find that [the new contractor] was not a 'perfectly clear' successor as envisioned in *Burns* and as limited by *Spruce Up*."[133] The ALJ also declined the General Counsel's invitation to reexamine *Spruce Up* in light of "the number and scale of corporate mergers and acquisitions in the 40 years since it was decided" and the assertion that "the majority holding in *Spruce Up* misconstrued *Burns* and has led to inconsistent results."[134] The ALJ noted, "It may be that this argument will be addressed by the Board but administrative law judges are bound by extant law."[135]

The Board did not take the opportunity to directly reexamine *Spruce Up*. Instead, it found that the ALJ improperly concluded that

126. *Id.*, slip op. at 15.
127. *Id.*, slip op. at 22.
128. *Id.*, slip op. at 21–22.
129. *Id.*
130. *Id.*, slip op. at 22.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*

the new contractor was not "a 'perfectly clear' successor within the meaning of *Spruce Up* . . . ."[136] In discussing *Spruce Up*, however, the Board shifted the timing of the perfectly clear successor analyses from when the successor invites the employees to accept employment to when it expresses an intent to retain the predecessor's employees. Indeed, in *Adams & Associates*, the Board held that "to avoid 'perfectly clear' successor status, a new employer must clearly announce its intent to establish a new set of conditions prior to, or simultaneously with, its *expression of intent to retain the predecessor's employees.*"[137]

Applying this standard, the Board concluded that the new contractor became a "perfectly clear" successor several weeks before it extended employment offers to any of the predecessor employees.[138] The Board focused on the new contractor's initial meeting with predecessor employees to announce the transition and inform them about the hiring process.[139] At this meeting, the new contractor's executive director stated that employees had been "doing a really good job," that the company "didn't want to rock the boat," and that it "wanted a smooth transition."[140] When the meeting opened for questions, an employee who identified herself as the union president asked about the available positions and what might prevent an incumbent employee from being hired.[141] The contractor's executive director responded that, "aside from disciplinary issues, he was 99 percent sure that [they] would all have a job."[142] He also noted, however, that the company planned to reduce the total number of positions at the Center from twenty-five to fifteen and to create a new position to help meet student-staff ratios.[143] Employees at the meeting were shown copies of the job descriptions for available positions and told they could apply for up to two. They were given twenty-four hours to return completed applications.[144]

According to the Board, these statements clearly "expressed an intent to retain a sufficient number of incumbent [employees] to continue the Union's majority status in the [contractor's] new workforce."[145] Therefore, under the Board's interpretation of *Burns* and *Spruce Up*, to preserve its authority to set initial terms and conditions of employment unilaterally and avoid "perfectly clear" successor status, the new contractor was required clearly to announce its intent

136. *Id.*, slip op. at 1.
137. *Id.*, slip op. at 3–4 (emphasis added).
138. *Id.* slip op. at 4–5.
139. *Id.*, slip op. at 2.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*, slip op. at 4.

to establish new conditions at or before the meeting at which these statements were made.[146] The Board found the new contractor did not inform the employees that their jobs would involve new terms until several weeks later, when it distributed offer letters and employment agreements to successful applicants.[147] Therefore, the new contractor became a "perfectly clear" successor at the initial meeting with employees.[148]

The Board took the same approach three months later in *Creative Vision*,[149] this time over the dissent of Republican Board Member, Philip A. Miscimarra.[150] In *Creative Vision*, the Board majority overruled the ALJ's determination that a new employer was not a "perfectly clear" successor under *Spruce Up*.[151] The principal source of disagreement between the majority and the dissent was the appropriate time to assess the new employer's status as a perfectly clear successor.[152] As in *Adams & Associates*, the majority focused on the time when the new employer expressed intent to retain predecessor employees.[153] In contrast, Member Miscimarra, like the ALJ, focused on the time when the new employer invited predecessor employees to accept employment.[154] The different conclusion that each side reached was directly related to their choice of the appropriate time for assessing "perfectly clear" successorship status.

As Member Miscimarra explained, the new employer's hiring process began on or about May 19, 2011, but remained in a state of flux until June 2 when the employees accepted employment by beginning work.[155] "Thus, in determining whether the [new employer] fulfilled its obligation under *Spruce Up* to clearly announce to the [incumbent employees] its intention to set new terms and conditions of employment prior to or simultaneously with inviting them to accept employment, we must examine what the [new employer] communicated to the [incumbent employees] *on or before June 2*."[156] Based on the following evidence, he agreed with the ALJ that the new employer "provided timely notice to the [incumbent employees] of its intention to set new terms and conditions of employment."[157]

146. *Id.*
147. *Id.*
148. *Id.*
149. 364 N.L.R.B. No. 91 (Aug. 26, 2016).
150. *Id.*, slip op. at 9 (Member Miscimarra, dissenting) ("Applying the standard set forth in *Spruce Up* . . . I would find . . . that the facts establish that the [new employer] was not a perfectly clear successor.").
151. *Id.*, slip op. at 1.
152. *Id.*, slip op. at 10 (Member Miscimarra, dissenting).
153. *Id.*, slip op. at 6–7.
154. *Id.*, slip op. at 10–11.
155. *Id.*, slip op. at 10.
156. *Id.*
157. *Id.*

First, starting in May, the new employer distributed employment applications to predecessor workers with W-4 tax withholding forms attached.[158] The predecessor treated workers as independent contractors and, accordingly, did not withhold taxes from their pay.[159] The ALJ and Miscimarra found that by including tax forms, the new employer signaled a fundamental change in employees' terms and conditions of employment—namely, that if they accepted employment with the new employer, they would no longer work as independent contractors and instead become employees subject to tax withholding.[160] Furthermore, because the employees received and signed the applications and accompanying tax forms, they were put on notice of the different employment terms offered by the new employer.[161]

Second, prior to June 2, the new employer informed approximately thirty percent of the predecessor workers of changes to terms and conditions of employment, including the pay rate, and that the employer would deduct taxes and social security from employees' paychecks.[162]

Third, on June 2, before work started, one of the new employer's supervisors communicated to all of the workers the new terms and conditions of employment, which they were free to accept or refuse.[163] These new terms included a new pay rate, the deduction of federal and state taxes, and a number of new employment standards and safety rules. Some employees refused to work upon learning these terms.[164] A sufficient number remained, however, to staff the operations.[165] According to Miscimarra, once the supervisor announced the new terms and conditions of employment on June 2, "the 'perfectly clear' exception, already inapplicable by virtue of the distributed tax withholding forms, was rendered doubly inapplicable."[166]

Member Miscimarra also noted that successor employers must recognize and bargain with the union under two conditions: "(1) [T]he union demands recognition or bargaining, and (2) the successor is engaged in normal operations with 'a substantial and representative complement' of employees, a majority of whom were employed by the predecessor."[167] In *Creative Vision*, the union had not made a demand for recognition or bargaining until June 6. According to Miscimarra, this was "the earliest point in time when the [new employer] could be

158. *Id.*, slip op. at 1.
159. *Id.*, slip op. at 11.
160. *Id.*
161. *Id.*
162. *Id.*, slip op. at 2.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*, slip op. at 12 (Member Miscimarra, dissenting).
167. *Id.*

deemed a 'successor' for purposes of Section 8(a)(5)" and "independently preclude[d] a finding that the [new employer] was a 'perfectly clear' successor on or before June 2, when the [it] commenced operations after indicating . . . that there would be different employment terms."[168]

The Board majority viewed the law and facts differently. According to the majority, the ALJ and Member Miscimarra improperly "ignored Board decisions clarifying that, to preserve its authority to set initial terms and conditions of employment unilaterally, a successor must clearly announce its intent to establish a new set of conditions prior to, or simultaneously with, its expression of intent to retain the predecessor's employees."[169] The majority added further:

> [A] subsequent announcement of new terms, even if made before formal offers of employment are extended or the successor commences operations, will not vitiate the bargaining obligation that is triggered when a successor expresses an intent to retain the predecessor's employees without making it clear that their employment is conditioned on the acceptance of new terms.[170]

According to the Board majority, the ALJ's own factual findings established that the new employer expressed intent to retain predecessor employees between mid-May and June 1.[171] The ALJ stated that, because the transition would be an abrupt shift, the new employer had to know in advance if it had enough employees.[172] In addition, the new employer made no effort to hire employees from other sources.[173] Furthermore, although the new employer asked the predecessor workers to complete employment applications and W-4 forms, it did not interview any applicants, examine qualifications, or check references.[174] Therefore, the ALJ had "no doubt" the new employer "intended to retain the [predecessor's workers] as its new work force and that 'filling out the applications and tax form was a formality.'"[175]

The majority disagreed with Member Miscimarra and the ALJ's assessment of the new employer's communications with the predecessor workers prior to June 2.[176] According to the majority, the inclusion of the W-4 forms with job applications, without explanation, let alone an express announcement that taxes would be withheld from the employees' pay, "was too ambiguous."[177] The majority thought it insufficient to make "clear [to] a reasonable employee in like circum-

168. *Id.*, slip op. at 12 (Member Miscimarra, dissenting).
169. *Id.*, slip op. at 3.
170. *Id.*
171. *Id.*, slip op. at 3–4.
172. *Id.*, slip op. at 4.
173. *Id.*
174. *Id.*
175. *Id.*
176. *See id.*, slip op. at 4 n.12, 5.
177. *Id.*, slip op. at 4 n.12.

stances . . . that continued employment [was] conditioned on acceptance of materially different terms from those in place under the predecessor."[178] The majority also concluded that the other evidence on which Member Miscimarra and the ALJ relied showed that, prior to June 2, the successor discussed new employment terms with only a relatively small number of predecessor workers.[179] Furthermore, although the new employer's supervisor announced the new employment terms to all predecessor workers on June 2, that announcement "came too late to remove the [new employer] from the 'perfectly clear' exception" because it already expressed the intent to retain the predecessor workers.[180]

The majority also disagreed with Miscimarra's conclusion that an employer cannot become a "perfectly clear" successor before the union makes a bargaining demand.[181] The majority observed that the rule Miscimarra invoked was developed in a very different context.[182] In *Fall River Dyeing*,[183] the Supreme Court addressed when the bargaining obligation was triggered if there was a hiatus between the closing and reopening of an enterprise or a successor gradually expanded its workforce over a period of time.[184] According to the majority in *Creative Vision*, "nothing in the language or reasoning of *Fall River* supports the extension of these criteria to the 'perfectly clear' successor context."[185] Indeed, "application of these criteria would eviscerate the 'perfectly clear' exception, which is intended to promote bargaining *before* the successor hires the predecessor's employees and fixes initial terms, in circumstances where the successor intends to retain as its work force a majority of the predecessor's employees."[186]

In *Nexeo Solutions*,[187] the Board considered whether the purchaser of a distribution center's assets that operated the business in basically the same form, and retained all the predecessor's bargaining unit employees without a break in service, was a "perfectly clear" successor.[188] The same Board majority that decided *Creative Vision* disagreed with the ALJ's decision that the *Nexeo Solutions* purchaser was not a "perfectly clear" successor.[189] The majority concluded that the purchaser became a "perfectly clear" successor because it was

178. *Id.*
179. *See id.*, slip op. at 5.
180. *Id.*
181. *Id.*, slip op. at 6.
182. *Id.*
183. 482 U.S. 27 (1987).
184. *Id.* at 29–30; *see also* Creative Vision, 364 N.L.R.B. No. 91, slip op. at 7 (Aug. 26, 2016).
185. *Creative Vision*, 364 N.L.R.B., slip op. at 6–7.
186. *Id.*, slip op. at 7.
187. 364 N.L.R.B. No. 44 (July 18, 2016).
188. *Id.*, slip op. at 1.
189. *Id.*, slip op. at 14–15.

"abundantly clear from the outset that the [purchaser] planned to retain the unit employees."[190]

To support its conclusion, the Board majority noted that under a November 5, 2010 purchase agreement, the purchaser (1) committed to offer employment to all the predecessor employees; (2) agreed that the purchase would not cause any employee to be terminated; and (3) guaranteed that, for a period of eighteen (18) months after the closing date, the predecessor employees who accepted the purchaser's employment offer would receive pay and benefits no less favorable than those provided immediately prior to the closing date.[191] On November 7, 2010, the predecessor employer told its employees they "will transfer to the new business."[192] However, "[t]here was no mention at that time that the [purchaser] intended to establish a new set of conditions."[193]

Under the majority's interpretation of *Burns* and *Spruce Up*, the purchaser became a "perfectly clear" successor, with an obligation to bargain over initial terms, on November 7, 2010.[194] The majority further supported its conclusion by relying on a November 8 communication in which the predecessor employer (1) "reiterated the message that all or substantially all of the . . . employees would be retained"; and (2) noted that the terms of the purchase agreement required the purchaser "to provide, to each transferred employee, base salary and wages that are no less favorable than those provided prior to closing[,] and other employee benefits that are substantially comparable in the aggregate to compensation and benefits as of January 1, 2011."[195]

Because the Board majority concluded that the purchaser became a "perfectly clear" successor on November 7, it generally disregarded as *untimely* all of the subsequent communications between the purchaser and the predecessor employees from November 7 to March 31, 2011 (when the purchase of assets was completed) and April 1, 2011 (when the purchaser began operating the business).[196] These communications included a letter distributed during a February 16, 2011, meeting in which the purchaser informed the predecessor employees that (1) it would not assume any of the predecessor's collective bargaining agreements; (2) it had elected "not to adopt, as initial terms and conditions of employment, any of the provisions contained in any" of those agreements; (3) if the employees accepted the purchaser's offer of employment, they no longer would "participate in the multi-

190. *Id.*, slip op. at 7.
191. *See id.*, slip op. at 7–8.
192. *Id.*, slip op. at 7.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*, slip op. at 8–9.

employer pension plan" maintained by the predecessor employer; and (4) instead, the employees would be covered by the purchaser's 401(k) plan.[197] On February 17, 2011, the purchaser also mailed employment offer letters, which were accompanied by a description of the purchaser's health insurance, life insurance, and 401(k) plans.[198]

Member Miscimarra would have affirmed the ALJ's finding that the purchaser was not a "perfectly clear" successor and, accordingly, "acted lawfully when it announced different initial terms and conditions of employment in job-offer letters that [the purchaser] mailed to [the predecessor] employees on February 17, 2011."[199] In Miscimarra's view, the General Counsel failed to satisfy his burden under *Spruce Up*.[200] He found the General Counsel's evidence insufficient to establish either that the purchaser had "misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment," or that it "failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment."[201] To the contrary, according to Miscimarra, "the [purchaser] never invited [the predecessor's] employees to accept employment without clearly announcing its intent to set new employment terms."[202]

Miscimarra listed several factors to support his conclusion that the purchaser was not a "perfectly clear" successor.[203] The November 7 and November 8 communications relied on by the majority did not constitute invitations by the purchaser to accept employment under *Spruce Up* because they were made by the predecessor (i.e., the seller).[204] As Miscimarra observed: "*Spruce Up* requires an invitation *by the successor employer*, not a statement by some other party, such as the predecessor employer, about that party's own expectations."[205] Furthermore, Miscimarra concluded there was insufficient evidence to attribute the predecessor's statements to the purchaser based on agency principles.[206]

Member Miscimarra also disagreed with the majority's claim that the purchaser invited employees to accept employment without conveying its intent to establish new terms when it stated it "[was] not planning job reductions" in early January 2011.[207] Miscimarra noted

197. *Id.*, slip op. at 4.
198. *Id.*
199. *Id.*, slip op. at 15.
200. *Id.*, slip op. at 20–21.
201. *Id.*, slip op. at 21.
202. *Id.*
203. *Id.*, slip op. at 21–22.
204. *Id.*, slip op. at 21.
205. *Id.*
206. *Id.*
207. *Id.*, slip op. at 22.

that immediately after that statement, the purchaser told employees that "[w]e are working hard to flesh out final plans for our new company's compensation and benefits program" and that it "hoped to have final resolution of that package in the near future."[208] To Miscimarra, this statement itself "clearly informed [the predecessor] employees of [the purchaser's] 'intent to establish a new set of conditions,'" as required by *Spruce Up*.[209] Therefore, according to Miscimarra, the evidence failed to support the majority's finding that the predecessor's employees reasonably would have thought the purchaser intended to retain them on the predecessor's terms and conditions.[210]

Additionally, Member Miscimarra disagreed that the purchase agreement supported finding the purchaser was a "perfectly clear" successor.[211] Initially, Miscimarra noted that the purchase agreement left the purchaser free to implement benefits and benefit plans that differed from the predecessor's as long as they were "substantially comparable in the aggregate to those provided by [the predecessor]."[212] The purchase agreement allowed the purchaser to implement different initial terms and conditions, as it did when it substituted a 401(k) plan for a union-sponsored pension plan and altered health insurance benefits.[213] Therefore, as Miscimarra observed: "The possibility was real that some [of the predecessor's] employees would seek employment elsewhere rather than accepting a different mix of benefits (and the possibility of completely different working conditions after 18 months)."[214]

Finally, "and dispositively," according to Miscimarra, "it [was] undisputed that [the purchaser] did not furnish the Purchase Agreement to the Union or employees until March 2011, *after* it had clearly announced different initial terms and conditions in its February 17 offer letters to [the predecessor] employees."[215] Hence, "the Purchase Agreement itself cannot properly be viewed as an 'invit[ation] . . . to accept employment' within the meaning of *Spruce Up*."[216] To Miscimarra, the Board should have considered February 17—not November 7—as the date to determine if the purchaser was a "perfectly clear" successor. Because the purchaser announced different terms and conditions of employment by February 17, it was not a "perfectly clear" successor under *Spruce Up*.[217]

208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*

In *Adams & Associates*, *Creative Vision*, and *Nexeo Solutions*, the Board majority focused on the date the successor employer expressed intent to retain the predecessor's employees—not when it invited employees to accept employment—as the temporal trigger for a "perfectly clear" successor finding. Thus, under current law, to avoid "perfectly clear" successor status, a successor employer must clearly announce its intent to change the terms and conditions of employment long before the date it extends employment offers or rights of first refusal to predecessor employees. If a successor to a unionized contractor on a federal service contract knows from the outset that it will need all or substantially all of the predecessor's employees, is obligated by E.O. 13495 to offer a right of first refusal to the predecessor's employees, and is obligated by the SCA to offer those employees an aggregate wage and benefit package no less than the predecessor's, the successor should clearly announce its intent to change terms and conditions of employment at or near the time it is first awarded the federal contract.

The same preventive action is necessary for a successor employer that, as in *GVS Properties*, is required to hire predecessor employees under a state or local worker retention law. Under the rationale of the *GVS* majority, the "decision" to retain predecessor employees effectively is made when an employer chooses to purchase a business or operation with actual or constructive knowledge of the requirements of a state or local retention law. Therefore, despite the majority's efforts to assuage the dissent's concerns, it is not difficult to see how the Obama Board could find an employer that purchases a business or operation subject to a worker retention law automatically would become both a "successor" and a "perfectly clear" successor, unless the employer clearly announces its intent to change terms and conditions of employment in its first communication with employees. Indeed, the dissenting Board member in *GVS* asserted that under the majority's analysis, the successor would need to make the announcement "prior to contracting to purchase the [predecessor's] business."[218] If a successor delays the announcement until it offers employment or a right of first refusal to predecessor employees, it risks losing its ability unilaterally to set initial terms and condition of employment under *Burns*.

III. What the Future Holds

Only three of the five NLRB positions are currently filled.[219] As of April 2017, the Board consists of Member Mark G. Pearce, a Democratic appointee whose term expires on August 27, 2018; Member Lauren McFerran, a Democratic appointee whose term expires on Decem-

218. GVS Props., LLC, 362 N.L.R.B. No. 194, slip op. at 10 (Aug. 27, 2015).

219. *Who We Are: The Board*, NAT'L LABOR RELATIONS BOARD, https://www.nlrb.gov/who-we-are/board (last visited Mar. 7, 2017).

ber 16, 2019; and Acting Chairman Philip A. Miscimarra, a Republican appointee whose term expires on December 16, 2017.[220] Richard F. Griffin, Jr. currently serves as the NLRB's General Counsel[221] and is responsible for investigating and prosecuting unfair labor practice cases and for the general supervision of case processing in the NLRB field offices.[222] Mr. Griffin previously served as General Counsel for the International Union of Operating Engineers.[223] He was appointed by President Obama on November 4, 2013, for a four-year term.[224]

President Trump started his term with the opportunity to fill the two vacant Board positions. In June 2017, he nominated two Republican candidates—Marvin Kaplan and William Emanuel—to fill the vacant positions.[225] He will also have the opportunity to fill the General Counsel position in early November 2017. Appointments to these positions require Senate confirmation. However, given Republican control of the Senate, President Trump's appointments will likely be approved. Therefore, Republican appointees soon will comprise a majority of Board members.

Such a majority could end the Obama Board's approach to successorship issues. The views expressed by the dissenting Board members in *GVS Properties*, *Creative Vision*, and *Nexeo Solutions* could be adopted as the prevailing law by the new majority. This could cause the following effects:

- The Board would reverse *GVS Properties*. The determination of a successor employer's obligations under the NLRA would not be controlled by state and local worker retention laws. An employer's status as a "successor" would not be determined until after the mandated retention period.

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220. Mark Gaston Pearce, *Who We Are: The Board*, NAT'L LABOR RELATIONS BOARD, https://www.nlrb.gov/who-we-are/board/mark-gaston-pearce (last visited Mar. 7, 2017); Lauren McFerran, *Who We Are: The Board*, NAT'L LABOR RELATIONS BOARD, https://www.nlrb.gov/who-we-are/board/lauren-mcferran (last visited Mar. 7, 2017); Philip A. Miscimarra, *Who We Are: The Board*, NAT'L LABOR RELATIONS BOARD, https://www.nlrb.gov/who-we-are/board/philip-miscimarra (last visited Mar. 7, 2017).

221. Richard F. Griffin, Jr., *Who We Are: The General Counsel*, NAT'L LABOR RELATIONS BOARD, https://www.nlrb.gov/who-we-are/general-counsel/richard-f-griffin-jr (last visited Mar. 7, 2017).

222. *Who We Are: The General Counsel*, NAT'L LABOR RELATIONS BOARD, https://www.nlrb.gov/who-we-are/general-counsel (last visited Mar. 7, 2017).

223. Griffin, *supra* note 221.

224. *Id.*

225. Mr. Kaplan currently is Chief Counsel at the Occupational Safety and Health Review Commission. He previously worked for the House Republicans on various education and oversight committees. Mr. Emanuel is a management-side labor attorney with the law firm of Littler Mendelson P.C. See Josh Eidelson, Chris Opfer, and Ben Penn, *Trump to Nominate Kaplan, Emanuel for Key Labor Board Spots*, BLOOMBERG BNA NEWS (May 11, 2017), https://www.bna.com/trump-nominate-kaplan-n73014450763/.

- The Board would return to a strict construction of the "perfectly clear" successor caveat to the *Burns* rule—that successor employers ordinarily are free to set initial terms and conditions of employment. The General Counsel would bear the burden of proving that facts warrant application of the caveat as clarified by *Spruce Up*; the Board would return the temporal focus of the "perfectly clear" determination to the time when the successor invites predecessor employees to accept employment; and the Board would adopt a more expansive view of the types of communications sufficient to constitute a clear announcement of changes in terms and conditions of employment.
- The Board would apply the "union demand" requirement in the successorship context. The successor's obligation to recognize and bargain with the union that represented the predecessor employees would not commence until the union demanded recognition or bargaining. It would not occur automatically, as a matter of law, when the employer becomes a statutory "successor" under *Burns*.

A new General Counsel appointed by President Trump will likely abandon efforts to have the Board reexamine *Spruce Up* and stop using an employer's compliance with mandates of E.O. 13495 and the SCA to contend the employer is a "perfectly clear" successor. In addition, President Trump could overturn E.O. 13495, thereby eliminating it altogether from the NLRB's successorship analysis.

Conclusion

President Obama and the Obama Board have fundamentally (yet relatively quietly) changed federal successorship law without expressly overruling a single NLRB precedent. Instead, the Board used a combination of (1) issuance of E.O. 13495; (2) a change in Board interpretation and application of longstanding NLRB law regarding successorship and "perfectly clear" successors; (3) the Board's willingness to permit state and local worker retention statutes to trump rights traditionally available to successor employers under federal labor law; (4) the Board's shift in the time when "perfectly clear" successor status is determined; and (5) the Board's narrow view of the types of communications sufficient to "clearly announce" the intention to change initial terms and conditions of employment and, thus, avoid a "perfectly clear" successor finding. Collectively, these changes made it more likely that a successor employer not only will inherit the predecessor's collective bargaining obligations, but also be unable to set the initial terms and conditions on which it will offer employment.

Like President Obama's other labor and employment initiatives, the recent shift in successorship law is subject to reversal by the Trump administration. It is important to remember, however, that successorship law—set forth in *GVS Properties*, *Adams & Associates*, *Creative Vision*, and *Nexeo Solutions*—does not change automatically with the arrival of the new administration, appointment of new Board members, or appointment of a new General Counsel. Because NLRB law is largely case-driven, the current law will remain in effect until new cases involving the key successorship issues work their way up to the reconstituted Board for decision. In the meantime, employers will continue to be subject to the restrictions imposed by the Obama Board's successorship decisions. Employers that fail to comply with those restrictions will do so at their peril.

Sarbanes-Oxley, Dodd-Frank, Retaliation, and Reward: Representing Clients in the Age of the Whistleblower

Daniel J. Hurson*

Introduction

On what now seems a routine basis, we learn of a corporate scandal, a major Securities and Exchange Commission (SEC) settlement, or a large whistleblower award. Whistleblower lawsuits are becoming increasingly common. Employment lawyers may eventually become involved in a whistleblower or retaliation case, representing either the whistleblower or the employer. This Article discusses how whistleblower and retaliation issues affect whether the client should become an SEC whistleblower, pursue a retaliation case, or both. Attorneys representing these clients must be familiar with the complex SEC whistleblower rules and claims process. Attorneys must also understand the judicial conflicts within the federal courts regarding when a whistleblower qualifies as a claimant in Dodd-Frank[1] or Sarbanes-Oxley Act (SOX)[2] retaliation cases. The chances unwittingly to make things more difficult for a client, or to face dismissal over a technical issue, are abundant.

This Article provides employment lawyers facing an SEC whistleblower case the benefit of my experience as a whistleblower lawyer for multiple clients during the first five years of the program. Part I outlines key aspects of the SEC Whistleblower Program from a practitioner's perspective. Part II describes a hypothetical whistleblower client and her story as it might be presented to a lawyer from whom she seeks representation. Part III discusses whether this client should become a whistleblower. Part IV considers whether she should "report

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1. 15 U.S.C. § 78u-6 (2012).
2. 15 U.S.C. § 1514A(a) (2012).

up" internally through her company's legal or compliance process, and Part V considers whether she can remain anonymous. Part VI presents several options the client may pursue, including whether she can file an anonymous SEC whistleblower complaint, file a whistleblower lawsuit in federal court, or "report up" and consider pursuing a retaliation case in the future. Part VII reviews the merits of filing a SOX retaliation case, a Dodd-Frank retaliation case, or both.

I. The SEC Whistleblower Process: Big Money for a Patient Few, Frustration for Others[3]

Employment whistleblowing and retaliation law has changed dramatically since Dodd-Frank launched the "age of the whistleblower" in 2011.[4] The SEC program has, as of January 2017, awarded more than $149 million to forty-one whistleblowers, and reached settlements worth $900 million in those cases.[5] Since August 2011, 18,334 tips have poured into the agency, and multimillion-dollar awards now seem more frequent than lottery jackpots.[6]

However, as an attorney who has represented SEC whistleblowers since the beginning of the program, I am well aware that tips resulting in awards are vastly outnumbered by those never acted upon (many for good reason) or those waiting for the seemingly endless process of evaluation, investigation, settlement, claim submission, and award decisions by the SEC.[7] In my experience, this process can take years. The SEC, as a law enforcement agency, welcomes and encourages tips and

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3. The CFTC could also factor into the SEC whistleblower facts because the commissions have nearly identical whistleblower programs. *Compare* 7 U.S.C. § 26 (2012), *with* 15 U.S.C. § 78u-6 (2012). To date, the SEC has made far more awards, but the CFTC's wide jurisdiction over commodities and derivatives should not be overlooked. Its massive settlements in benchmark fixing cases suggest the potential of enormous awards for future whistleblowers in similar cases. *Compare* Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Announced Fourth Whistleblower Award (July 26, 2016), http://www.cftc.gov/PressRoom/PressReleases/pr7411-16 (CFTC issued fourth award in July 2016), *with* U.S. SECURITIES EXCHANGE COMMISSION, 2015 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf (last visited Mar. 23, 2017) (SEC paid out 30 awards in 2015).

4. *See Corporate Crime, The Age of the Whistleblower*, ECONOMIST (Dec. 3, 2015), http://www.economist.com/news/business/21679455-life-getting-better-those-who-expose-wrongdoing-companies-continue-fight (discussing the changing landscape for whistleblowers after Dodd-Frank).

5. Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces $7 Million Whistleblower Award (Jan. 23, 2017), https://www.sec.gov/news/pressrelease/2017-27.html.

6. 2016 SEC ANN. REP. TO CONG. ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 23, https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2016.pdf. [hereinafter 2016 ANNUAL REPORT].

7. In its 2016 Annual Report, the SEC Office of the Whistleblower indicated it "[wa]s tracking over 800 matters in which a whistleblower's tip has caused a Matter Under Inquiry or investigation to be opened or which have been forwarded to Enforcement staff for review and consideration in connection with an ongoing investigation." *Id.* at 27.

vigorously supports whistleblowers. The whistleblower, however, is not exactly a partner in the process, but instead is an important provider of evidence, one piece of a much larger picture.

Moreover, the whistleblower rules are complex, with many "off ramps" that can derail a potential award.[8] The agency's lawyers, while welcoming to whistleblowers, can share neither their strategy nor progress. Nor can they provide much information about whether the matter is moving toward a favorable conclusion, has been put on the shelf, or was dead on arrival.[9] It is largely a one-sided process in which the whistleblower provides the SEC with information, and the commission proceeds without communicating with the whistleblower unless more information is needed. Then, another set of senior Enforcement Division lawyers (Claims Review staff) determines if the whistleblower's tip meets all necessary conditions for an award, and if so, what percentage of sanctions the whistleblower will be awarded. The SEC itself makes the final determination.[10] The Preliminary Determination is made with input from the Enforcement Division lawyers who handled the case and the SEC Office of the Whistleblower,[11] but neither you nor your client will likely ever meet those serving as the "judge and jury" for the claim. When providing advice, an attorney representing a client deciding whether to become a whistleblower, file a retaliation lawsuit, or both should consider how these decisions could have a life-altering impact for the client.

Whistleblowers face key decisions early in the process, such as whether to file a retaliation claim under SOX or Dodd-Frank, betting on a whistleblower claim, or both (or neither).[12] If relying on an eventual whistleblower claim, the client must consider whether to remain anonymous. Tricky situations may arise if the SEC conducts an investigation while the whistleblower remains employed at the target company, essentially as a "mole" laying low while fellow employees, includ-

8. *See* 15 U.S.C. § 78u-6 (2012); 17 C.F.R. § 240.21F-1 (2016).

9. My understanding is that SEC staff has been given the authority to inform a whistleblower of a case closure. In several cases, I have asked that question and received an answer. But, generally, SEC staff cannot give the whistleblower or counsel a "progress report" on a case. I have found that the best indicator the investigation is alive is when SEC staff asks to speak to your client and then comes back for more information months, or even years, later. Also, a public company under investigation may disclose that fact, usually through an SEC Form 8-K, or an SEC 10-K or 10-Q filing, but it may not necessarily disclose the nature of the investigation.

10. 17 C.F.R. § 240.21F-5(a) (2016).

11. The whistleblower may contest the SEC's preliminary determination if it initially rejects the claim or issues an award less than the maximum amount available. Before doing so, the whistleblower may request a meeting with the staff of the Office of the Whistleblower, but not the Claims Review staff, to whom only a brief can be presented. 17 C.F.R. § 240.21F-11(e)(1)(ii) (2016).

12. The SOX section 806 anti-retaliation provisions are found at 18 U.S.C. § 1514A (2012). The Dodd-Frank section 922 anti-retaliation provisions are found at 15 U.S.C. § 78u-6.

ing the whistleblower's supervisors and co-workers, are called to testify. The client may also face the prospect of company lawyers seeking to represent everyone involved (unknowingly including the whistleblower) under the umbrella of the company's attorney-client privilege.

II. The Client

To demonstrate the complexities that could arise when representing a whistleblower, consider a hypothetical client, Mary, seeking your legal advice. Mary may be a potential whistleblower or a retaliation victim. Like most clients, she comes with both favorable and unfavorable facts.

Mary, a mid-level manager at Amalgamated Widgets (AW), a midsize public company, comes to you for advice. Mary has been with the company for seven years and has a family that depends on her income. AW has not been doing well because the Chinese have perfected what may be a superior widget. Employees are worried. Sales have to improve. Some have been laid off. There is talk of a takeover and a possible sale to a foreign-controlled buyer. The stock price is down. Analysts are negative, and short-sellers are beginning to circle overhead and spread rumors. A run-in with the SEC would not be good for the company.

Mary works in retail sales under a senior-level manager named Bill. Mary is not an accountant, but has some background in accounting. Her good friend, Liz, is a recently hired compliance officer. Another friend, Sue, also works at the company. Liz and Sue often ride to work together. Mary has received good performance reviews for years, but for the past six months has noticed that Bill seems stressed. More ominously, she believes he may be "cooking the books."[13]

Bill stays late many evenings, hunched over his computer. He has asked Mary how to access certain files in the company's accounting system, and she noticed while in his office that he appeared to be making various "top side" accounting entries, especially toward quarter-end. This has been going on for about four months. Mary has access to his computer, having learned his password by looking in his desk drawer. She reviewed some of his emails to other managers that suggest he has been reversing some accounting entries, changing others, and in general making AW's performance look better by reducing or deferring expenses. Mary took photos of these entries and made copies

13. Investopedia defines this phrase as "an idiom describing fraudulent activities performed by corporations in order to falsify their financial statements. . . . [C]ooking the books involves augmenting financial data to yield previously nonexistent earnings." *Cook the books*, INVESTOPEDIA, http://www.investopedia.com/terms/c/cookthebooks.asp (last visited Mar. 2, 2017); *see also Cook the books*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/cook%20the%20books (last visited Mar. 2, 2017).

of some emails. She brings these documents to your office in a big brown envelope. She also brings a copy of her employment agreement, which forbids her from disclosing such information outside the company or reporting to the SEC.

Mary mentions that on several occasions, Bill asked her for help making entries on his computer. She admits that because she was unsure of what to do, she reluctantly helped Bill make some entries. Bill seemed nervous and secretive. When she asked him if this was proper, he seemed perturbed and told her simply to help him figure out the process of making entries, and not to ask a lot of questions. Several days later, he referenced Mary's upcoming performance review. Bill's boss, Jerry, called Mary into his office to ask her how things were going with Bill and also emphasized her performance because of the potential upcoming downsizing. She then blurted out to Jerry what she had seen Bill doing with the accounting records, but did not tell him she helped Bill to a limited extent. Jerry replied, "Don't worry about it, Bill has a lot on his plate."

After that, Mary observed Jerry in Bill's office more frequently, and they appeared to be arguing. Mary does not know Jerry well, but he had been pleasant to her until their recent meeting, after which he seemed to avoid her. He has done nothing about their conversation about Bill, as far as she knows. Mary is worried, and she discussed this with her husband. He warned her they need the income from her job.

Mary also told her friend in compliance, Liz, that there may be something afoot in her department relating to accounting records, but she did not tell her about Bill changing entries. Mary says Liz is new to the company, just out of college, and not too sure of herself. Mary does not know if Liz has done anything about Mary's comments. Mary's friend Sue noticed that Liz has not driven home with Sue lately and that Liz has been spending more time with Bill after hours. Sue told Mary not to get too involved with Bill but gave no explanation. Last week, Mary was surprised to hear from the human resources department that Jerry put a note in her personnel file that says "Mary seems to be somewhat anxious of late, and according to her immediate supervisor, her attention to work and concentration on finishing assignments has slipped." Her performance review is due in about two months.

Mary has read about large awards and is considering becoming a whistleblower, but she is concerned she may be prohibited from doing so because of language in her employment agreement forbidding such reporting. She asks if she can be a whistleblower, what that may involve, and about her chances of prevailing. She wonders if her limited assistance to Bill will get her in trouble and whether she should just keep her head down and do nothing, especially because her job already seems to be in jeopardy. However, she also wonders whether she may have some kind of retaliation case against her employer because of the comments Bill and Jerry made about her upcoming performance review and because of the negative information Jerry already placed in her file. She wants to keep her job. Her husband is nervous about this issue as well and asked her not to do anything that will hurt her position at the company.

Mary is clearly onto something troublesome at AW. Bill is apparently engaged in some kind of accounting fraud. Mary voiced concerns to him, but she also may have abetted his actions and could have some exposure. Senior managers such as Jerry may be involved. She informed Jerry, but he took no action. She appears headed for a bad performance review, possibly in retaliation for questioning Bill's actions.

Should Mary report the situation to legal or compliance? She has already shared some information with Liz, her friend in compliance, and with her friend Sue. Mary tells you she is afraid to report any higher in the company because Bill and Jerry are powerful managers close to the CEO, and she fears the consequences if she surfaces as an in-house whistleblower. The company has a tip line, but others say they have had few results with prior complaints and may even have suffered retaliation after making calls. She fears if she uses the tip line she will not remain anonymous. Mary does not think anyone else knows about the limited help she gave Bill, but in any investigation she would almost surely be asked about her interactions with Bill and any potential involvement.

III. Should Mary Become a Dodd-Frank Whistleblower?

Mary has seen headlines about big SEC whistleblower awards and wants to know if this is an option. On the surface, this looks like a potential securities fraud case. The SEC has pursued many companies for similar practices.[14] Reviewing the SEC's helpful Office of the Whistleblower website, you see that several people have received multimillion-dollar awards.[15] But, having made a quick review of the SEC's Final Rules on Dodd-Frank, you see a complicated labyrinth of rules, exceptions, definitions, and qualifications of who can be a whistleblower and when.[16] You are concerned Mary could get into trouble with the SEC, or even

14. The SEC has formed a Financial Reporting and Audit Group to investigate "securities law violations in the preparation of financial statements and the disclosure of financial information to investors." *Financial Reporting and Audit (FRAud) Group*, SEC OFFICE OF THE WHISTLEBLOWER, https://www.sec.gov/spotlight/financial-reporting-and-audit-task-force.shtml (last visited Mar. 23, 2017). This effort has led to a number of enforcement actions since late 2016. *Id.*

15. *Resources*, SEC OFFICE OF THE WHISTLEBLOWER, https://www.sec.gov/about/offices/owb/owb-resources.shtml#news (last visited Feb. 20, 2017).

16. 17 C.F.R. §§ 240.21F-1 to -17 (2016).

the Department of Justice (DOJ), and you are neither a securities lawyer nor a white-collar criminal defense lawyer.

Doing further research, you review additional SEC rules that further explain the law.[17] You note that as of January 2017, the SEC made only forty-one awards despite receiving 18,000 tips.[18] While many awards were seven figures, it is impossible to tell from the heavily redacted award orders on the SEC website what the facts were in those cases.[19] You also see several cases in which claims were denied, again without much explanation.[20] No body of law exists for evaluating the odds of getting an award. What should you advise Mary about her potential to receive an award?

The whistleblower rules are detailed and specific. For example, the SEC can pay awards to eligible individuals who voluntarily provide original information to the Commission that leads to the successful enforcement of actions brought by the SEC, and potentially other agencies, that result in monetary sanctions of more than $1 million.[21] Note the "voluntary" requirement. The whistleblower must submit information to the SEC before the SEC or other specified government agencies direct any "request, inquiry, or demand [relating] to the subject matter" to the whistleblower or a whistleblower's representative.[22] If Mary waits until the SEC contacts her, she may be too late.

Mary's information must also be "original information."[23] It must come from her independent knowledge or independent analysis and not be known to the SEC from any other source.[24] Even if the information is original and leads to sanctions, Mary will still not get an award if the monetary sanction against the company is less than $1 million.[25] If, for any reason the SEC cannot collect a monetary sanction, there may be no award.[26] Mary also must give "specific, credible, and timely" information that causes the SEC to open or re-open an investigation or "inquire concerning different conduct as part of a current . . . investigation."[27] If the SEC is already investigating the conduct, her information must "significantly contribute[] to the success of the action."[28]

17. 17 C.F.R. §§ 240, 249 (2016).

18. *See* Press Release, *supra* note 5 and accompanying text.

19. *Id.*

20. *See, e.g.*, Order Determining Whistleblower Award Claim, SEC Release No. 79604, File No. 2017-4, Dec. 19, 2016. Other orders can be found at *Final Order of the Commission*, SEC Office of the Whistleblower, https://www.sec.gov/about/offices/owb/owb-final-orders.shtml (last visited Mar. 23, 2017).

21. 17 C.F.R. § 240.21F-3(a)(1)–(4) (2016).

22. *Id.* § 240.21F-4(a).

23. *Id.* § 240.21F-3(a)(2).

24. *Id.* § 240.21F-4(b).

25. *Id.* § 240.21F-3(a)(4).

26. *Id.* § 240.21F-14(b).

27. *Id.* § 240.21F-4(c)(1).

28. *Id.* § 240.21F-4(c)(2).

There are no judicial opinions construing any of these terms, and the SEC makes all payment determinations on a case-by-case basis, so far offering limited guidance of how the standards are applied.[29] The heavily redacted orders on the agency's website protect whistleblower identity and generally give little insight into the decision-making process.[30]

IV. Should Mary "Report Up" Internally First?

Should Mary first make a full report to the legal or compliance department at her company before she contacts the SEC? The SEC and many companies encourage this.[31] But it requires Mary to identify herself. Mary will be considered to have reported to the SEC on the same date she reported internally if she reports to the SEC herself within 120 days of reporting to the company.[32] Company counsel will also be aware of this deadline, and in the event Mary reports internally, they will likely advise the company to report itself quickly to the SEC to ensure the company will not have to respond to an SEC inquiry before its own disclosure. This has become standard practice for companies wanting to appear cooperative with the SEC but needing time to conduct an internal investigation. The SEC prefers receiving information promptly and then permitting the company to complete its investigation, which can take many months. But if a whistleblower also reports to the SEC, all subsequent company information benefits the whistleblower, who gets full credit as if the whistleblower had reported to the SEC at the same time as to the company.[33]

If, for example, Mary's friend in compliance, Liz, reports Mary's information to her superiors, Mary might not get credit if the SEC contacts Liz first. The SEC might not consider Mary's informal discussion with Liz equivalent to reporting up internally.[34] The same problem would exist with respect to Mary's co-worker Sue, who might decide to go to the SEC or the company with Mary's information about Bill.[35] Even Bill, figuring things could be going south, could become a whistleblower by deciding to turn himself in, claiming he was pressured by Jerry and others to make false entries. Bill, if not convicted of

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29. *Id.* § 240.21F-6.

30. *See Final Orders of the Commission*, SEC OFFICE OF THE WHISTLEBLOWER, https://www.sec.gov/about/offices/owb/owb-final-orders.shtml.

31. One factor that may increase a whistleblower award is "[w]hether, and the extent to which, a whistleblower reported the possible securities violations through internal whistleblower, legal or compliance procedures before, or at the same time as, reporting them to the Commission. . . ." 17 C.F.R. § 240.21F-6(a)(4)(i).

32. *Id.* §§ 240.21F-4(b)(7), 240.21F-4(c)(3).

33. *Id.* §§ 240.21F-4(c)(3), 240.21F-4(b)(7).

34. *Id.* § 240.21F-4(b)(7).

35. Mary still might be able to convince the SEC she was the "original source" of the information, but her claim definitely would be weaker. *Id.* § 240.21F-4(b)(1)(ii).

a crime related to the SEC action, may still qualify for an award, albeit probably a reduced one.[36] There are numerous ways in which this information could come to the SEC's, another regulatory agency's, or the company's attention without Mary's involvement. She could easily become a witness, or worse, come under investigation herself. If, however, the company or other employees report to the SEC first, Mary likely could not be regarded as a whistleblower.

As Mary looks to you for advice, you have no way of knowing if the company knows about Bill's actions and is planning to contact the SEC itself. There are powerful incentives for the company to self-report. Likewise, if anyone outside the company learns of Bill's actions and reports it to a state or federal law enforcement agency, including the SEC, and the agency contacts Mary before she makes a report, she will not qualify for an award and may be in trouble herself for her involvement with false entries. In any event, Mary needs to move quickly.

You should review all these issues with her promptly and make a record of your conversation. If Mary does nothing but is later contacted by the SEC after it opens an investigation, she may need a defense attorney, not a whistleblower lawyer. If you did not advise her of her choices early on, or if someone else makes a report and receives a large award, Mary may seek another lawyer to sue you for failing to advise her of all her options.

Attorneys also must be aware of numerous special restrictions affecting employees in legal, accounting, or compliance operations that could disqualify them as whistleblowers.[37] But there are also exceptions to those restrictions that may allow them to become whistleblowers.[38] Although Mary does not appear to fit any of these categories, Liz probably would.

Finally, you should consider the chances of an award when deciding whether to make a Dodd-Frank whistleblowing report. The SEC must recover a penalty exceeding $1 million for the whistleblower to be eligible for an award.[39] If the SEC recovers less than $1 million, as happens with many claims, there will be no award.[40] This could happen here, for example, if the SEC found Bill, or only Bill and Jerry, and no one else at the company, at fault. The company might cooperate quickly and avoid a significant penalty or have insufficient assets to pay a large penalty. Although Mary may have provided helpful

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36. *Id.* §§ 240.21F-6(b)(1), 240.21F-8(c)(3).

37. *See, e.g.*, *id.* § 240.21F-4(b)(4)(i)–(iv).

38. *Id.* § 240.21F-4(b)(4)(v)(A)–(C). The broadest exception, (C), requires compliance officers and auditors to wait 120 days after they have brought the information to the company (or the company already knows it) to bring the information to the SEC. This makes an initial understanding of your client's job description very important, particularly if your client has compliance duties.

39. *Id.* § 240.21F-3(a)(4).

40. *Id.*

information to the SEC as a whistleblower, she could end up with only an expression of the SEC's appreciation.

Attorneys must also analyze the technical requirements of the SEC rules to avoid learning, perhaps years after the SEC settlement and a whistleblower award claim, that your client does not qualify for any award for some technical reason. The SEC enforcement staff that receives the tip and launches an investigation, while welcoming your client's information, normally will not be concerned whether your client technically qualifies as a whistleblower.[41] The SEC wants information to build its case. It has no obligation to warn whistleblowers that they may not qualify for awards.[42] However, senior lawyers in the SEC's Enforcement Division, who review claims after successful SEC enforcement actions (the Claims Review staff),[43] know these complex rules and can deny or reduce an award on many grounds. With potentially millions of dollars at stake for your client, lawyers must carefully review the SEC's complex rules to ensure they are properly advising clients. It is truly a minefield, paved with good intentions, but full of traps.

The heavy redaction of posted award notices makes it difficult to tell how many awards reached the maximum under Dodd-Frank,[44] thirty percent of the recovered financial penalty. Early in the case, attorneys need to review the factors the Commission considers when increasing or decreasing awards.[45]

Large awards come from cases in which a whistleblower stops a major ongoing fraud scheme that has caused millions of dollars in losses to investors and that would never have been discovered without the whistleblower, or a Foreign Corrupt Practices Act (FCPA)[46] case against a solvent multinational corporation involving millions of dollars in bribes. Such cases take significant investigatory time, but

41. There are few automatic disqualifiers listed on the SEC's Tip, Complaint, or Referral (TCR) form used for initial submissions, but whistleblowers may be disqualified for many other reasons. *See Submit a Tip*, SEC OFFICE OF THE WHISTLEBLOWER, https://www.sec.gov/about/offices/owb/owb-tips.shtml (last visited Mar. 23, 2017).

42. 17 C.F.R § 240.21F-1 ("You should read these procedures carefully because the failure to take certain required steps within the time frames described in these rules may disqualify you from receiving an award for which you otherwise may be eligible.").

43. *Id.* § 240.21F-10(d).

44. *See, e.g.*, Order Determining Whistleblower Award Claim, SEC Release No. 78881, File No. 2016-17 (Sept. 20, 2016); 17 C.F.R. § 240.21F-5(b) ("The amount will be at least 10 percent and no more than 30 percent of the monetary sanctions that the Commission and the other authorities are able to collect.").

45. 17 C.F.R. § 240.21F-6. The commission may increase an award by considering the significance of information or the assistance the whistleblower provided, law enforcement's interest in the information, and the whistleblower's participation in internal compliance systems. The Commission may decrease an award by considering the whistleblower's culpability and interference with internal compliance and reporting systems and whether the report was unreasonably delayed. *Id.*

46. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, et seq. (2012).

often generate large settlements.[47] Whistleblowers can be particularly helpful in such cases that typically require access to foreign-based evidence typically hard to investigate by normal domestic methods.[48]

Negative factors can reduce a whistleblower's award. Besides a whistleblower's serious personal culpability, unreasonable reporting delay is the most significant negative factor reducing awards.[49] This factor occurs often because whistleblowers commonly wait long periods before reporting wrongdoing to the SEC. Some need time to decide whether to report, some wait until they leave the company or are fired, some learn of the wrongdoing long after the fact, and some are just tardy. Regardless of the reason, the SEC frowns on delay and may use it to reduce the award.[50] The SEC dislikes cases in which the statute of limitations (usually five years)[51] has run or is close to running. If the case is well beyond five years old, it is probably not worth its effort unless it involves a large company that has committed significant fraud, in which case the statutory period may be extended.[52] Clients with a good explanation for delayed reporting may still get awards.

The client's expected award is also relevant to the attorney's decision whether to take the case because whistleblower cases are normally handled on a contingency basis.[53] Unlike other types of lawsuits, expenses are rare. Travel may be required if the SEC or DOJ wants to interview your client, especially in an FCPA case overseas. But gener-

47. *See* Daniel J. Hurson, *The FCPA and SEC Whistleblowers: Major Opportunities*, Mondaq (Jan. 6, 2016), http://www.mondaq.com/unitedstates/x/455536/Whistleblowing/The+Foreign+Corrupt+Practices+Act+FCPA+A+Major+Opportunity+For+SEC+Whistleblowers. *See also, e.g.*, Press Release, U.S. Sec. & Exch. Comm'n, SEC Awards $5.5 Million to Whistleblower (Jan. 6, 2017), https://www.sec.gov/news/pressrelease/2017-1.html.

48. *See* Hurson, *supra* note 47.

49. 17 C.F.R § 240.21F-6(b)(2).

50. *Id.* Cases reported to the SEC after the investigation has begun can also be difficult for counsel to assess at the outset. The whistleblower's contribution has to be "significant," a determination that depends on each case's facts and the Claims Review staff's perception. In one case, my client was originally denied an award, but after further SEC review of its significance, and the receipt of new information, the Commission made an award.

51. *See, e.g.*, Stacey L. McGraw & Stacey E. Rufe, *The Foreign Corrupt Practices Act: An Overview of the Law and Coverage-Related Issues*, Insurance Coverage (ABA Section of Litig. Mar. 21, 2014), http://apps.americanbar.org/litigation/committees/insurance/articles/janfeb2014-foreign-corrupt-practices-act.html (five-year limitations period on Foreign Corrupt Practices Act (FCPA) actions).

52. *Id.*

53. *See e.g.*, *Whistleblower Protection*, Loevy & Loevy, https://www.loevy.com/whistleblower-protection/ (last visited Mar. 2, 2017) (handling whistleblower cases on a contingency-fee basis); *cf.* Zachary Kitts, *Interesting Opinion on Lawyer Contingency Fees . . . and Proof That No Good Deed Goes Unpunished*, Virginia Qui Tam Law (May 2, 2013), http://vaquitamlaw.com/interesting-opinion-on-lawyer-contingency-fees-and-legal-ethics/ (contingency fees common in False Claims Act whistleblower cases).

ally, a contingency fee is appropriate to account for the limited time you will spend on this type of case.

V. Can Mary Keep Her Name Confidential?

Most whistleblowers want to remain anonymous, and the SEC allows anonymity if the whistleblower has counsel.[54] In such a case, the attorney files the "Tip, Complaint or Referral" form (TCR) with the SEC.[55] If filed electronically,[56] the critical thirteen-digit TCR number is issued immediately, but this takes longer for mail filings. When I file an SEC whistleblower case, I generally do not describe the facts in the limited space provided, but submit a cover letter briefly describing the matter and the client and a detailed document with exhibits fully describing the claim as attachments. When relevant, I provide the government with timelines and emails, taking care to avoid submitting privileged communications.[57]

Depending on the subject matter and the company's location, I may contact SEC attorneys I have previously worked with to alert them to the TCR, hoping to generate interest in the case. New TCR submissions that appear qualified (i.e., involve the securities laws and are not simply claims for losses on stock purchases and the like) are routed by the Office of the Whistleblower to the SEC's Office of Market Intelligence, where attorneys determine to which division and office (Washington, D.C., or regional offices) to refer the submission.[58] Normally, if the company is (or has been) under investigation, the case may be routed to the staff attorney handling that case.[59] It is crucial that the case is assigned to a staff attorney with time and interest to develop the case, but neither the client nor attorney have any control over that decision.

A client also should be cautioned that anonymity is not guaranteed. By law, the SEC has to keep the whistleblowers' names confidential until submission of formal award claims for an award on a second

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54. *See* 17 C.F.R § 240.21F-9(c).

55. *Id.*

56. *Id.*

57. If you think the client may have privileged material, you can inform the SEC and offer a brief privilege log. You should wait for the SEC to contact you about sending it to the "taint unit" for review. Or, to be completely safe, if you are certain the material is privileged, return it back to the client and discuss it no further. Of course, companies have been known to mark documents liberally, especially emails, as privileged even though they are not. SEC lawyers are quite knowledgeable about these issues.

58. *See* 2016 ANNUAL REPORT, *supra* note 6, at 23, 27 (describing process in some detail).

59. *Id.* at 27.

form called a WB-APP.[60] On this form, whistleblowers disclose their identity only to the SEC.[61] It is never publicly disclosed.[62]

There are circumstances that may cause a whistleblower's identity to be revealed even before a case is filed or an award is considered. Documents produced by whistleblowers, such as emails, frequently contain names or other identifying information. The TCR form asks the whistleblower to identify such documents in advance.[63] That information can be redacted from copies shown to a company witness during an investigation, but a deleted name on a document may allow the witness (or more likely the company lawyer) to figure out whose name has been removed. In my experience, SEC enforcement attorneys take seriously their legal duty to protect the whistleblower's identity and will work with you and your client to maintain confidentiality throughout the investigation. That said, you should caution your client that the company eventually may deduce the whistleblower's identity unless your client is far removed from those involved in the case.[64]

If the case is litigated, whether in a civil SEC enforcement proceeding or a DOJ criminal case, the defense may be able to obtain the whistleblower's name in discovery.[65] Fortunately, the vast majority of cases settle well before discovery, but the SEC and the DOJ's increased emphasis on bringing charges may lead the defendants to refuse settlement. The government would then have to engage in discovery, potentially revealing the whistleblower's identity.

If the SEC refers the matter to a foreign law enforcement agency,[66] it may be unable to guarantee confidentiality of the whistleblower's identity. Foreign "securities and law enforcement authorities" may receive the information but are not subject to confidentiality provisions binding domestic authorities, such as a self-regulatory organization or state attorney general.[67]

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60. *Form WB-APP*, U.S. Securities and Exchange Commission, https://www.sec.gov/about/forms/formwb-app.pdf (last visited Mar. 23, 2017).

61. 17 C.F.R. § 240.21F-10(c).

62. *See* 15 U.S.C. § 78u-6(h)(2)(A) (2012) (commission may not disclose whistleblower's identity except as required by public proceeding); *see also* 17 C.F.R. § 240.21F-7 (same).

63. *Form TCR Tip, Complaint or Referral*, U.S. Securities and Exchange Commission, https://www.sec.gov/about/forms/formtcr.pdf (last visited Mar. 23, 2017).

64. Daniel J. Hurson, *Ten "Rules" for Becoming a Successful SEC Whistleblower*, Mondaq (Sept. 11, 2013) http://www.mondaq.com/unitedstates/x/261844/Corporate+Commercial+Law/The+New+Rules+For+Becoming+A+Successful+SEC+Whistleblower.

65. *See* 15 U.S.C. § 78u-6(h)(2)(A); *see also* 17 C.F.R. § 240.21F-7.

66. 17 C.F.R § 240.21F-7(a)(2) (SEC may refer tips to foreign securities and law enforcement authorities).

67. *Id.* However, the statute requires the Commission to "determine what assurances of confidentiality it deems appropriate in providing such information to foreign securities and law enforcement authorities." *Id.*

If an investigation begins in Mary's case, she would probably be suspected as the whistleblower because of her close connection and previous statements to company employees involved in the matter. Fortunately, given the harsh penalties the SEC or DOJ can level against a companies or persons retaliating against a Dodd-Frank whistleblower,[68] the company may never retaliate against Mary.[69] Of course, retaliation can take many forms and raises its ugly head in many contexts. Retaliation from fellow employees, for example, can be a problem for whistleblowers.[70] If your client has already suffered retaliation before coming to you, the issues get more complicated.

VI. Mary's Options

Based on Mary's facts, you should consider the following possibilities:

A. *Option One: File an Anonymous SEC Whistleblower Case but No Retaliation Case*

Mary has direct evidence of an apparent ongoing accounting fraud orchestrated by a high-level manager, perhaps with knowledge and involvement of higher management. She has documents, including some emails. The case could be significant and relatively easy for the SEC to prove. Accounting fraud is a major target for the SEC because it may involve misrepresentation of financial statements, serious internal control violations, and direct injury to investors. In this case, it appears Mary should get full credit for bringing the fraud to the SEC's attention. If the activity has been ongoing and involves significant monetary amounts, it could exceed $1 million in penalties. Moreover, if Mary does not go to the SEC, someone else might. On balance, I would probably take this case.

Mary has some exposure because she provided limited assistance to Bill. Because she can explain that she was pressured by a superior, she would be a good candidate for non-prosecution, and her actions probably would not significantly reduce her award.[71] It would be prudent to raise

68. 15 U.S.C. § 78u-6(h)(1); *see also* 18 U.S.C. § 1513(e) (2012) (fine and imprisonment for up to ten years for retaliation, including interference with lawful employment or livelihood, against any person who provides law enforcement with truthful information relating to the commission of any federal offense).

69. In my experience, clients are more likely to experience blackballing with other potential employers in ways impossible to prove.

70. *See, e.g.*, Halliburton, Inc. v. Admin. Review Bd., 771 F.3d 254, 256–57 (5th Cir. 2014) (coworkers treated employee negatively after discovering whistleblowing activity).

71. The SEC has a "cooperation program" similar to the Department of Justice (DOJ). *SEC Spotlight—Enforcement Cooperation Program*, U.S. SECURITIES AND EXCHANGE COMMISSION, https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml (last visited Mar. 2, 2017). The current version of the Financial CHOICE Act (H.R. 10), recently passed by the House Financial Services Committee and expected to pass in the full House of Representatives, contains sweeping changes to the Dodd-Frank Act and curtails SEC enforcement in numerous respects. H.R. 10, 115th Cong. (2017). It would

this concern early with the SEC and seek a non-prosecution deal, an available SEC option. This approach, however, may require Mary to reveal her identity. Even if the SEC does not offer a cooperation deal, on these facts I seriously doubt the SEC or DOJ would charge Mary with aiding and abetting or committing securities fraud.

Mary can try to remain anonymous, at least for the time being, so she can remain at her job. She does not have to identify herself to the company as a whistleblower, although the company could ask her about it if an investigation is opened and she is interviewed, and you should discuss how she should respond. In my opinion, she has a right to deny being a whistleblower if company counsel asks because she is proceeding anonymously under law to report to the SEC.[72] Plus, if she continues to work there, she can supply ongoing information to the SEC regarding Bill, Jerry, and perhaps others, possibly strengthening her case for an award.

Mary can also continue to supply documents and information to the SEC. Federal law and many courts treat providing corporate documents directly related to fraud as protected activity on public policy grounds.[73] A 2016 federal magistrate decision held such materials to be attorney work product protected from discovery in civil litigation.[74] You may choose to supply a limited number of documents with the initial TCR form in hopes of getting the SEC interested in your client's case and then leave it to the SEC to issue a subpoena to the company for documents or request the company to provide them voluntarily. Of course, if the client has a non-privileged "smoking gun" email, it is advantageous to include it in your initial submission.

The whistleblower can also use otherwise confidential company documents to prosecute or defend against an employer retaliation case. The Defend Trade Secrets Act[75] provides immunity from civil or criminal liability under federal and state trade secrets laws for whistleblowers who disclose a trade secret if done in confidence to a government official or an attorney for the purpose of reporting a violation of law.[76] Properly applied, this law should protect whistleblowers who provide confidential documents to the SEC or other enforcement

prohibit whistleblower awards to those involved in illegal conduct. *Id.* § 825. This could, in theory, impact Mary if it were currently the law. The bill is expected to have more difficulty in the Senate, but should be watched carefully for its eventual impact on the whistleblower provisions. *See* Brena Swanson, *Financial CHOICE Act narrowly passes committee, next stop full House*, HOUSINGWIRE (May 4, 2017), https://www.housingwire.com/articles/40047-financial-choice-act-passes-through-committee-next-stop-house.

72. *See* 17 C.F.R § 240.21F-9(c) (2016) (whistleblowers can proceed anonymously).

73. *See infra* notes 75–77 and accompanying text.

74. BofI Fed. Bank v. Erhart, No. 15CV2353 BAS (NLS), 2016 WL 4150983, at *5 (S.D. Cal. Aug. 5, 2016).

75. Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (to be codified as amended in scattered sections of 18 U.S.C.).

76. *Id.* § 7, 130 Stat. at 384–85.

agencies, if they relate to illegal activity of any sort and can be considered "trade secrets" under the Act's broad terms.[77]

1. Is Mary's Employment Agreement an Impediment?

If Mary files an SEC whistleblower submission, you should also provide her employment agreement to the SEC if it has language in any way discouraging or forbidding her from providing information to the SEC, or from receiving any whistleblower award, or similar language. Apparently, many companies were a bit too aggressive over the years, figuring they could get employees to give up their federal rights, and tried to undermine the SEC program by using such restrictions.[78] In response, the SEC has aggressively enforced 17 C.F.R. § 240.21F-17(a), which provides that "[n]o person may take any action to impede an individual from communicating directly with the [SEC] staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement."[79]

In 2016, the SEC fined a company for severance agreements requiring outgoing employees to waive rights to monetary recovery from complaints filed with the SEC or other federal agencies.[80] It fined another company $265,000 for similar conduct.[81] A 2014 SEC settlement stated Anheuser-Busch InBev violated the FCPA by including language in a separation agreement that stopped employees from voluntarily communicating with the SEC by imposing a financial penalty on employees if they violated the strict non-disclosure terms.[82] A 2017 case fined asset manager BlackRock, Inc. for using separation agreements requiring employees to waive obtaining whistleblower awards.[83]

Based on these decisions, if Mary's employment agreement included language prohibiting her from reporting to the SEC, it would likely be unenforceable. However, most of these cases settle for less

77. *See* Daniel J. Hurson, *The Whistleblower Protections of the Defend Trade Secrets Act Could Have a Broad Impact—But Only if Employees Are Told About Them*, MONDAQ (Sept. 13, 2016), http://www.mondaq.com/unitedstates/x/526468/Whistleblowing/The+Whistleblower+Protections+Of+The+Defend+Trade+Secrets+Act+Could+Have+A+Broad+ImpactBut+Only+If+Employees+Are+Told+About+Them.

78. *See, e.g.*, Health Net, Inc., SEC Release No. 78590, File 3-17396 (Aug. 16, 2016) (administrative proceeding).

79. 17 C.F.R. § 240.21F-17(a) (2016).

80. Health Net, Inc., SEC Release No. 78590, File 3-17396 (Aug. 16, 2016) (administrative proceeding).

81. BlueLinx Holdings, Inc., SEC Release No. 78528, File No. 3-17371 (Aug. 10, 2016) (administrative proceeding).

82. Anheuser-Busch InBev SA/NV, SEC Release No. 78957, File No. 3-17586 (Sept. 28, 2016) (administrative proceeding).

83. BlackRock, Inc., SEC Release No. 79804, File No. 3-17786 (Jan. 17, 2017) (administrative proceeding).

than the $1 million necessary to generate a whistleblower award.[84] Unenforceable employment agreement language, by itself, probably would not justify a whistleblower case. In Mary's case, however, this separate penalty could be combined with a more serious one for the accounting fraud Mary uncovered.

OSHA also has been critical of such language, releasing new policy guidelines for its review of private settlement agreements in whistleblower actions.[85] OSHA guidelines make clear that agreements containing language restricting complainant's ability to assist the government or waive monetary awards for providing information to the government, will be rejected.[86]

2. When Should You File Mary's SEC Whistleblower Case?

If Mary decides to make an SEC whistleblower submission, she should file immediately. In her case, there is no advantage in waiting. If further information or developments arise, you can supplement her submission by contacting the SEC Office of the Whistleblower.[87] Although the SEC encourages it, she need not "report up" within the company before submitting the TCR.[88] Completing a TCR on the SEC website takes about thirty minutes.[89] Attorneys should still file the TCR even if they are uncertain whether securities violations occurred. Normally, attorneys can also allege internal control and "books and records" violations of the securities law (which is, ironically, prohibited under the FCPA).[90] Any corporate practice allowing accounting fraud and misstated financial reports (or just about any other variety of corporate wrongdoing) will probably involve securities violations. Even if the allegation is incorrect and the case goes nowhere, there is an important benefit to having filed with the SEC if the client is also contemplating a Dodd-Frank retaliation case.[91]

Mary will then have to wait to see if the SEC responds to the submission. If nothing happens after a few weeks, you can contact the

84. *See* 2016 Annual Report, *supra* note 6 (fiscal year 2016 brought more than 4,200 whistleblower tips, but only thirteen resulted in whistleblower awards that totaled more than $57 million).

85. U.S. Dep't of Labor, OSHA, Memo re: New Policy Guidelines for Approving Settlement Agreements in Whistleblower Cases at 1, https://www.whistleblowers.gov/memo/InterimGuidance-DeFactoGagOrderProvisions.pdf (Aug. 23, 2016) ("OSHA will not approve a 'gag' provision that prohibits, restricts, or otherwise discourages a complainant from participating in protected activity.").

86. *Id.* at 1–2.

87. *See What Happens to Tips*, SEC, https://www.sec.gov/about/offices/owb/owb-what-happens-to-tips.shtml (last visited Mar. 3, 2017).

88. *See* 17 C.F.R. § 240.21F-4(b)(7) (2016).

89. *Submit a Tip*, SEC Office of the Whistleblower, https://www.sec.gov/about/offices/owb/owb-tips.shtml (last visited Mar. 3, 2017).

90. 15 U.S.C. § 78m (2012).

91. *See infra* Part VII.

SEC Office of the Whistleblower to find out if it has referred the matter to the Enforcement Division. I have had cases with an ongoing investigation that neither my client nor I were aware of, and cases in which months passed before the SEC contacted me about a submission I assumed had gone nowhere. Again, the best indication is a request by SEC staff to talk to your client, but even that does not assure that the SEC will ultimately decide to pursue your case.

If the SEC opens an investigation, the process could take two to four years or longer to reach a conclusion. If the case resolves with an order or settlement, attorneys should carefully read the issued order, which may indicate how much your client's information affected the outcome. After the settlement, it may take several months before the case is posted on the SEC website as one eligible for an award. It is important to follow the announcements on the SEC's website at the end of each month because the Office of the Whistleblower is not required to notify you if it believes your client should apply for an award, although I have been so notified in the past. After the case is posted as eligible, you have ninety days to file an award claim, using form WB-APP.[92] You should receive an acknowledgment from the Office of the Whistleblower that your claim has been received. Then, you must wait again, potentially for many more months, before the SEC makes a preliminary award decision. If your client accepts the Claims Review Staff's decision as to the percentage of the penalty assessed and collected from the company as the client's award, the SEC Commissioners have thirty days to request Commission review.[93] To my knowledge this has never happened, but there is always a chance a Commissioner might want to review an award, potentially adding months to the process. This process apparently has also been slowed by bogus claimants, whose assertions must be investigated and, even after being rejected, are allowed sixty days to request reconsideration.[94]

If Mary suffers retaliation from any quarter after filing the TCR, report it to the SEC. This submission may get SEC attorneys more interested in the case, and if it is already under investigation, the SEC will consider that behavior as part of its case. However, Mary would have to disclose her identity to the SEC, and then presumably to the

92. 17 C.F.R. § 240.21F-10.

93. *Id.* § 240.21F-10(h).

94. Andrew Ceresney, SEC Enforcement Director, The SEC Whistleblower Program: The Successful Early Years (Sept. 14, 2016), https://www.sec.gov/news/speech/ceresney-sec-whistleblower-program.html ("[S]imilar to our investigations, the award process takes time. There are sometimes multiple claimants applying for an award in a matter—we have had up to 16 in one matter. Our Whistleblower Office gives each one the attention and due diligence that it deserves. The award applications also often present unique, first impression issues that require careful review and thought.").

company, if she reported retaliation to the SEC or filed her own retaliation case.

In short, if Mary files a Dodd-Frank whistleblower case, and not a retaliation claim, the case will be much easier because the SEC will do all the "heavy lifting." But you and Mary may both be in for a long wait as the SEC investigates, files, and then settles a case against the company. You may only sporadically be part of that process. This can be very frustrating, and at times your client may question your role as an advocate. On the bright side, you avoid having to litigate a grueling case, conduct and pay for discovery, deal with a hostile judge or adversary, and you have the investigative power of the U.S. government on your side. An attorney may feel genuine pride after watching a major corporation face its wrongdoing, knowing your client had the courage to initiate the process. And, it will be well worth the wait if the SEC settles the case for a substantial amount, and your client gets up to thirty percent of what can be millions of dollars.[95]

3. Interviews, Conflicted Counsel, and Other Close Calls

Although there are benefits of filing a whistleblower complaint anonymously, complications may arise. If Mary files an anonymous whistleblower case while still working at the company, or, even after that, if she leaves voluntarily, her situation could get complicated if the SEC opens an investigation. If the SEC immediately begins conducting the investigation on its own, it will most likely want to interview her, either by phone or in person. She can remain anonymous, and as noted, it is a good sign if the SEC staff does ask for such an interview.

If the company undertakes an internal investigation, as is usually the case, the SEC may leave it to company counsel to interview employees. As Bill's assistant, the company would likely interview Mary and would probably find sooner, rather than later, that she already knows about Bill's activities. If she is a former employee, she could decline the interview and interview only with the SEC.

As a current employee, if Mary declines to interview with the company, it could have a facially legitimate justification to terminate her. If the company terminates Mary not knowing she is the whistleblower, it would be hard for her to prove the firing was retaliation. Assuming she is still employed and agrees to an interview, the company will assume she has no need for counsel. But Mary has a problem. She does not want to discuss her involvement in the accounting manipulation, however minor it may have been. She certainly does not want to reveal she is the whistleblower. You may offer to appear as her counsel, but the company may conclude she is hiding something if she, perhaps

95. 17 C.F.R. § 240.21F-5(b).

alone among employees, brings her own counsel. If she goes to the interview alone, company counsel will probably ask who she has spoken to about these matters, and she will have to decide whether she is willing to disclose her identity as a whistleblower, lie about it, or simply refuse to answer. If she admits she helped Bill change the accounts, she might be fired. Mary is between a rock and a hard place.

Similarly, tricky situations can arise in an SEC investigation if company counsel, unaware of Mary's whistleblower role, want to represent her along with other employees in any SEC interviews, as is often the case. This could happen even if she was a former employee and the company volunteered to provide counsel. For the company, this tactic makes sense because it would want to keep informed of the facts and learn what she is going to tell the SEC if and when interviewed.

SEC enforcement lawyers may indirectly assist Mary by initially not requesting that the company provide her for an interview, but that may just be another red flag to company counsel. Sometimes it may be better for the SEC to include her on a list of interviewees its lawyers will speak with later to make it appear she is not the whistleblower.

Under these circumstances, Mary should not be represented by a company lawyer who assumes Mary is just another employee covered by the company's attorney-client privilege. That lawyer would obviously have a disqualifying conflict representing Mary if the lawyer knew her status as a whistleblower. The SEC would not want such a situation to develop either because it assiduously stays away from attorney-client privilege issues. Instead, Mary could ask for her own counsel (although the company may want her to cover the cost) to handle any situations that may arise with the company. You could offer to represent her yourself, but that might present problems if the company later finds out you were also her "whistleblower lawyer" who was simultaneously working with the SEC. Mary could also simply decline the company's offer of counsel. This option would be easier if she is a former employee, but the company may find it concerning if she is still employed there. There are no easy solutions here.

What is your advice to Mary? You could tell her that if she receives a request for an interview, she could appear with you or another lawyer and explain what she knows and that she is concerned about her exposure and thus felt the need for an independent lawyer. That lawyer could tell the company that as far as Mary and her counsel are concerned, the interview is not covered by the company's attorney-client privilege, and it should proceed accordingly, if at all. Company counsel may not accept this premise, but you have made your record. Of course, she is not obliged to disclose she is an SEC whistleblower. If company counsel is smart, it will not ask that question, and if it does, Mary can just decline to answer. Indeed, it is my personal view she has every right to say "no" because her identity as a confidential whistleblower is legally protected. If the company forces her to reveal her whistleblower status, the SEC might well consider that an attempt to intimidate or interfere with her right to report wrongdoing to the SEC.[96]

If the company interviews Mary and she is candid, she could lose her job. You could well predict that if she discloses everything, the company will look for a reason to fire her so that it can explain her termination to the SEC without appearing retaliatory, even though the company may not definitively know she is a whistleblower. The company could terminate her and claim it was because of her involvement in the accounting manipulation or could demote her by transferring her to another department. As the internal investigation continues, fellow employees will probably discover her role as Bill's accomplice, in which case she may be seen not as a hero, but as disloyal and self-serving. Are there really any good options for Mary that include outing herself as a whistleblower?

B. Option Two: File an SEC Whistleblower Case, Immediately Report Up Within the Company, and Then Consider Filing a SOX Retaliation Case and a Future Dodd-Frank Retaliation Case If Appropriate

Mary has another option that may allow her to take advantage of Dodd-Frank. First, fill out the TCR form on the SEC website (or by mail) and thus file a whistleblower case. Tell the SEC the entire story in detail. Mary can proceed anonymously or identify herself if she prefers. Then contact the company's office of the General Counsel, the office of the Chief Compliance Officer (CCO), or both, to inform them she is prepared to come in immediately to report serious fraud in the company. Request a meeting with higher-level management. Tell them you will accompany her as her attorney. This approach should get the company's attention. But if it does not, be prepared to deliver promptly a well-written summary of the facts to the General Counsel's office, and confirm receipt.

In the meeting, Mary should inform the General Counsel or CCO of all facts, including the whistleblower case filed with the SEC. She should describe Bill's actions in detail, her meetings with Bill and Jerry, and their attempts to intimidate her, including the note placed in Mary's personnel file. At the meeting, Mary should present her documents and let the company know the SEC now has them, too. Be

96. *See, e.g.*, Williams v. Rosenblatt Sec. Inc., 136 F. Supp. 3d 593, 619 (S.D.N.Y. 2015) ("[T]he Second Circuit Court of Appeals has adopted a 'case-by-case approach to requests for preliminary relief based on witness intimidation.'" (quoting Moore v. Consol. Edison Co. of N.Y., 409 F.3d 506, 512 n.6 (2d Cir. 2005))).

truthful and candid and provide a full description of whatever assistance Mary gave Bill, explaining her reasons for so doing.

Mary then has up to 120 days to file a whistleblower case with the SEC and still get credit for having reported to the SEC as of the date she initially reported to the company.[97] To obtain maximum leverage, she should file with the SEC first and then inform the company. Of course, if Mary has already informed the company, and it disclosed information to the SEC already, you need to file the TCR with the SEC as soon as possible, even if it appears the 120-day grace period has already run out.

Identifying herself as an SEC whistleblower carries some risk for Mary,[98] but after she takes this good faith action, supported by counsel, the company will be reluctant to fire or demote her out of fear of a retaliation claim by her or the SEC. The company may have no choice but to interact with her very carefully. If it does not, start taking notes for a retaliation complaint. Once company counsel hears Mary's story, it will presumably report it to the CEO and the Board. Management should take steps to deal with Bill and Jerry. But if it does not, or instead retaliates against Mary, she can report this to the SEC and bolster her case.

If the company plans strategically, however, it will likely retain experienced outside counsel who will advise it to move quickly to inform the SEC that it will cooperate fully and launch its own investigation. Because the company knows she has filed the TCR and is cooperating with the SEC, she should suffer no negative consequences for reporting information internally, for this is the very action the company should have indicated it expects from its employees.

The company's counsel will want immediately to start building its defense with the SEC, which will require management to cooperate with the SEC and treat Mary fairly. If Mary has been proceeding anonymously, at some point she should consider dropping her anonymity with the SEC. Meanwhile, a document hold order probably will be sent to all employees. In the typical case, Bill, Jerry, and Mary's computers will be confiscated and sent to forensic accountants for analysis.[99] The company will need to consider making a public disclosure

97. 17 C.F.R. § 240.21F-4(b)(7).

98. *See supra* notes 31–36 and accompanying text.

99. You and Mary should consider carefully the possibility that her computer will be seized. If there are privileged emails between you and her saved on it, she should consider deleting them (even if company forensics experts may be able to recover them). Otherwise, nothing should be deleted, particularly emails with others, such as Bill, which will appear on his computer and may eventually go to the SEC. It is vitally important to Mary's status as a whistleblower that she maintain the complete confidence of the SEC staff.

of some kind, and perhaps file a Form 8-K,[100] to offer investors some explanation regarding the SEC and internal investigations. AW's stock may take a temporary hit, but that is normal. For better or worse, the market is used to such announcements.

Mary should be able to keep her job, but may struggle personally when working with fellow employees once word gets out that she is involved in the investigation. Mary should also expect that Bill, and probably Jerry, will retain counsel and possibly try to blame her in some fashion. But Mary has strengthened her position by becoming an SEC whistleblower early on and reporting up through the right channels. She will gain the respect of both the SEC and, one would hope, the senior management of the company, for her forthright actions. Thus, Mary should be protected from adverse action by the company.

VII. Should Mary File a Retaliation Case, and If So, Under What Law?

If Mary files a retaliation case, she has at least three options. She can file a traditional SOX case by filing an OSHA complaint,[101] she can file a Dodd-Frank retaliation case in federal court,[102] or she can do both. Let us first examine the outlook for a Dodd-Frank retaliation case. Dodd-Frank has some obvious advantages over a SOX retaliation case: a much longer statute of limitations (three years as opposed to the 180-day limit to file with OSHA),[103] and double backpay damages.[104] It does not, however, provide for emotional distress damages. It allows for filing the action immediately in federal court, as opposed to waiting 180 days, after which, if OSHA has not issued a final decision, a federal case could be filed.[105]

The elements of a SOX and Dodd-Frank retaliation case are similar. Mary probably has a prima facie retaliation case under either statute. She engaged in "protected activity" because she had both an objective and subjective reasonable basis to believe that Bill's creation of false accounting entries (a specific type of illegal conduct) violated a provision of 18 U.S.C. § 1514A.[106] The courts and the Administrative

100. For information on Form 8-K, see *Form 8-K*, U.S. SECURITIES AND EXCHANGE COMMISSION (Aug. 10, 2012), https://www.sec.gov/answers/form8k.htm.

101. *File a Complaint*, U.S. DEP'T. OF LAB., OSHA, WHISTLEBLOWER PROTECTION PROGRAMS, https://www.whistleblowers.gov/complaint_page.html (last visited Mar. 3, 2017).

102. *See, e.g.*, Egan v. TradingScreen, Inc., No. 10 Civ. 8202(LBS), 2011 WL 1672066, at *1 (S.D.N.Y. May 4, 2011) (plaintiff claimed defendants violated Dodd-Frank's anti-retaliation provision).

103. *Compare* 15 U.S.C. § 78u-6(h)(1)(B) (2012), *with* 18 U.S.C. §1514A(b) (2012).

104. 15 U.S.C. § 78u-6(h)(1)(C).

105. 15 U.S.C. § 78u-6(h)(1)(B).

106. This section is entitled "Civil action to protect against retaliation in fraud cases."

Review Board for SOX cases have relaxed standards for what constitutes reasonable belief. In fact, the pleading standard is more relaxed than in federal court for a Dodd-Frank case.[107] Mary need not identify a specific act of securities fraud, but she must be able to show that a reasonable person, with the same training and experience, under the same circumstances would believe the employer violated securities laws.[108] Mary reported Bill's accounting manipulation to Jerry, a supervisor with authority to investigate such misconduct; the company, through Jerry, knew of her protected activity; she suffered an adverse action (Jerry's personnel file entry); and the circumstances and timing were sufficient to raise the inference that her protected activity likely contributed to the adverse action.

As Mary's counsel, you would need to watch the 180-day OSHA statute of limitations, which began to run when Mary learned Jerry put the unfavorable personnel note in her file.[109] The case would be stronger if Mary had actually received an adverse performance review, likely several months off, before the 180-day limit for a SOX case. There is no way to know how her revelations to the company will affect that review. The company may actually give her a good review for reporting the accounting fraud.

Section 806 of SOX permits uncapped compensatory damages.[110] Section 922 of Dodd-Frank does not.[111] SOX includes an express exemption from mandatory arbitration agreements, while Dodd-Frank claims are subject to such agreements.[112] Mary has some good options if she pursues a retaliation claim. The SOX case must be filed soon, but could later be merged into a Dodd-Frank case in federal court if the company retaliates. On the other hand, a retaliation case may not be worth the effort and expense, especially if she has an ongoing whistleblower claim and is still at the company.

There is currently a circuit split on whether a whistleblower must first file a case with the SEC before bringing a Dodd-Frank case. The Fifth Circuit requires a whistleblower first report to the SEC before

107. Wood v. Dow Chem. Co., 72 F. Supp. 3d 777, 789 (E.D. Mich. 2014) ("But the pleading standard [for reasonable belief] under the Act is not so demanding.").

108. Sylvester v. Parexel Int'l LLC, ARB No. 07-123, 2011 WL 2165854, at *12 (Dep't of Labor May 25, 2011) (en banc).

109. 29 C.F.R. § 1980.103(d) (2016).

110. 18 U.S.C. § 1514A (2012).

111. 15 U.S.C. § 78u-6 (2012).

112. *See* Jason Zuckerman, *The Evolution of SOX: A Powerful Remedy For Retaliation*, LAW360 (May 24, 2016, 11:32 AM), https://www.law360.com/articles/799338/the-evolution-of-sox-a-powerful-remedy-for-retaliation; *see also* Jason Zuckerman & Dallas Hammer, *SOX Whistleblower Protections Are Not Obsolete*, LAW360 (Sept. 21, 2015, 10:45 AM), https://www.law360.com/articles/704629/sox-whistleblower-protections-are-not-obsolete.

bringing a Dodd-Frank claim,[113] but the Second Circuit does not.[114] The SEC addressed this issue in its Final Rule[115] and has filed amicus briefs in several cases supporting the Second Circuit's position that an employee who has reported internally is not required first to file a report with the SEC.[116] The SEC argues that the statute is ambiguous and, under *Chevron*, the SEC's stated interpretation should control.[117] Since 2011, at least twenty-four court decisions reviewed this issue, and at least seventeen have agreed with the SEC's broad interpretation, while at least seven have not.[118]

Fortunately, attorneys can avoid this issue by filing an SEC whistleblower submission before filing a Dodd-Frank retaliation case. If Mary files the TCR the same day she reports internally to the company regarding the accounting fraud, thus becoming a statutory "SEC whis-

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113. Asadi v. G.E. Energy (USA), LLC, 720 F.3d 620, 623 (5th Cir. 2013).

114. Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 154–55 (2d Cir. 2015).

115. 17 C.F.R. § 240.21F-2 (2016).

116. *See, e.g.*, Brief of the Sec. & Exch. Comm'n, Amicus Curiae in Support of the Appellant at 37, Berman v. Neo@Ogilvy LLC, 801 F.3d 145 (2d Cir. 2015) (No. 14-4626).

117. *Id.* at 7, 12 (citing Chevron USA, Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984)).

118. A Wisconsin federal district court agreed with the Fifth Circuit's position in *Asadi*, holding a whistleblower must first file with the SEC before bringing a Dodd-Frank claim. Lamb v. Rockwell Automation Inc., No. 15-CV-1415-JPS, 2016 WL 4273210 (E.D. Wis. Aug. 12, 2016). In *Lamb*, the plaintiff submitted her SEC complaint long after her internal reporting and termination. She thus failed to meet an element of the prima facie case. "[The employer] is only prohibited from retaliating against a 'whistleblower'—one who has reported to the SEC—and at the time it allegedly retaliated, Lamb was not one. Thus, not only does Lamb fail to state a Section 922 [of the Dodd-Frank Act] claim, she can never do so." *Id.* at *4. *See also* Verble v. Morgan Stanley Smith Barney, LLC, 148 F. Supp. 3d 644, 656 (E.D. Tenn. 2015) (rejecting SEC and Second Circuit positions), *aff'd on other grounds*, No. 15-6397, 2017 WL 129040 (6th Cir. Jan. 13, 2017). More recently, in *Somers v. Digital Realty Trust Inc.*, a divided Ninth Circuit panel sided with the Second Circuit and affirmed the district court's denial of the defendant's motion to dismiss a Dodd-Frank whistleblower claim. 850 F.3d 1045 (9th Cir. 2017). It held that, in using the term "whistleblower," Congress did not intend to limit protections to those who disclose information to the SEC, and thus the Dodd-Frank retaliation provisions also protect those who are fired after making internal disclosures of alleged unlawful activity under SOX and other laws, rules, and regulations. *Id.* at 1048–51. The Court found that any ambiguity in the Dodd-Frank language was resolved by an SEC regulation and thus entitled to *Chevron* deference. *Id.* at 1051. The appellant corporation filed a petition for certiorari. Petition for Writ of Certiorari, *Somers*, 850 F.3d 1045 (No. 16-1276). On June 26, 2017, the Supreme Court granted cert in *Digital Realty Trust*, to be heard in the October term. *Somers*, 2017 WL 1480349 (U.S. June 26, 2017). Presumably, this case will resolve the issue of whether whistleblowers are protected from retaliation under Dodd-Frank if they report alleged misconduct only internally, rather than to the SEC. If the Ninth Circuit's position is upheld, it will probably result in more whistleblowers reporting internally first, and not bypassing that option by going to the SEC initially to ensure they have retaliation protection. So, in this case, it would seem that both whistleblowers and corporations (except perhaps for Digital) should be hoping the Supreme Court affirms the Ninth Circuit. Likewise, if the Supreme Court affirms, it could effectively render the SOX retaliation provision moot, as most whistleblowers would favor using Dodd-Frank as it has important advantages over SOX as discussed above.

tleblower," she could file a Dodd-Frank case without fear. She would qualify under both the Fifth and Second/Ninth Circuit rules and presumably under whatever decision the Supreme Court makes, if and when it decides the issue. Mary would then have at least three years to see if any of her SEC whistleblowing activities, or her earlier reporting to Jerry, lead to retaliation. If the company retaliates against her as a whistleblower, she could file or amend her Dodd-Frank retaliation case.[119] In sum, if you take Mary's case, you should quickly file the TCR with the SEC to ensure that a later retaliation case, if filed, would be safe from dismissal on the grounds that Mary was not an SEC whistleblower at the time of filing.

Conclusion

You likely will never have a potential SEC whistleblower case just like Mary's, but you may encounter cases involving both SEC whistleblower claims and the potential for simultaneous retaliation claims under Dodd-Frank, SOX, or both. This review is designed to assist you by providing the best counsel possible to the "Mary" who comes to you in dire need of sound advice.

119. The Fifth Circuit opinion considered that an employee fired after becoming a whistleblower and reporting up to the General Counsel on the same day could utilize Dodd-Frank even if the employer was unaware of the SEC whistleblower filing. *Asadi*, 720 F.3d at 627–28. In our hypothetical, while Mary is unlikely to be fired on the day she reports up to the General Counsel, she would be protected from any retaliation from that point forward. Also, even if Mary did not tell the company the same day that she went to the SEC, she would still be protected from any retaliation for reporting to the company under SOX, 18 U.S.C. § 1514A (2012), or Dodd-Frank, 15 U.S.C. § 78u-6(h)(1) (2012).

When Are Employers' Unilateral Changes Prohibited? A Look at *E.I. Du Pont*, *Minteq*, and *Graymont*: A Management Perspective on the Need for a Uniform Standard

Jamie R. Adams*

Introduction

National Labor Relations Board (NLRB or Board) decisions in *Graymont PA, Inc.*,[1] *Minteq International, Inc.*,[2] and *E.I. Du Pont de Nemours*[3] resurrect an important question for labor lawyers: when operating under a negotiated management rights clause, what standard should parties apply to determine if a unilateral change is permitted? When an employer wants to provide new uniforms, change its health care plan, revise its absenteeism policy, or require employees to sign a confidentiality agreement, it must consider whether it must provide the union with notice and the opportunity to bargain before implementing the change. The duty to bargain understandably may frustrate the employer by requiring it to bargain again over a matter it thought was resolved in earlier negotiations. If the employer instead unilaterally implements the change, the union may question whether the change was lawful and whether it should seek recourse.

Under the current state of law, whether management must bargain over a mandatory subject covered by a management rights clause depends on who is interpreting the applicable law. According to Board decisions, management rights must be specific, and an employer justifying a unilateral change must demonstrate a "clear and unmistakable waiver" of the right to bargain.[4] Dissenting Board members and several circuit courts have routinely disagreed with this standard's application, finding that parties have *already* bargained, and favored in-

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1. 364 N.L.R.B. No. 37 (June 29, 2016).
2. 364 N.L.R.B. No. 63 (July 29, 2016).
3. 364 N.L.R.B. No. 113 (Aug. 26, 2016).
4. United Techs. Corp., 287 N.L.R.B. 198, 198 (1987).

stead a "contract coverage" standard.[5] The Board asserts it need not follow circuit court precedent because it must ensure a nationally uniform labor policy and maintain consistent administration of the National Labor Relations Act (NLRA or the Act).[6] Several circuits, however, rely on section 301 of the Labor Management Relations Act to insist that courts—not the Board—must determine the appropriate standard of review.[7] Section 301 allows parties to a collective bargaining agreement (CBA) to bring contract interpretation disputes directly to federal court without having to file unfair labor practice charges with the Board.[8] These circuits say they owe no deference to the Board because it is not an expert in contract interpretation, and the Board should leave such questions to courts and arbitrators.[9]

This Article examines the history of standards for unilateral changes under management rights provisions, as well as the impact of the expiration of the parties' agreement on past practices established pursuant to such provisions. Part I provides an overview of management's right to make unilateral changes. Part II reviews recent NLRB decisions on unilateral changes. Part III identifies how different contexts result in application of different standards for Board and court interpretation of management rights clauses and explains how multiple standards burden the parties.

I. An Overview of Management's Right to Make Unilateral Changes

The rules surrounding an employer's right to make unilateral changes to mandatory subjects of bargaining during a contract's term are complex. It is helpful to consider an example. Imagine management wants to establish a new policy requiring mandatory uniforms for its workers. Assume the parties' management rights language states: "The responsibilities reserved to the exclusive discretion of the employer include, but are not limited to, adoption and implementation of new policies, work rules, procedures and regulations, as well as the modification or amendment of existing policies, work rules, procedures and regulations." Under current Board law, the determinative issues are whether the parties fully discussed and consciously explored the topic of uniforms during negotiations over the management rights provision and

5. Bath Marine Draftsmen's Ass'n v. NLRB, 475 F.3d 14, 25 (1st Cir. 2007); NLRB v. U.S. Postal Serv., 8 F.3d 832, 836 (D.C. Cir. 1993); Chi. Trib. Co. v. NLRB, 974 F.2d 933, 937 (7th Cir. 1992).

6. *See, e.g.*, *Bath Marine*, 475 F.3d at 22–23 (discussing NLRB's stance not to defer to circuit court precedent).

7. Enloe Med. Ctr. v. NLRB, 433 F.3d 834, 838 (D.C. Cir. 2005) (Board should petition for certiorari when it disagrees with circuit precedent).

8. 29 U.S.C. § 185(a) (2012).

9. *See, e.g.*, Heartland Plymouth Court MI, LLC v. NLRB, 650 F. App'x 11 (D.C. Cir. 2016).

whether the union has clearly and unmistakably waived its right to bargain over the uniform policy change.[10] The Board would likely find this change unlawful.[11] If the Board concludes that providing new uniforms is an unlawful unilateral change, and the employer appeals the decision, several circuit courts—including the D.C. Circuit, where many appeals of Board decisions are filed—would instead apply the contract coverage standard.[12] These courts would ask whether the contract language covers the right to make the unilateral change. If so, they would deny enforcement of the Board's Order because the parties already bargained over the issue and left such decisions to management discretion. Unlike the Board, these courts would find the change lawful.

A. *The Duty to Bargain and Refrain from Unilateral Changes Under the NLRA*

The Supreme Court has held that an employer may not make unilateral changes with respect to mandatory bargaining subjects, such as wages, hours, or other terms and conditions of employment.[13] Instead, it must maintain the status quo and provide the union with notice and an opportunity to bargain about such proposed changes.[14] The employer must refrain from implementing these changes until the union has either waived the right to bargain or the parties have bargained in good faith to agreement or impasse.[15] It is well-established that, when an employer unilaterally implements a term or condition of employment mid-term, without bargaining, it is an unfair labor practice violating section 8(a)(5) of the Act. The applicable NLRA section provides:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title.[16]

Section 8(d) of the Act defines the obligation to bargain collectively and explains that, during the term of a contract, the duty to bargain collectively "shall also mean that no party to such contract shall termi-

10. Graymont PA, Inc., 364 N.L.R.B. No. 37, slip op. at 2 (June 29, 2016); Johnson-Bateman Co., 295 N.L.R.B. 180, 189 (1989).

11. *Graymont*, 364 N.L.R.B. slip op. at 2; *Johnson-Bateman*, 295 N.L.R.B. slip op. at 189.

12. Heartland Plymouth Court MI LLC v. NLRB, 838 F.3d 16, 25 (D.C. Cir. 2016).

13. NLRB v. Katz, 369 U.S. 736, 743 (1962).

14. *Id.*

15. *Id.*

16. 29 U.S.C. § 158(a)(1), (5) (2012).

nate or modify such contract, unless [certain requirements are met]."[17] When an employer unilaterally modifies a contract mid-term, section 8(d) of the Act makes it an unfair labor practice under section 8(a)(5).[18]

Although the duty to bargain under the NLRA continues during the CBA's term,[19] parties may nevertheless negotiate terms that make it unnecessary to bargain over subsequent changes in terms or conditions of employment.[20] The primary reason for negotiating management rights clauses is to streamline the CBA and reduce the time and costs of mid-term negotiations over mandatory bargaining subjects. During negotiations, for example, parties may agree that management will be permitted to make unilateral changes to certain terms and conditions of employment without triggering the duty to bargain. However, once parties leave the table and implement the contract, they often disagree about the scope of these provisions.

B. Metropolitan Edison*: "Clear and Unmistakable Waiver"*

The Board uses a "clear and unmistakable waiver" standard when reviewing whether a unilateral change is permitted by a management rights clause.[21] For example, in *United Technologies*, the employer unilaterally modified the progressive discipline steps of its attendance policy in reliance on its management rights clause.[22] The contract gave the employer the "sole right and responsibility to direct the operations of the company and in this connection . . . to select, hire, and demote employees, *including the right to make and apply rules and regulations for* production, *discipline*, efficiency, and safety."[23] The Board found that the "contract language plainly grant[ed] the [r]espondent the right to unilaterally make and apply rules for discipline."[24] It also reviewed the parties' bargaining history and found nothing to indicate that the language was "intended to mean something other than that which it plainly state[d]."[25] The Board held that "by agreeing to the management functions provisions, the Union waived its right to bargain over the [employer's] change in its progressive discipline procedure."[26]

17. *Id.* § 158(d).

18. *See* St. Vincent Hosp., 320 N.L.R.B. 42, 42 (1995) (describing "interlocking legal principles of Section 8(a)(5) and 8(d)").

19. Provena Hosps., 350 N.L.R.B. 808, 811 (2007).

20. *See, e.g.*, United Techs. Corp., 287 N.L.R.B. 198, 198 (1987).

21. United Techs. Corp., 287 NLRB at 205 (relying on Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 n.12 (1983)).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 199.

C. *"Contract Coverage": The Fundamental and Long-Running Disagreement*

Several U.S. Courts of Appeals, and dissenting Board members, reject the Board's clear and unmistakable waiver standard and instead prefer the "contract coverage" approach.[27] The D.C. Circuit has explained that it has a "fundamental and long-running disagreement" with the Board over whether an employer violates section 8(a)(5) by refusing to bargain over a subject allegedly contained in a collective bargaining agreement.[28] The D.C. Circuit applies the contract coverage approach, distinguishing it from the Board's waiver: "A waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain about a matter; but where the matter is covered by the [CBA], the union *has exercised* its bargaining right and the question of waiver is irrelevant."[29] "Accordingly, questions of 'waiver' normally do not come into play with respect to subjects already covered by a collective bargaining agreement."[30] In declining to adopt a clear and unmistakable waiver standard, the D.C. Circuit has explained that parties should not need to bargain over every possible issue that may arise during the contract:

> The rather obvious problem with [this type of specificity requirement] is that it is, in practice, impossible to meet. Surely it would have required near-supernatural prescience for the parties to have foreseen, at the time of drafting the [labor agreement], what implementation issues would arise with respect to "specific individual details" that had not even been conceived, much less implemented, at the time. Nor could any mortal drafter anticipate, perhaps months or years in advance, the "full range of impact and implementation issues" that could arise from an as yet unforeseen modification of performance standards.[31]

The D.C. Circuit has clarified: "[W]hen employer and union bargain about a subject and memorialize that bargain in a [CBA], they create a set of rules governing their future relations. Unless the parties agree otherwise, there is no continuous duty to bargain during the term of the CBA with respect to a matter covered by the contract."[32] The court reasoned that "it is naïve to assume that bargaining parties anticipate every hypothetical grievance and purport to address it in their

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27. *See* Bath Marine Draftsmen's Ass'n v. NLRB, 475 F.3d 14, 25 (1st Cir. 2007); NLRB v. U.S. Postal Serv., 8 F.3d 832, 836 (D.C. Cir. 1993); Chi. Trib. Co. v. NLRB, 974 F.2d 933, 937 (7th Cir. 1992).
28. Enloe Med. Ctr. v. NLRB, 433 F.3d 834, 835 (D.C. Cir. 2005).
29. Dep't of Navy v. Fed. Labor Relations Auth., 962 F.2d 48, 57 (D.C. Cir. 1992).
30. NLRB v. U.S. Postal Serv., 8 F.3d 832, 836–37 (D.C. Cir. 1993).
31. *Dep't of Navy*, 962 F.2d at 60.
32. *U.S. Postal Serv.*, 8 F.3d at 836.

contract. Rather, a collective bargaining agreement establishes principles to govern a myriad of fact patterns."[33]

Some circuits follow the D.C. Circuit's contract coverage approach, while others have used, sometimes with modifications, the Board's clear and unmistakable waiver standard. The First Circuit expressly "adopt[ed] the District of Columbia Circuit's contract coverage standard to determine whether the Unions have already exercised their right to bargain. If so, the waiver standard is meaningless."[34] The Seventh Circuit has also held that the concept of waiver is irrelevant, musing: "we wonder what the exact force of the 'clear and unmistakable' principle can be when the parties have an express written contract and the issue is what it means."[35] Other circuits, including the Sixth, Ninth, and Tenth Circuits, have adopted the Board's clear and unmistakable waiver standard or developed a modified version of it, creating a patchwork of standards potentially applicable to a dispute over mid-term unilateral changes.[36] In *Enloe Medical Center v. NLRB*,[37] the D.C. Circuit identified this circuit split.[38] It acknowledged:

> the Board refuses to acquiesce in our analysis of the issue—as it has every right to do—but since *any employer* faced with a section 8(a)(5) holding predicated on the Board's 'clear and unmistakable waiver' doctrine as applied to the interpretation of an agreement can file a petition in *this court* . . . the Board's implementation of its policy is stalemated. The Board is, of course, always free to seek certiorari.[39]

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33. *Id.* at 838.

34. *See* Bath Marine Draftsmen's Ass'n v. NLRB, 475 F.3d 14, 25 (1st Cir. 2007).

35. Chi. Trib. Co. v. NLRB, 974 F.2d 933, 937 (7th Cir. 1992).

36. The Ninth Circuit adopted the Board's doctrine, explaining: "Proof of a contractual waiver is an affirmative defense and it is the employer's burden to show that the contractual waiver is 'explicitly stated, clear and unmistakable.' . . . Equivocal, ambiguous language in a bargaining agreement, without more, is insufficient to demonstrate waiver." Local Joint Exec. Bd. of Las Vegas v. NLRB, 540 F.3d 1072, 1079–80 (9th Cir. 2008) (internal citations omitted). The Tenth Circuit has held that "it is . . . well established that unions can waive their right to bargain over wages or other mandatory bargaining subjects . . . . Waivers of statutory bargaining rights must be 'clear and unmistakable' in order for courts to enforce them. . . ." Capitol Steel & Iron Co. v. NLRB, 89 F.3d 692, 697 (10th Cir. 1996) (citing Metro. Edison v. NLRB, 460 U.S. 693, 708 (1983)). The Second Circuit takes a slightly different approach, using a two-step inquiry to determine whether a union has waived its right to bargain: (1) whether the right subject to collective bargaining is clearly and unmistakably covered by the contract; and (2) if the subject is *not* covered by the collective bargaining agreement (CBA), whether the union has clearly and unmistakably waived its right to bargain. Local Union No. 36, Int'l Brhd. of Elec. Workers, AFL- CIO v. NLRB, 706 F.3d 73, 81–82 (2d Cir. 2013). The Second Circuit's rationale is that its two-step test upholds longstanding precedent that relinquishment of statutory rights should be deliberate and obvious. *Id.*

37. 433 F.3d 834 (D.C. Cir. 2005).

38. *Id.* at 838.

39. *Id.* (emphasis added).

D. Bath Iron Works*: Clear and Unmistakable Waiver Applied for Unilateral Changes and "Sound Arguable Basis" for Unilateral Modification*

In 2005, in *Bath Iron Works Corp.*, the Board distinguished between unilateral changes and unilateral contract modifications.[40] It clarified its approach, recognizing that an employer may change terms or conditions of employment if it can demonstrate that the union clearly and unmistakably waived its right to bargain over the change.[41] However, if the claim is that the employer unlawfully unilaterally modified a CBA (in violation of section 8(d), rather than section 8(a)(5)), it should analyze whether the employer can present a "sound arguable basis" that the contract permits the modification.[42]

The Board explained that "contract modification" and "unilateral change" cases are "fundamentally different in terms of principle, possible defenses, and remedy."[43] In a unilateral change case, the question is whether an employment practice concerning a mandatory bargaining subject was changed without bargaining.[44] In a contract modification case, the question is whether the employer failed to adhere to the contract and modified a provision without consent.[45] The Board explained, "[w]e do not view our decision here as a 'missed opportunity' to address this controversy over the applicability of the clear and unmistakable waiver standard and the contract coverage theory. We simply note that the issue is not before us."[46]

II. Recent Board Decisions Regarding Unilateral Changes

In 2016, the Board further developed its unilateral change doctrine in *Graymont*, *Minteq*, and *E.I. Du Pont*.

A. Graymont*: Clear and Unmistakable Waiver Remains the Standard*

In *Graymont*, the Board adhered to its clear and unmistakable waiver approach for section 8(a)(5) claims if the employer asserts the union waived its right to bargain over a particular matter during a CBA's term.[47] The three-member majority rejected the employer's argument that the contract coverage standard, applied by the D.C. Circuit and several other circuit courts, was appropriate for assessing

40. 345 N.L.R.B. 499, 501 (2005).
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 502.
47. Graymont PA, Inc., 364 N.L.R.B. No. 37, slip op. at 2 (June 29, 2016).

such claims.[48] The Board affirmed the administrative law judge's finding that the union did not clearly and unmistakably waive its right to bargain over changes to the employer's work rules, absenteeism policy, and progressive discipline schedule, holding that the employer violated section 8(a)(5) by unilaterally implementing these changes.[49]

Member Philip Miscimarra, dissenting, would have found that the union clearly and unambiguously granted the employer the right to make the changes.[50] Alternatively, under the contract coverage standard, he thought the parties already bargained and agreed that the employer had the right to make the changes unilaterally.[51]

B. Minteq International*: Management Rights Language Must Specifically Reference the Permissible Unilateral Change*

In *Minteq*, the Board found that the employer violated section 8(a)(5) by requiring new employees to sign a non-compete and confidentiality agreement (NCCA) as a condition of employment without giving the union notice and an opportunity to bargain.[52] It found the NCCA's provisions "clearly affect[ed] employees' terms and conditions of employment in ways that extend[ed] beyond work rules governing employees' conduct in the workplace."[53] Therefore, the management rights clause permitting the employer to set "work rules" was too vague to constitute a clear and unmistakable waiver of the right to bargain.[54] "Additionally, there [wa]s nothing in the parties' bargaining history to support a finding that the management-rights clause was intended by the parties to encompass the implementation of the NCCA."[55]

C. E.I. Du Pont de Nemours*: Upon Expiration of a Contract, the "Status Quo" Does Not Include Changes Made Pursuant to a Management Rights Clause*

In *E.I. Du Pont*, upon remand from the D.C. Circuit, the Board reexamined whether the employer violated section 8(a)(5) by unilaterally changing the terms of the employees' benefit plan after the appli-

48. *Id.*, slip op. at 3 n.11.

49. *Id.*, slip op. at 3. Graymont appealed the Board's decision, and the Board consented to summary reversal rather than allowing the D.C. Circuit again to address this issue. *See* Part III.C below. *Graymont* was issued after yet another D.C. Circuit decision, in which it again rejected the Board's clear and unmistakable waiver standard. Heartland Plymouth Court MI, LLC v. NLRB, 650 F. App'x 11, *12–13 (D.C. Cir. 2016) (*Heartland Plymouth I*). In *Heartland Plymouth I*, the D.C. Circuit repeated its disagreement with the NLRB. *Id.* at *12–13. In a subsequent fees motion, the D.C. Circuit stated: "More than a decade ago, we told the NLRB that our positions on the 'contract coverage' analysis were 'stalemated' absent the Board seeking *certiorari*." Heartland Plymouth Court MI LLC v. NLRB, 838 F.3d 16, 25 (D.C. Cir. 2016) (*Heartland Plymouth II*).

50. *Graymont*, 364 N.L.R.B., slip op. at 9 (Miscimarra, Member dissenting).

51. *Id.*, slip op. at 9.

52. Minteq Int'l, Inc., 364 N.L.R.B. No. 63, slip op. at 1 (July 29, 2016).

53. *Id.*, slip op. at 3.

54. *Id.*, slip op. at 4–5.

55. *Id.*, slip op. at 5.

cable CBAs had expired and during negotiations for successor agreements that were not at impasse.[56] The Board affirmed its prior findings and returned to its rule in *Beverly Health & Rehabilitation Services*[57] and *Register-Guard*,[58] holding that discretionary unilateral changes allegedly made pursuant to a past practice developed under an expired management rights clause are unlawful.[59] The majority overruled precedent, including the *Courier-Journal* cases,[60] *Capitol Ford*,[61] and *Beverly Health & Rehabilitation Services*,[62] stating those decisions conflicted with earlier well-established waiver principles.[63]

The majority also clarified Board precedent outlining when a past practice requires an employer to continue terms and conditions of employment as status quo in the absence of a CBA.[64] It reviewed its past practice doctrine under *Katz*,[65] emphasizing that the Board and the courts have repeatedly held that "employers may act unilaterally pursuant to an established practice *only* if the changes do not involve the exercise of significant managerial discretion."[66] The Board also held that an employer that makes wide-ranging and varied changes to unit employees' benefits, without cognizable fixed criteria, does not establish a past practice that permits the changes to continue after the CBA has expired.[67] Therefore, the majority stated that following expiration of the parties' CBA, the employer "had the statutory obligation to adhere to the terms and conditions of employment that existed on the expiration date . . . until it bargained to agreement or reached a good faith impasse in overall bargaining for a new agreement."[68]

Member Miscimarra, dissenting, asserted that the majority improperly redefined the definition of "change" under the Supreme Court's *Katz* decision. He contended that Board precedent interpreting *Katz,* and common sense, requires that a continuation of a past practice does not constitute a change.[69] He relied on Board precedent, in-

56. E.I. Du Pont de Nemours, 364 N.L.R.B. No. 113, slip op. at 1–2 (Aug. 26, 2016).

57. 335 N.L.R.B. 635 (2001), *enf'd in relevant part by* Beverly Health & Rehab. Servs. v. NLRB, 317 F.3d 316 (D.C. Cir. 2003).

58. 339 N.L.R.B. 353 (2003).

59. *E.I. Du Pont*, 364 N.L.R.B., slip op. at 5.

60. Courier-Journal, 342 N.L.R.B. 1093 (2004); Courier-Journal, 342 N.L.R.B. 1148 (2004).

61. 343 N.L.R.B. 1058 (2004).

62. Beverly Health & Rehab. Servs., 346 N.L.R.B. 1319 (2006).

63. *E.I. Du Pont*, 364 N.L.R.B., slip op. at 6–8, 13.

64. *Id.*, slip op. at 6–7.

65. NLRB v. Katz, 369 U.S. 736 (1962).

66. *E.I. Du Pont*, 364 N.L.R.B., slip op. at 7.

67. *Id.*, slip op. at 9–10.

68. *Id.*, slip op. at 10.

69. *Id.*, slip op. at 15–16 (Miscimarra, Member, dissenting).

cluding *Shell Oil Co.*,[70] *Westinghouse Electric Corp. (Mansfield Plant)*,[71] and *Courier–Journal* to support his position.[72]

III. Determining Which Standard Applies to Unilateral Changes Made Under a Management Rights Clause

A. *Which Standard Applies to Unilateral Changes Made Under a Management Rights Clause While the Parties' CBA Is in Effect?*

When determining whether a unilateral change may be made pursuant to a management rights clause, employers should determine the standard that will be applied by the Board and by the courts in their jurisdiction. This is particularly true if the management rights clause does not specify the unilateral change's subject by name.[73]

1. Applying the Clear and Unmistakable Waiver Standard

The "clear and unmistakable waiver" standard requires parties unequivocally to express their mutual intention to permit unilateral employer action on a particular employment term, notwithstanding the statutory bargaining duty.[74] The employer must show the union waived its right to bargain over the particular subject.[75] This can be accomplished by referring to contract provisions related specifically to the subject, by reviewing the parties' conduct (e.g., bargaining history, past practice, action, or inaction), or by a combination of these factors.[76] In assessing whether a contract expresses such intention, courts must read the employer's reserved management rights contract provisions together.[77]

The Board generally will not find that a broad management rights clause constitutes a clear and unmistakable waiver.[78] The Board requires a waiver that specifically references the particular disputed topic.[79] The parties must have fully discussed and consciously explored the disputed issue.[80] The following chart provides examples of the Board's specificity requirements, illustrating why general management clauses generally fail.

70. 149 N.L.R.B. 283 (1964).

71. 150 N.L.R.B. 1574 (1965).

72. *E.I Du Pont*, 364 N.L.R.B., slip op. at 18 n.20, 19–20 (Miscimarra, Member, dissenting).

73. *See, e.g.*, Minteq Int'l, Inc., 364 N.L.R.B. No. 63, slip op. at 4 (July 29, 2016); Baptist Hosp., 351 N.L.R.B. 71, 73 (2007) (management rights clause's specificity is relevant to inquiry).

74. Provena Hosps., 350 N.L.R.B. 808, 811 (2007).

75. *Id.* at 811.

76. *Id.* at 810; Am. Broadcasting Co., 290 N.L.R.B. 86, 88 (1988); Am. Diamond Tool, Inc., 306 N.L.R.B. 570, 570 (1992) (waiver of bargaining right may also be inferred from parties' past practices or from combination of CBA's express provisions and parties' past practices).

77. Baptist Hosp., 351 N.L.R.B. 71, 73 (2007).

78. *Provena*, 350 N.L.R.B. at 811–12.

79. *Id.*

80. *Id.* at 810 (citing Metro. Edison Co. v. NLRB, 460 U.S. 693 (1983)).

Unilateral Change	**Management Rights Language**	**Outcome**
Progressive Disciplinary Procedure for Absenteeism	The employer had "the sole right and responsibility to direct the operations of the company . . . , including the right to make and apply rules and regulations for production, discipline, efficiency, and safety."[a] The employer also had the right "to discharge or otherwise discipline any employee for just cause."[b]	The Board found that the clause's plain language gave the company the unilateral right to make disciplinary rules and impose discipline pursuant to them.[c]
Attendance Policy	The employer had the "exclusive right to manage the plant and its business, and to exercise the customary functions of management . . . [and] . . . to make such fair and reasonable rules, not in conflict with this Agreement, as it may from time to time deem best for the purposes of maintaining order, safety, and/or effective operation of Company plants, and after advance notice thereof to the Union and the employees, to require nondiscriminatory compliance therewith."[d]	The reference to "rules" in this clause was too general and did not clearly cover the employer's discipline-linked attendance policy changes.[e]
Progressive Disciplinary Procedure for Absenteeism	The employer "[R]etain[ed] the sole and exclusive rights to manage; to direct its employees; . . . to evaluate performance, . . . to discipline and discharge for just cause, to adopt and enforce rules and regulations and policies and procedures; [and] to set and establish standards of performance for employees."[f]	The Board held that none of the management rights provisions specifically referenced "work rules, absenteeism, or progressive discipline."[g] Further, there was no evidence that the parties discussed these subjects during negotiations.[h] Therefore, the employer did not establish a clear and unmistakable waiver of the right to bargain over these changes.[i]

Unilateral Change	Management Rights Language	Outcome
Non-Compete and Confidentiality Agreement	The employer had the right to "hire employees, determine their qualifications . . . ," "issue, amend and revise work rules and Standards of Conduct . . . and to take whatever action is either necessary or advisable to manage and fulfill the mission of the Company . . . ."[j]	The Board held that the management rights clause was insufficiently specific[k] because it made no reference to non-compete/non-disclosure agreements.[l] The reference to "work rules" was too vague to show that the union clearly and unmistakably waived its right to bargain over the change.[m]

[a] United Techs. Corp., 287 N.L.R.B. 198, 198 (1987) (emphasis omitted).
[b] *Id.* at 205.
[c] *Id.* at 198.
[d] Dorsey Trailers, 327 N.L.R.B. 835, 836 (1999).
[e] *Id.* at 836.
[f] Graymount PA Inc., 364 N.L.R.B. 37, slip op. at 1 (June 29, 2016).
[g] *Id.*, slip op. at 3.
[h] *Id.*
[i] *Id.*
[j] Minteq Int'l, Inc., 364 N.L.R.B. 63, slip op. at 2 (July 29, 2016).
[k] *Id.* at 4.
[l] *Id.*
[m] Id. at 4–5.

The Board has required an increasing level of specificity. However, if the management rights clause is sufficiently specific, the Board will find that it constitutes a clear and unmistakable waiver allowing the employer's unilateral change.[81]

2. Applying the Contract Coverage Standard

The inquiry under the "contract coverage" standard is whether the agreement covers the disputed subject.[82] The contract coverage approach emphasizes the parties' existing bargain.[83] If a subject is covered by a current CBA, the employer generally has no ongoing obligation to bargain.[84] Under this approach, a section 8(a)(5) unilateral change allegation will be dismissed if "there is a contract clause that is relevant to the dispute."[85] Determining whether the subject of the dispute is covered by the parties' CBA is a matter of ordinary contract interpretation.[86] If such a clause exists, it can reasonably be said that

81. *See, e.g.*, *id.*, slip op. at 4; Baptist Hosp., 351 N.L.R.B. 71, 73 (2007); Provena, 350 N.L.R.B. 808, 815 (2007); Caraustar Mill Grp., 339 N.L.R.B. 1079, 1082 (2003); United Techs., 287 N.L.R.B. 198, 198 (1987).
82. NLRB v. USPS, 8 F.3d 832, 836 (D.C. Cir. 1993).
83. *Id.* at 836.
84. *Id.* at 836.
85. *Baptist Hosp.*, 351 N.L.R.B. at 72 n.7.
86. Enloe Med. Ctr. v. NLRB, 433 F.3d 834, 839 (D.C. Cir. 2005).

the parties have bargained about the subject and incorporated their bargain into the contract.[87]

Waiver is irrelevant because the parties have already exercised their rights to bargain on the issue.[88] There is no need to bargain over changes to mandatory bargaining subjects if the parties have negotiated a CBA addressing how these issues will be handled.[89] The union's bargaining rights regarding that subject have been fully exercised for the life of the agreement.[90] The Board's clear and unmistakable waiver approach does not apply because it imposes "an artificially high burden" of specificity on employers and ignores the reality that CBAs establish "principles to govern a myriad of fact patterns."[91]

The chart below demonstrates how circuit courts have applied the contract coverage standard.

Unilateral Change	**Management Rights Language**	**Outcome**
Drug and Alcohol Policy	The employer "has and retains exclusively to itself . . . the exclusive right . . . to establish and enforce reasonable rules and regulations relating to the operation of its facilities and to employee conduct."[a]	The Seventh Circuit found that the alcohol and drug policy was a regulation relating to employee conduct, and the drug and alcohol standard was a reasonable rule.[b] The employer had the right to impose such rules.[c]
Service Reductions	The employer shall have the exclusive right to "transfer" and "assign" employees, to "maintain the efficiency of the operations entrusted to it," and "to determine the methods, means and personnel by which such operations are to be conducted."[d]	The D.C. Circuit found that the service reductions were within the scope of the power for which the parties bargained.[e] Because the CBA memorialized the terms of the bargain, it covered the dispute.[f]

87. *See USPS*, 8 F.3d at 836; Provena Hosps., 350 N.L.R.B. 808, 817 (2007) (Battista, Chairman, dissenting).
88. *See generally USPS*, 8 F.3d at 836.
89. *Id.* at 833–34, 836.
90. *See* Heartland Plymouth I, 650 F. App'x 11, 13 (D.C. Cir. 2016).
91. *Enloe*, 433 F.3d at 837; *USPS*, 8 F.3d at 838; *see also* Dep't of the Navy, 962 F.2d 48, 56–57 (D.C. Cir. 1992).

Unilateral Change	**Management Rights Language**	**Outcome**
On-Call Policy	The employer "retains the sole and exclusive right to exercise all the authority, rights and/or functions of management," and "to revise, withdraw, supplement, promulgate, and *implement* policies during the term of the agreement 'as it deems appropriate.'"[g]	The D.C. Circuit found that the agreement gave the employer the unilateral right to adopt and implement a new mandatory on-call policy.[h]

[a] Chi. Trib. Co. v. N.L.R.B., 974 F.2d 933, 935 (7th Cir. 1992).
[b] *Id.*
[c] *Id.*
[d] NLRB v. USPS, 8 F.3d 832, 835 (D.C. Cir. 1993).
[e] *Id.* at 838.
[f] *Id.*
[g] Enloe Med. Ctr. v N.L.R.B., 433 F.3d 834, 836 (D.C. Cir. 2005).
[h] *Id.* at 840.

The D.C. Circuit, where any employer may file a petition for review of a Board decision,[92] has applied the contract coverage standard for more than two decades.[93] The First and Seventh Circuits also apply this standard.[94]

3. Applying the Sound Arguable Basis Standard

Under current Board law, the clear and unmistakable waiver standard does not apply to alleged section 8(d) contract modifications. The Board's "sound arguable basis" analysis determines whether the employer's action is supported by (or contrary to) the contract.[95] Generally speaking, the employer acts lawfully if it "has a 'sound arguable basis' for its interpretation of a contract and is not 'motivated by union animus or . . . acting in bad faith.'"[96] In addition, the union must identify a "specific term 'contained in' the contract that the [contested action] modified."[97] The Board is not required to find that the employer's interpretation is correct, nor that the employer's interpretation is better than the union's.[98] Instead, the Board must decide whether the union has proven that the employer's interpretation is not colorable.[99]

92. 29 U.S. Code § 160(f) (2012).
93. *See Enloe Med. Ctr.*, 433 F.3d at 836; *see also* S. Nuclear Operating Co. v. NLRB, 524 F.3d 1350, 1358 (D.C. Cir. 2008); *USPS*, 8 F.3d at 836–37; *Dep't of the Navy*, 962 F.2d at 56–57.
94. Bath Marine Draftsmen's Ass'n v. NLRB, 475 F.3d 14, 25 (1st Cir. 2007); Chi. Trib. Co. v. NLRB, 974 F.2d 933, 936–37 (7th Cir. 1992).
95. *See also supra* text accompanying note 42.
96. Bath Iron Works Corp., 345 N.L.R.B. 499, 502 (2005).
97. Milwaukee Spring Div., 268 N.L.R.B. 601, 602 (1984).
98. *Bath Iron Works*, 345 N.L.R.B. at 503.
99. *Id.*

Bath Iron Works indicates that either the employer or the union may wish to challenge the Board's standard. For example, the union appealed the Board's *Bath Iron Works* decision, arguing that, under its prior precedent, a clear and unmistakable waiver was required.[100] The First Circuit explained that "the Board avoided the controversy surrounding the applicable standard when a union alleges a § 8(a)(5) unilateral change and the employer defends with contractual privilege . . . ."[101] The First Circuit then expressly "adopt[ed] the District of Columbia Circuit's contract coverage test to determine whether the [u]nions ha[d] already exercised their right to bargain."[102] It said: "The unfair labor practice determination depends solely on the interpretation of the contract in place, and the appropriate standard . . . is the sound arguable basis standard."[103] Essentially, the sound arguable basis standard bears a close resemblance to the contract coverage standard.

B. *What Standard Applies to Unilateral Changes Made Pursuant to Past Practices Established Under a Management Rights Clause Once the Parties' CBA Expires?*

The above analyses apply to management rights provisions in a current CBA. Once the agreement expires, the management rights clause expires with it, and the parties must consider these questions anew. Under current Board law, "unilateral changes ostensibly made pursuant to a past practice developed under an expired management-rights clause are unlawful."[104] Under *Katz*'s past practice doctrine, employers may act unilaterally pursuant to an established practice only if changes do not involve significant managerial discretion—this freezes the "status quo."[105] "[W]ide-ranging and varied changes, made with no cognizable fixed criteria, d[o] not establish a status quo [that management may] continue post-expiration."[106] When the agreement expires, the terms effective on its expiration date become fixed as the status quo.[107]

The Board's rationale for this standard is that, "when a union agrees to a management-rights clause, it has prospectively waived its right to object to discretionary unilateral changes" during the term of the contract, but when the contract expires, "those discretionary changes cannot constitute a past practice that an employer could or should continue post-expiration."[108] According to the Board, "a contrary rule would make the expiration of the clause 'meaningless wher-

100. *Bath Marine*, 475 F.3d at 20.
101. *Id.* at 23.
102. *Id.* at 25.
103. *Id.*
104. E.I. Du Pont de Nemours, 364 N.L.R.B. No. 113, slip op. at 1 (Aug. 26, 2016).
105. *Id.*, slip op. at 7.
106. *Id.*, slip op. at 10.
107. *Id.*, slip op. at 9.
108. *Id.*, slip op. at 6.

ever the employer had taken advantage of [the management rights clause] to make changes.'"[109]

When evaluating whether an employer's actions constitute a "change," the employer must go beyond "compar[ing] the new actions to the past actions."[110] Instead, an employer must "look at whether *other things* have changed—specifically, whether a [CBA] previously existed, whether the prior CBAs contained language conferring a management right to take the actions in question, and whether a new CBA exists containing the same contract language."[111] If not, under this standard, the employer's actions will constitute a "change," even though they are identical to what the employer did before.[112] The employer must bargain to agreement or impasse on all mandatory bargaining subjects under negotiation before taking action regarding any issue.[113] Applying a standard in which past practices expire along with a negotiated management rights clause adds "a new Board-imposed duty for parties to negotiate regarding actions that represent a *continuation* of what the employer has done before."[114]

C. *The Problem with the Existence of Multiple Standards*

When negotiating or implementing a CBA, parties must navigate a maze of varied and conflicting standards to determine the effect of a management rights provision. The application of a current CBA's management rights clause depends on the provision's specificity to the dispute. If the language is insufficiently specific, the Board will invalidate it, and the employer's rights will then depend on the employer's willingness to appeal the Board's decision to a circuit court that applies the contract coverage standard. Upon contract expiration, the employer must carefully examine past practices to determine whether it made prior similar changes pursuant to the management rights clause and whether the continuation of those past practices now constitutes a "change."[115] As Member Miscimarra correctly observed, "unions and employers face enormous challenges in contract negotiations: prioritizing issues, reconciling divergent positions, preparing and responding to information requests, and managing the bar-

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109. *Id.*, slip op. at 5.
110. *Id.*, slip op. at 15–16 (Miscimarra, Member, dissenting).
111. *Id.*
112. *Id.*, slip op. at 16.
113. *Id.*
114. *Id.* (emphasis in original).
115. When reviewing a past practice pursuant to an expired management rights clause, the employer may also need to consider whether the management rights clause was specific enough to satisfy the Board's "clear and unmistakable waiver" standard to support the unilateral change. If the management rights clause is broad, the employer could argue that the change could not have lawfully been made pursuant to that clause prior to its expiration, and therefore, is subject to a standard past practice analysis.

gaining process."[116] The Board's recent decisions regarding management rights clauses add to these challenges.

The Board's decision in *Graymont PA, Inc.*[117] illustrates the employer's difficult dilemma. Graymont believed it was free to act unilaterally under *both* the contract coverage and clear and unmistakable waiver standards.[118] The dissenting Board Member agreed with the employer's conclusion that it satisfied both standards, stating: "[n]o reasonable person reading this language could conclude that Graymont's right of unilateral action extended to rules, regulations, policies and procedures concerning *some* matters but not others."[119]

The Board majority found otherwise. It held that, because the CBA provisions did not "specifically reference work rules, absenteeism, or progressive discipline," the union did not clearly and unmistakably waive its right to bargain over those subjects.[120] The D.C. Circuit has held that, although the Board is free to apply its waiver analysis, it may not do so to the exclusion of the contract coverage analysis.[121] Despite this, the Board refused to apply the contract coverage standard stating, "we reject it and adhere to the Board's long-established 'clear and unmistakable waiver' standard."[122]

Graymont appealed, arguing that "[t]he Board chose to ignore this well settled precedent in favor of its 'clear and unmistakable waiver' analysis."[123] Furthermore, "the Board's refusal to adhere to [this Court's] precedent dooms its decision before this [C]ourt."[124] The Board thereafter consented to summary reversal of its decision.[125] The existing patchwork of different Board and court standards applying to the same contract provision caused Graymont to face an unfair labor practice charge, an administrative hearing, a Board review, and an appeal, only to have the decision summarily reversed. As the D.C. Circuit observed in *Heartland Plymouth*:

> [T]he Board's policy has had the effect of needlessly protracting litigation, establishing a two-tiered system of labor law in the same jurisdiction, encouraging disrespect for the [the] Board['s] orders, and antagonizing the courts. . . . *Even worse, it compels litigants to ex-*

116. *Id.*, slip op. at 16.
117. Graymont PA, Inc., 364 N.L.R.B. No. 37, slip op. at 3 (June 29, 2016).
118. *Id.*, slip op. at 3.
119. *Id.*, slip op. at 12 (Miscimarra, Member, dissenting).
120. *Id.*, slip op. at 3.
121. Enloe Med. Ctr. v. NLRB, 433 F.3d 834, 837–38 (D.C. Cir. 2005); s*ee also* Heartland Plymouth II, 838 F.3d 16, 19–20 n.1 (D.C. Cir. 2016) (question of contract coverage is antecedent to waiver question).
122. *Graymont*, 364 N.L.R.B. at 3 n.11.
123. Corrected Brief of Petitioner at 13, Graymont, PA, Inc. v. NLRB, No. 16-1249 (D.C. Cir. Nov. 8, 2016).
124. *Id.* (alterations in original).
125. *See* Consent of the NLRB to Summary Reversal, Graymont, PA, Inc. v. NLRB, No. 16-1249 (D.C. Cir. Jan. 23, 2017).

pend resources in litigating cases in which it is clear that the appropriate circuit will not enforce the Board's order.[126]

Employers may believe their contract language is sufficiently specific to cover the anticipated change under the clear and unmistakable waiver test or the contract coverage test, only to have their unilateral change deemed unlawful. Under the current framework, a broad management rights clause that fails expressly to identify the exact unilateral change is essentially useless. However, if the company is willing to spend the additional time and resources to challenge the Board's decision, it can be relatively certain that its action will be found lawful. That leaves little predictability for parties that are either unwilling or unable to negotiate long, detailed management rights clauses. The outcome of their dispute will often depend on the parties' litigation tactics rather than on their negotiations. When considering whether to implement a unilateral change, employers must carefully analyze whether the existing management rights language is sufficiently specific under current Board law and whether they are willing to appeal an adverse Board decision. If the parties' contract has expired, employers should be cautious about making changes without first providing the union with notice and the opportunity to bargain—even if the employer has been operating the same way for years, and the action does not intuitively seem to constitute a "change." Unless the Board, under the new administration, alters its current standards, the question of whether a unilateral change is lawful will continue to be governed by a complicated set of rules and very high standards, both during the term of the contract and after expiration.

The Board could resolve this by either taking this dispute to the Supreme Court or by adopting a more relaxed standard that the D.C. Circuit and other circuits will approve. The legal battle between the Board and the D.C. Circuit has existed for two decades, and the divide is only deepening. Over the years, the Board has increasingly narrowed its reading of the parties' contract language. The Board's insistence on a strict application of the clear and unmistakable waiver standard, absent Supreme Court review, creates confusion and compels the parties to spend needless expenditure of time and money. Employers, unions, and employees pay the literal price.

Conclusion

Recent Board decisions demonstrate the uphill battle employers face in asserting management rights—even when those rights are negotiated by the parties and reduced to writing. An employer may leave the table after negotiating a management rights clause only to have the union file

126. *Heartland Plymouth II*, 838 F.3d at 24.

an unfair labor practice charge against it for exercising the rights it thought it had negotiated. In effect, the Board's current approach invalidates parties' agreements and eliminates rights that employers secured at the bargaining table.

These recent cases make it more important than ever that employers insist upon specificity in management rights clauses and insist that the parties actively and fully discuss the application of those clauses to ensure the bargain is fully enforceable. When negotiating management rights clauses, employers must identify priority issues, explore those issues fully during negotiations, and keep accurate notes of the bargaining history. If later called to justify a unilateral change, the employer may need to point to express contract provisions, the conduct of the parties (such as bargaining history, past practice, action, or inaction), or a combination of these factors. The enforceability of management rights clauses—and the lawfulness of employers' unilateral changes pursuant to those clauses—will lack uniformity unless the Board makes a significant departure from its current standards or seeks review.

Attorney Misconduct on Social Media: Recognizing the Danger and Avoiding Pitfalls

Robert C. Nagle* & Pamela Chandran**

Introduction

Social media has created unprecedented access for—and to—everyone, including employers, employees, unions, lawyers, and witnesses. Only a decade ago, such access was unfathomable. Facebook, LinkedIn, Instagram, Snapchat, and other social media platforms effectively create "second lives" online for participants and bystanders alike. Social media allows people to broadcast their thoughts to the world, but also allows others to reach into their personal sphere.

In the legal context, social media can offer a trove of useful evidence or even party admissions, but they also present potential pitfalls for lawyers seeking that information. Social media's reach also extends to non-lawyers—attorneys must tread carefully within social media. This Article focuses upon the intersection of social media and legal ethics, particularly in labor and employment law. Part I discusses the most frequently used social media platforms and identifies the ethical issues attorneys may face when using social media to gather evidence. Part II describes attorneys' obligations to preserve their own client's social media evidence, and Part III demonstrates how attorney advertising on social media implicates ethical concerns.

I. An Ever-Expanding Galaxy of Platforms

The number of social media has exploded in recent years and continues to expand. Attorneys must stay current with these technology trends. Facebook, LinkedIn, Instagram, Snapchat, and Yelp are among the most widely used and well-known social media platforms. Each platform has unique roots and tends to serve its own function. For example, Facebook was designed as a platform for posting biogra-

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phical information and photos, connecting with friends, and interacting with others using Facebook's "newsfeed" and messaging service, but it has evolved to feature a huge range of applications.[1] LinkedIn started as an online career network oriented toward business professionals, functioning like an interactive online resume.[2] Instagram and Snapchat permit sharing photographs and short videos with other members.[3] Snapchat's design allows photos and videos to disappear shortly after transmission.[4] Teenagers use Instagram and Snapchat more than Facebook.[5] Eighty percent of teens reported using Snapchat at least once per month and seventy-nine percent reported using Instagram at least once per month, while just over fifty percent of teens reported using Facebook at least once per month.[6] Other apps such as Signal, which do not strictly fit into the "social media" category, allow users to send encrypted messages.[7] Apps such as Wickr Me offer that function, but, like Snapchat, automatically delete messages after viewing.[8]

Early research suggests that people behave differently online, but more recent research indicates that personality traits remain consistent when people interact online.[9] While people's conduct may be less restrained on social media, its users may fail to understand that using social media usually leaves a permanent electronic record.[10] In particular, users may not know the consequences of posting information related to pending litigation. Thus, social media posts present a potential goldmine of relevant evidence.

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1. *See* Margaret Rouse, *Facebook*, TECHTARGET (Aug. 11, 2014), http://whatis.techtarget.com/definition/Facebook. Tech Target creates content focused on the technology sector and market analysis for clients and the general public. *See About Us*, TARGET-TECH, http://www.techtarget.com/about-us/ (last visited Mar. 30, 2017).

2. *See* Margaret Rouse, *LinkedIn*, TECHTARGET (July 2016), http://whatis.techtarget.com/definition/LinkedIn.

3. *See* Margaret Rouse, *Instagram*, TECHTARGET (Dec. 2012), http://searchcio.techtarget.com/definition/Instagram; Margaret Rouse, *Snapchat*, TECHTARGET, (Oct. 2016), http://searchmobilecomputing.techtarget.com/definition/Snapchat.

4. Rouse, *Snapchat*, *supra* note 3. However, not all Snapchat photos and videos disappear. *See* Rheana Murray, *What Really Happens to Your Deleted Internet Messages and Photos*, ABC NEWS (May 9, 2014), http://abcnews.go.com/Technology/deleted-snapchat-photos/story?id=23657797.

5. Deepa Seetharaman, *A Rival's Shadow Looms Over Snapchat IPO*, WALL ST. J. (Feb. 6, 2017), https://www.wsj.com/articles/arivalsshadowloomsoversnapchatipo 1486296005.

6. *Id.*

7. Kit Eaton, *These Apps Promise to Encrypt Your Smartphone Communications*, N.Y. TIMES (Mar. 23, 2016), https://www.nytimes.com/2016/03/24/technology/personaltech/encryption-by-app-adds-security-to-smartphones.html?_r=0.

8. *Id.*

9. Samuel Gosling et al., *Manifestations of Personality in Online Social Networks: Self-Reported Facebook-Related Behaviors and Observable Profile Information*, 14 CYBERPSYCHOLOGY, BEHAV., & SOC. NETWORKING 483, 483 (2011).

10. *See* Christopher Mele, *How to Log Off of Facebook Forever, With All Its Perks and Pitfalls*, N.Y. TIMES (Mar. 24, 2017), https://www.nytimes.com/2017/03/24/technology/delete-facebook-twitter-accounts.html?_r=0.

A. *Use of Social Media Posts as Evidence*

Social media can provide direct evidence for attorneys. A human resource manager's racist comments on Facebook could provide attorneys with circumstantial evidence of discrimination, or an employee's post on the beach while using Family and Medical Leave could lead to dismissal of a retaliation claim. *Gulliver Schools Inc. v. Snay*,[11] involving an employment discrimination settlement agreement between a private school and its former headmaster, is illustrative. The parties' agreement's confidentiality clause restricted communication about the settlement to the headmaster's spouse, attorney, and tax advisor.[12] Soon after the agreement, the headmaster's daughter posted the following: "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT."[13]

This post not only broadly revealed the settlement's existence, but proved conclusively that the headmaster had informed his daughter of the agreement, despite her absence from the list of those allowed to know of its existence.[14] The post caused the headmaster to lose $80,000 of settlement money.[15] *Snay* demonstrates how social media evidence can significantly affect litigation. The defendant's counsel zealously represented the school to prove breach of the settlement agreement, proof that was only available by finding the daughter's social media post.

Non-traditional social media platforms may also provide useful information to attorneys. For example, labor organizations increasingly use social media for organizing campaigns. Apps and websites like Unionize.me, Union Connect, and Jornaler@ allow increased communication among employees and unions, worker centers, and other workers' rights organizations.[16] Some of these apps look and feel like social media platforms. Like evidence from social media, information contained on these platforms could be used in legal proceedings.

Attorneys should be aware that ethics rules may even compel lawyers to use technology to represent their clients' interests adequately. ABA Model Rule 1.1 requires lawyers to provide "competent represen-

11. 137 So. 3d 1045 (Fla. Dist. Ct. App. 2014).
12. *Id.* at 1046.
13. *Id.*
14. See *id.* at 1048.
15. *Id.*
16. *See* UnionizeMe, Unionize.me (last visited Mar. 30, 2017) (platform for organizing and electronically signing authorization cards); *JORNALER@ App: Grow Knowledge, Build Community, End Wage Theft*, Cornell University, https://www.ilr.cornell.edu/worker-institute/new-york-state-projects/jornaler-app-grow-knowledge-build-community-end-wage-theft (platform aimed at unorganized day laborers for reporting wage complaints and other issues); UnionConnect, unionconnect.com (last visited Mar. 30, 2017) (platform for unions to communicate directly with members); *see also Jornaler@App*, Jornalero.org (last visited Mar. 30, 2017).

tation."[17] Comment 8 to Rule 1.1 clarifies that this obligation includes knowing "the benefit and risks associated with relevant technology."[18] Thus, lawyers must keep abreast of technological changes to ensure competent representation. This may include a duty to review social media profiles and affirmatively advise clients that their social media histories may be discoverable.

B. Searching for Evidence

Despite the tantalizing realm of evidence social media offers, attorneys must be aware of the potential ethical dangers of seeking and using social media evidence and know how to avoid potential pitfalls. This Part specifically analyzes how ABA Model Rule 4.2 restricts an attorney's search for evidence on social media and how Rule 4.3 restricts attorney communications with represented and unrepresented parties.[19] Rule 4.2 prohibits communication with represented parties, while Rule 4.3 prohibits a lawyer from acting as a disinterested person when dealing with unrepresented persons.[20]

1. Viewing Public Profiles

Under the ABA Model Rules, a lawyer can generally view online public profiles of any person without raising an ethical issue. Public profiles can usually be found by a search query within the social media platform. Because access to a public profile usually can be gained without contacting the person who posted the profile, viewing it is a passive act not constituting a "communication" or "dealing" with a represented or unrepresented party.[21] Thus, information posted on a public profile can generally be collected without concern for use in litigation.

However, attorneys must be mindful of each social media platform's peculiarities. For example, LinkedIn notifies users when someone has viewed their profile. At least three bar associations have addressed this issue, with conflicting results. The New York City Bar Association (NYCBA) and the New York State Bar Association (NYSBA) concluded that the "who's viewed my profile" message on LinkedIn is a communication to that person, which, depending on the circumstances, could constitute an ethical violation.[22] The ABA, however, concluded that the message does not constitute a communication.[23] Thus, lawyers must

17. MODEL RULES OF PROF'L CONDUCT R. 1.1 (AM. BAR ASS'N 2016).
18. *Id.*
19. MODEL RULES OF PROF'L CONDUCT R. 4.2, 4.3 (AM. BAR ASS'N 2016).
20. *Id.*
21. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466 (2014).
22. N.Y. Cty. Lawyers Ass'n, Formal Op. 743 (2011); N.Y. Cty. Bar Ass'n, Formal Op. 2012-2 (2012).
23. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466 (2014).

be vigilant to learn the functions of each social media platform, as well as their jurisdiction's ethical guidance.

2. Viewing Non-Public Profiles

Many social media profiles are private, meaning a third-party cannot access a profile's content without user consent. Requesting access to another's social media account is commonly referred to as "friending."[24] As opposed to viewing a public profile, friending—the overture to friend someone—almost certainly constitutes a communication with the social media owner, subjecting friending to ethical constraints.[25]

Ethical consequences of friending vary, depending on whether the account owner is a represented or unrepresented party. This is especially difficult to determine in the labor law context because it is not always clear whether a bargaining unit employee is "represented" by counsel. It is well settled that the union counsel do not directly represent grievants in labor arbitration.[26] Instead, union counsel represent the union, and the union, in turn, is the grievant's bargaining representative.[27] However, lawyers representing employers should be mindful that sometimes an attorney-client relationship may exist between a bargaining unit employee and union counsel. Management lawyers, therefore, should assume that bargaining unit employees are represented by counsel when considering friending or other social media contact.[28] A lawyer will likely commit an ethical violation by friending represented parties to gain access to their profiles, unless the lawyer has the consent of opposing counsel.

However, if the person profiled is unrepresented, friending does not necessarily violate an ethical rule, depending on the lawyer's jurisdiction. Bar disciplinary authorities have reached different conclusions on this topic, subjecting lawyers to different rules. At least three bar authorities suggest that lawyers may friend an unrepresented person if no deception is involved.[29] Others require lawyers

24. *Friend*, Oxford Dictionary, https://en.oxforddictionaries.com/definition/friend (last visited Mar. 28, 2017).

25. Model Rules of Prof'l Conduct R. 4.2, 4.3 (Am. Bar Ass'n 2016).

26. Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985) (grievant could not bring malpractice claim against union lawyer because allegations of underlying claim are subsumed within a breach of the duty of fair representation claim against union).

27. *See id.*; Griesemer v. Retail Store Emp. Union, Local 1393, 482 F. Supp. 312, 314–15 (E.D. Pa. 1980) (union law firm not disqualified from representing union in duty of fair representation action by terminated grievant against union; different firm partner represented grievant in settlement in which grievant was reinstated).

28. Regardless of whether an ethical rule is implicated, management-side attorneys may find themselves running afoul of Section 7 or on the receiving end of an arbitrator's disfavor if they friend bargaining unit employees in non-litigation settings.

29. N.Y. State Bar Ass'n Social Media Ethics Guideline 4.B (June 9, 2015); N.Y. Cty. Bar Ass'n, Formal Op. 2010-2 (2010); Phila. Bar Ass'n Prof'l Guidance Comm., Op. Bar 2009-2 (2009).

to disclose affirmatively their identity and reason for friending.[30] These jurisdictions require attorneys seeking access to social media profiles to disclose their identities to the owner of the social media accounts.[31] The rules requiring disclosure can be read in conjunction with the "no deception" rules to require lawyers, at minimum, to reveal their identities when friending unrepresented persons.[32]

However, there are no ethical implications if a client, without direction from a lawyer, obtains social media posts by friending. Here, the attorney does not commit an ethical violation because the client, not subject to the ethical rules, is the one doing the friending.[33] Lawyers can receive social media evidence procured by a client only if the client obtains the evidence on the client's own initiative.

II. Attorney-Client Relations: Safeguarding Evidence

Not only must lawyers be mindful of ethical obligations when searching for evidence, they must also be wary of ethical obligations prohibiting them from "obstruct[ing] another party's access to evidence" or unlawfully altering, destroying, or concealing evidence.[34] ABA Model Rule 3.4 also prohibits lawyers from counseling or assisting clients to do the same.[35] A lawyer cannot obstruct access to a client's social media profile or counsel a client to delete evidence relevant to pending litigation. However, because posts are not actually destroyed or altered when a profile is made "private," attorneys may ethically counsel clients to make profiles private.[36]

Using Snapchat could implicate the rule against destroying evidence because its photos and videos shared there are automatically erased in ten seconds or less.[37] A client could easily and unintentionally engage in spoliation of evidence if a photo or video posted on Snapchat relates to litigation. Clients should be counseled against use of Snapchat and other "ephemeral" messaging apps, especially if a litigation hold is in place.

30. N.H. Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05 (2012) (requiring disclosure of attorney identity and nature of legal dispute); Mass. Bar Ass'n Comm. on Prof'l Ethics Op. 2014-5 (2014) (requiring disclosure of attorney identity and client representation); San Diego Cty. Bar Ass'n Legal Ethics Comm., Op. 2011-2 (2011) (requiring disclosure of attorney identity and purpose).

31. *Id.*

32. *See* Phila. Bar Ass'n Prof'l Guidance Comm., Op. Bar 2009-2 (2009) ("no deception" rule prohibits attorneys from friending under a false identity).

33. N.Y. State Bar Ass'n Social Media Ethics Guideline 5.D.

34. MODEL RULE OF PROF'L CONDUCT R. 3.4(a) (AM. BAR ASS'N 2016).

35. *Id.*

36. Phila. Bar Ass'n Prof'l Guidance Comm., Op. Bar 2014-05 (2014).

37. *See generally* Ryan G. Ganzenmuller, Comment, *Snap and Destroy: Preservation Issues for Ephemeral Communications*, 62 BUFF. L. REV. 1239 (2014).

Other ephemeral messaging apps like Wickr Me can be put to more nefarious uses. In *Meyer v. Kalanick*,[38] the defendant used "dubious practices" in an attempt to find derogatory information about the plaintiff and plaintiff's counsel.[39] Although not addressed in the decision, there was evidence that a private investigator hired by the defendant used Wickr Me to attempt to conceal communications.[40] The private investigator was expressly told: "to keep any communication about [the investigation] encrypted or over chat to avoid potential discovery issues."[41] Defendant's counsel disclaimed knowledge of the investigation and avoided ethical violations.[42] However, this case demonstrates how a party's agents could negatively affect the course of litigation and expose counsel to ethics violations.[43]

III. Concerns with Legal Advertising on Social Media

Finally, lawyers must also be mindful of ethical constraints on advertising and solicitation when using social media.[44] For instance, an attorney could commit an ethical violation simply by maintaining a LinkedIn profile if it contains information constituting attorney advertising without necessary disclosures. Attorneys should include only biographical information on a LinkedIn account and avoid descriptions and endorsements that could be construed as advertising.[45] Furthermore, attorneys should not use the term of "specialist" or other lan-

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38. Meyer v. Kalanick, No. 15 Civ. 9796, 2016 WL 3981369 (S.D.N.Y July 25, 2016) (Rakoff, J.).

39. *Id.* at *1.

> It is a sad day when, in response to the filing of a commercial lawsuit, a corporate defendant feels compelled to hire unlicensed private investigators to conduct secret personal background investigations of both the plaintiff and his counsel. It is sadder yet when these investigators flagrantly lie to friends and acquaintances of the plaintiff and his counsel in an (ultimately unsuccessful) attempt to obtain derogatory information about them. The questions here presented, however, are whether such dubious practices result in waiver of attorney-client privilege and work-product protection, and whether disciplinary action is warranted.

Id.

40. Sam Biddle, *Federal Judge Rips Uber Apart Over Dirt-Digging Investigation*, INTERCEPT (July 29, 2016, 2:15 PM), https://theintercept.com/2016/07/29/federal-judge-rips-uber-apart-over-dirt-digging-investigation/.

41. *Id.*

42. *Meyer*, 2016 WL 3981369, at *9.

43. *Cf.* Lester v. Allied Concrete Co., Nos. CL08–150, CL09–223, 2011 WL 12663430, at *2 (Va. Cir. Ct. Oct. 21, 2011) (sanctioning attorney $540,000 and client $180,000 when attorney instructed client to "clean up" the client's Facebook page), *aff'd in part, rev'd in part*, 736 S.E.2d 699 (Va. 2013).

44. *See* MODEL RULES OF PROF'L CONDUCT R. 7.1–7.4 (AM. BAR ASS'N, Discussion Draft 1983).

45. N.Y. Cty. Lawyers Ass'n Prof'l Ethics Comm., Formal Op. 748 (2015) (ethical implications of attorney profiles on LinkedIn).

guage that could violate the rule preventing assertions of specialties or special competence.[46]

Advertising restraints vary among jurisdictions. The California Rules of Professional Conduct and the California Business and Professions Code, for example, permit attorneys to advertise only if advertisements comply with specified restrictions.[47] California attorneys must consider both the Rules and statutes to assess whether their postings constitute advertisements. Initially, an attorney must determine whether online postings are "communications" under Rule 1-400, which requires that messages (1) be made by or on behalf of a California attorney; (2) concern the attorney's availability for professional employment; and (3) be directed to a former, present, or prospective client.[48] Any communication open to the public (for instance, a blog or a Facebook post without privacy restrictions) automatically meets the first and third criteria. An attorney must also ascertain whether the attorney's post constitutes an advertisement subject to restrictions under California's Business and Professions Code section 6157.[49] Fundamentally (and simplistically speaking), if the attorney solicits work, the post is an advertisement. The analysis[50] occasionally seems like hair-splitting.[51] The following examples demonstrate how this analysis applies to lawyers' posts describing successful case outcomes:

- "Case finally over. Unanimous verdict! Celebrating tonight." Under California Rule 1-400(A), this is not a "communication" because there is no implication that the post "concern[s] the availability for professional employment."
- "Another great victory in court today! My client is delighted. Who wants to be next?" The first sentence alone does not constitute a communication under Rule 1-400(A); however, "who wants to be next" implies availability for employment, making the post a communication. The next inquiry is whether the communication meets all of the rules' restrictions, and here, the post fails. In addition to violating the rule on client testimonials,[52] the post violates the prohibition on "guarantees, warran-

46. *Id.*; MODEL RULES OF PROF'L CONDUCT R. 7.4 (AM. BAR ASS'N 2016).

47. CAL. RULES OF PROF'L CONDUCT R. 1-400 (STATE BAR OF CAL. 2015).

48. *Id.*

49. CAL. BUS. & PROF. CODE § 6157(c) (2017).

50. *Id.* § 6157.1 ("No advertisement shall contain any false, misleading, or deceptive statement or omit to state any fact necessary to make the statements made, in light of circumstances under which they are made, not false, misleading, or deceptive.").

51. *See* State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2012-186 (2012) (social media postings subject to professional responsibility rules).

52. CAL. RULES OF PROF'L CONDUCT R. 1-400 std. 2 (STATE BAR OF CAL. 2015). Testimonials about attorneys must contain express disclaimers that they do not guarantee outcomes. *Id.*

ties, or predictions regarding the result of the representation" because it ties the "victory" to the attorney's next client.[53]

- "Won a million dollar verdict. Call me for a free consultation." The second sentence states availability for employment, which makes this a communication under Rule 1-400(A), but it does not appear to violate any conduct rules.
- "Just published an article on sexual harassment investigations in the workplace. Let me know if you would like a copy." This post does not concern "availability for professional employment," but merely conveys information and is therefore not a communication.[54]

These examples show that rules for attorney advertising and solicitation are nuanced, and a lawyer must carefully review the rules when announcing professional success on social media.

Conclusion

Although technology advances and social norms change, lawyers must be mindful that ethical obligations generally remain the same. Lawyers must be knowledgeable about changing technology and applicable ethical rules to ensure they do not cross ethical boundaries while zealously representing their clients.

53. *Id.* at R. 1-400 std. 1.
54. *Id.* at R. 1-400.

Keeping Mothers in the Workplace: Shifting from *McDonnell Douglas* to Protect Employees Who Use FMLA Leave

Chelsey Jonason*

Introduction

Many women enter the workforce with goals of reaching top executive positions, but workplace realities often thwart these goals. In 2013, women earned thirty-seven percent of MBAs granted in the United States,[1] but filled only twenty-five percent of S&P 500 executive positions in 2016.[2] From 1988 to 2013, between forty-one and fifty percent of law school graduates were women, but the number of female law firm partners barely surpassed twenty percent during those years.[3] It is hard to imagine a majority of women entered MBA and J.D. programs without aspirations of top positions.[4]

For many women, competing workplace and domestic demands are the primary obstacle preventing them from reaching top positions. The most frequent response of mothers polled about their disinterest in top executive positions was: "I don't feel like I would be able to balance fam-

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1. *Knowledge Center: Women's Share of MBAs Earned in the U.S.*, CATALYST (July 8, 2014), http://www.catalyst.org/knowledge/womens-share-mbas-earned-us (graph displaying percentages of MBAs earned by females from 2002 to 2013).

2. *Knowledge Center: Women in the Workforce: United States*, CATALYST (Aug. 11, 2016), http://www.catalyst.org/knowledge/women-workforce-united-states (includes chart showing percentages of females at various levels of leadership in major companies). Cf. LeanIn.org & McKinsey & Co., *Women in the Workplace*: 2015, at 2, 6–8 (2015), http://wit.berkeley.edu/docs/Women-in-the-Workplace-2015.pdf (women are not leaving organizations at greater numbers than men, but are less likely to advance).

3. *Knowledge Center: Women in Law in Canada and the U.S.*, CATALYST (Mar. 3, 2015), http://www.catalyst.org/knowledge/women-law-canada-and-us.

4. Professor Susan Sturm argued that the judiciary has not effectively remedied subtle and complex forms of workplace inequity. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001). Strum attributed continued gender inequity to "second generation" claims of inequality, linked to social practices and patterns of interaction among workplace groups that exclude non-dominant groups over time. *Id.* at 460. Such exclusion is difficult to trace at the individual level and appears only when aggregating patterns. She further noted that inflexible workplace structures disfavoring family responsibilities may not give rise to a legal challenge. *Id.* at 474, n.50.

ily and work commitments."[5] Women with highly involved careers seek effectiveness in both work and home life and feel guilty when they cannot do both simultaneously.[6] Parenting during early childhood is especially demanding; married women with children under six have the lowest workforce participation rate of any group of women.[7]

High-profile companies, such as Netflix, Twitter, Facebook, and Microsoft, are trying to combat women's departure by offering more generous leave policies that help new parents balance the demands of work and home.[8] Although companies expand policies and politicians propose paid leave,[9] there is still concern that employers will subtly or overtly retaliate if employees fully use permitted leave.[10] In 2015, Marissa Meyer, then CEO of Yahoo!, famously announced she would not take much time off after the birth of her twins, sending an implicit message throughout the company about expectations for dedicated employees.[11] Employers send subtle signals that employees

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5. *By the Numbers*, WALL ST. J. (Sept. 30, 2015), http://graphics.wsj.com/women-in-the-workplace/ (study by LeanIn.org & McKinsey & Co.). Anne-Marie Slaughter evoked controversy with her Atlantic Monthly article, "Why Women Still Can't Have it All." Anne-Marie Slaughter, *Why Women Still Can't Have it All*, ATLANTIC MONTHLY, July/Aug. 2012, http://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020/. She "debunks" the myth that society is currently structured to allow women realistically to "have it all" by reflecting on her own departure from a high-level White House position while watching other women leave and talking to young women who fear challenges yet to come. Id.

6. *Part III: Contemporary Issues in Career Management*, *in* CAREER MANAGEMENT 289 (4th ed. Jeffrey H. Greenhaus et al. eds., 2010) (ebook); *see also* Joan C. Williams, *Keynote Address: Want Gender Equality? Die Childless at Thirty*, 27 WOMEN'S RIGHTS L. REP. 3, 5 (2006) ("[C]onscientious parents are caught between two fundamentally inconsistent social ideals: the time-greedy ideal worker norm at work, and the equally time-greedy intensive-parenting norm in family life."); *Fewer Mothers Prefer Full-time Work: From 1997 to 2007*, PEW RESEARCH CENTER (July 12, 2007), http://www.pewsocialtrends.org/2007/07/12/fewer-mothers-prefer-full-time-work/ (working mothers give themselves lower parenting marks).

7. Press Release, Bureau of Lab. Stat., Dep't of Lab., Employment Characteristics of Families Summary (Apr. 22, 2016), http://www.bls.gov/news.release/famee.nr0.htm (sixty-four percent of women whose youngest child is under six participate in the workforce, compared to seventy-four percent of women whose youngest child is between six and seventeen).

8. Rachel Gillett, *Netflix, Google, Facebook, and 13 Other Companies with Extremely Generous Parental Leave Policies in America*, BUS. INSIDER (Aug. 5, 2015, 6:40 PM), http://www.businessinsider.com/generous-parental-leave-policies-in-america-2015-8.

9. *See, e.g.*, *Women's Rights and Opportunity*, HILLARY FOR AMERICA (Sept. 5, 2017), https://www.hillaryclinton.com/issues/womens-rights-and-opportunity/ (last visited Oct. 29, 2015); *American Opportunity Agenda: Expand Paid Family and Medical Leave*, KIRSTEN GILLIBRAND: U.S. SENATOR FOR NEW YORK, http://www.gillibrand.senate.gov/issues/paid-family-medical-leave (last visited Oct. 29, 2015).

10. *See generally* Joan C. Williams et al., *Law Firms as Defendants: Family Responsibilities Discrimination in Legal Workplaces*, 34 PEPP. L. REV. 393, 404–11 (2007) (examples of men and women lawyers retaliated against for family responsibilities); Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F.L. REV. 171, 185 (2006) (describing family responsibility discrimination).

11. *See* Claire Cain Miller & David Streitfeld, *Big Leaps for Parental Leave, if Workers Actually Take It*, N.Y. TIMES, Sept. 1, 2015, http://www.nytimes.com/2015/09/

should not take their full leave by statements such as, "Take all the time you need" instead of "We'll see you in twelve weeks."[12] Employers may view active parents as distracted and less dedicated to their work, harming career prospects.[13] Men who take parental leave face additional stigma, receiving insults and resentment at work.[14] The stigma of using family friendly policies and the fear of retaliation for taking family leave discourages new parents from taking available leave.[15] As a result, more than ninety percent of all workers believe taking extended family leave will hurt their position at work.[16] However, parents have little legal recourse for this type of discrimination,[17] which discourages leave-taking and pushes new parents out of the workforce.

Employers should be penalized for treating an employee's use of the Family Medical Leave Act (FMLA) as a negative factor in employment decisions. Allowing employers to penalize leave-taking undermines the core purpose of the FMLA.[18] Ensuring employers do not subtly or overtly retaliate against employees will help change workplace culture, ensure that both men and women are comfortable using their full leave, and allow employees to return from leave without stigma.

Currently, the appropriate legal standard to establish retaliation-for-taking-leave (RFTL) claims is uncertain, with many courts borrowing the burden-shifting *McDonnell Douglas* framework from anti-discrimination law. Employers would benefit from a clear standard because retaliation claims have increased dramatically over the last decade and are likely to increase further if statutory paid leave proposals are enacted.[19]

02/upshot/big-leaps-for-parental-leave-if-workers-actually-follow-through.html?_r=2. In contrast, Mark Zuckerberg, CEO of Facebook, announced he would take four full months of leave upon the birth of his first child. *See id.*

12. *See id.*

13. *See* Jason Hall, *Why Men Don't Take Paternity Leave*, FORBES (June 14, 2013) http://www.forbes.com/sites/learnvest/2013/06/14/why-men-dont-take-paternity-leave/#1bf8c8be3270.

14. *Id.*

15. *See id.* The author had several conversations with new entrants into the workforce about whether they planned to take leave when they have children. Most men said they probably would not take their full leave, citing social stigma and harm to their work reputation. One young lawyer said that his firm allowed men to work part-time, but he knew of no men who had done so, and he worried about the consequences of doing so. He also shared the story of a colleague who had to respond to e-mails and submit a brief while his wife was in the delivery room.

16. Women in the Workplace: 2015, *supra* note 2, at 16.

17. *See* Sturm, *supra* note 4, and accompanying text.

18. *See* Findings and Purposes, 29 U.S.C. § 2601 (2012) ("It is the purpose of this Act to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity.").

19. In 2014, the EEOC reported retaliation claims under all statutes constituted 42.8% of total charges against employers, compared to 28.6% of charges in 2004. *Charge Statistics: FY 1997 Through FY 2014*, EEOC, http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Nov. 15, 2015). In a survey conducted by the Note's author of

Part I of this Note provides background on the FMLA and its prohibition of retaliation against employees for taking leave. This Part highlights the inadequate proof structure of *McDonnell Douglas* for employees with RFTL claims. Part II analyzes the FMLA's purpose and summarizes administrative guidance. It recommends adoption of the Ninth Circuit "negative factor" test for analyzing RFTL claims. Part III considers implications of the recommended test to better protect employees who exercise the right to leave and discourage employers from creating workplace cultures hostile to family leave.

I. Background

A. *Introduction to the FMLA and Its Retaliation Prohibition*

In 1993, Congress enacted the FMLA to allow workers flexibility in scheduling time off for family and medical needs and to alleviate tensions of competing work and family demands.[20] The FMLA grants eligible employees up to twelve weeks of unpaid leave to care for a newly born, adopted, or fostered child; and for care of oneself, a parent, or a spouse, or a child with a serious health condition.[21] Upon return, an employer must restore the employee to the same or equivalent position with equivalent benefits, pay, and other terms and conditions of employment.[22]

The FMLA prohibits employer interference with employee exercise of FMLA rights and from retaliation against employees who oppose such interference.[23] The courts[24] and the Department of Labor (DOL)[25] also interpret the FMLA as prohibiting retaliation against employees who exercise their right to take family leave. Courts are divided on whether this protection comes from 29 U.S.C. § 2615(a)(1), which prohibits interference with the exercise of rights, or 29 U.S.C. § 2615(a)(2), which prohibits retaliation against employees who oppose an unlawful practice.[26]

FMLA-related cases in the federal courts of appeals in 2015, retaliation for taking leave was litigated in approximately twenty-five percent of cases.

20. *See* 29 U.S.C. § 2601 (2012) (describing the "purpose of this Act" and promoting parents taking time to care for their families).

21. 29 U.S.C. § 2612 (2012). The FMLA also grants leave to family members of military service members in certain circumstances. *Id.*

22. 29 U.S.C. § 2614 (2012).

23. 29 U.S.C. § 2615(a)(1) (2012); 29 U.S.C. § 2615(a)(2).

24. *See, e.g.*, Gordon v. U.S. Capitol Police, 778 F.3d 158, 163 (D.C. Cir. 2015); Potenza v. City of N.Y., 365 F.3d 165, 167 (2d Cir. 2004).

25. 29 C.F.R. § 825.220(c) (2016).

26. *Compare* Colburn v. Parker Hannifin/Nichols Portland Div., 429 F.3d 325, 330–31 (1st Cir. 2005) (applying 29 U.S.C. § 2615(a)(1) and the DOL regulation, 29 C.F.R. § 825.220(c)), *and* Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1122–23 (9th Cir. 2001) (analyzing retaliation for using FMLA leave under 29 U.S.C. § 2615(a)(1)), *with* Lovland v. Emp'rs Mut. Cas. Co., 674 F.3d 806, 811 (8th Cir. 2012) ("Our cases have classified claims of retaliation for the exercise of FMLA rights as arising under the 'discrimination' prohibition of § 2615(a)(2).").

The statute does not specify the appropriate evidentiary standard for employees to establish RFTL claims, but a DOL regulation provides guidance: "[E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions."[27] Because the DOL regulation analyzes RFTL claims as interference claims, the two types of claims should be evaluated under similar standards. Courts use varied elements to establish a prima facie interference claim, but none apply the *McDonnell Douglas*[28] burden-shifting framework.[29] In an interference claim, an employee need only show (1) entitlement to leave, (2) an adverse employer action interfering with that right, and (3) a causal relationship between the two.[30] This is a much lighter burden than required by *McDonnell Douglas*; it does not require an employee to establish pretext if an employer offers an alternative reason for the action.[31]

Despite this regulation's simplified elements requirements for establishing prima facie interference claims, many courts excuse employers that retaliate against employees for taking FMLA leave by applying the employer-friendly[32] *McDonnell Douglas* framework.[33] Of the approximately 125 FMLA claims in the federal circuit courts in 2015 published on Westlaw, twenty-nine cases involved RFTL claims.[34] Twenty-

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27. 29 C.F.R. § 825.220(c) (2016) (emphasis added).

28. McDonnell Douglas v. Green, 411 U.S. 792, 804, 807 (1973). *McDonnell Douglas* established a three-part burden-shifting framework to sift through circumstantial evidence in Title VII discrimination cases. *See* Sandra F. Sperino, *Recreating Diversity in Employment Law by Debunking the Myth of the McDonnell Douglas Monolith*, 44 HOUS. L. REV. 349, 361 (2007). "Over the past forty years the *McDonnell Douglas* framework has become the most widely used method for evaluating, ordering, and structuring the presentation of circumstantial evidence of discrimination in Title VII cases." *Id.*

29. *See Substantive Rights Cases*, ABA SECTION OF LABOR & EMPLOYMENT LAW, THE FAMILY MEDICAL LEAVE ACT § 10.III.A.1, at 10-35 (William Bush et al. eds., Supp. 2015) ("Most courts continue to hold that . . . *McDonnell Douglas* . . . has no application to cases involving the denial of FMLA entitlements. Rather, the analysis is whether the employee can demonstrate that he or she is entitled to the benefit claimed.").

30. These are the requirements for establishing a prima facie case in the First, Third, Eighth, and Eleventh Circuits. *See Interference with Exercise of Rights*, *in* ABA SECTION OF LABOR & EMPLOYMENT LAW, THE FAMILY MEDICAL LEAVE ACT § 10.II.A.1, at 10-6 to 10-7 (William Bush et al. eds., Supp. 2015).

31. *See id.* at 10-7.

32. *See generally* William R. Corbett, *McDonnell Douglas, 1973–2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 202 (2003) ("Although it was developed to facilitate plaintiffs in presenting their cases, most of the Supreme Court's subsequent interpretations have not been favorable to plaintiffs."); Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 753 (1995) ("Requiring plaintiffs to prove a prima facie case under the *McDonnell Douglas* framework has doomed otherwise valid discrimination claims."); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2302 (1995) ("Two recent Supreme Court cases make clear that the employer's intermediate burden [in *McDonnell Douglas*] is so light as to be trivial. . . . [E]ven a facially 'implausible,' 'silly,' 'fantastic,' or 'superstitious' reason meets the rebuttal burden.").

33. *See, e.g.*, Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 160 (1st Cir. 1998).

34. *See infra* Appendix A.

six courts applied a version of *McDonnell Douglas*, and a plaintiff succeeded on the merits in only one case.[35] The other plaintiffs felt they were treated negatively for exercising their right to FMLA leave. Denying recovery in these circumstances will discourage these plaintiffs and their co-workers from taking FMLA leave in the future.

B. McDonnell Douglas *Analysis Illustrated*

Consider the following hypothetical: Maria, a lawyer, spent the last six years working for Johnson & Larson LLP, a firm known for its solid work and competitive atmosphere. She met her minimum billable hours every year and her performance reports show good, but not fantastic, work. During her sixth year, she takes FMLA leave for the birth of her second child and spends twelve weeks at home using her firm's six-week paid leave policy in conjunction with her FMLA leave. When she returns to work, her billable minimum for the year is reduced to reflect her leave. For several weeks, she struggles to get work from partners and must spend extra time on non-billable activities to rebuild her work portfolio. Her infant daughter gets ill a few times during her first months in daycare and Maria must spend more time away from the office, but does not exceed allotted sick days. She meets her minimum billable requirement, but does not exceed it. Three months after returning from leave, she is denied partnership because, according to her employer, she "is not fully dedicated to her job or ready to meet the demands of being a partner." Others in her class, both men and women, who did not use FMLA leave, were promoted to partner.

Maria thinks her firm is retaliating against her for taking her full FMLA leave. Many, but not all, courts apply the *McDonnell Douglas* burden-shifting framework to Maria's in the absence of direct evidence of retaliation.[36] These circuits apply varying versions of the *McDonnell Douglas* prima facie case, but several apply a three-prong test requiring a plaintiff to establish: (1) she engaged in protected activity, (2) she was adversely affected by an employment decision, and (3) there was a causal connection between the two.[37] Maria can easily

35. *See infra* Appendix A.

36. The First, Fourth, Fifth, Seventh, Tenth, Eleventh, and D.C. Circuits apply varying versions of the *McDonnell Douglas* burden-shifting framework in FMLA claims when the employer retaliated for the taking of FMLA leave. *See infra* Appendix B. Other circuits apply *McDonnell Douglas*, but questions remain whether it is the appropriate test for FMLA retaliation claims. *See infra* Appendix B.

37. *See, e.g.*, Walker v. United Parcel Serv. of Am., Inc., 76 F. App'x 881, 889 (10th Cir. 2003) (applying the three-prong test); *see also* Smith v. BellSouth Telecommc'ns, Inc., 273 F.3d 1303, 1313 (11th Cir. 2001). Some courts use a four-prong test with an additional element requiring proof the employee was otherwise qualified for the position. *See, e.g.*, Potenza v. City of N.Y., 365 F.3d 165, 168 (2d Cir. 2004). Others also require comparison to employees who did not exercise FMLA rights. *See, e.g.*, Jines v. Evans Motors, 292 F. Supp. 2d 1130, 1137 (N.D. Ind. 2003).

establish the first two prongs—that she exercised her protected right to FMLA leave[38] and was adversely affected by not being promoted to partner.[39]

The final prong, a causal connection, will be her first stumbling block. Maria may struggle to establish that but-for her FMLA leave, she would now be a partner. She can try to rely on the temporal proximity between leave and denial of partnership, but the court may determine three months is too long a delay to establish causation.[40] Maria can also seek to establish causation by relying on her employer's statement that she "is not fully dedicated to her job or ready to meet the demands of being a partner." However, this statement did not directly reference FMLA leave nor did it directly criticize her for taking time off to care for her baby. A court may determine that, coupled with the time lapse between leave and partnership denial, this was a "stray remark" insufficient to establish causation.[41] To find causation under *McDonnell Douglas*, the court must infer the comment referenced her choice to prioritize her baby over work by using her full FMLA leave and held it against her in her evaluation.[42]

If the court accepts Maria's prima facie case, the burden of production shifts to her employer, under *McDonnell Douglas*, to articulate a legitimate, non-discriminatory reason for denying Maria partner status and the presumption of discrimination drops from the case.[43] The burden on the employer is light, and it will likely argue Maria was denied promotion because she failed to exceed billable minimums hours and produced only a standard work product, thereby failing to

38. Maria's leave is covered by FMLA because she worked at least twelve months before taking leave and at least 1,250 hours during the previous twelve months. *See* 29 U.S.C. § 2611(2)(A) (2012). Maria was entitled to twelve work weeks of leave during any twelve-month period "[b]ecause of the birth of a son or daughter of the employee and in order to care for such son or daughter." 29 U.S.C. § 2612(a)(1)(A) (2012).

39. Courts generally adopt the Title VII definition of "adverse employment action." Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 60, 68 (2006). *See, e.g.*, Breneisen v. Motorola, Inc., 512 F.3d 972, 979 (7th Cir. 2008); Metzler v. Fed. Home Loan Bank of Topeka, 464 F.3d 1164, 1171 n.2 (10th Cir. 2006). In *Burlington Northern*, the Court adopted a broad interpretation of adverse employment actions by asking whether the employer action would "dissuade[] a reasonable worker from making or supporting a charge of discrimination." *Burlington N.*, 548 U.S. at 68.

40. *See, e.g.*, Wascura v. City of Miami, 257 F.3d 1238, 1247 (11th Cir. 2001) (3.5 month delay was too great to establish temporal proximity); Hite v. Biomet, Inc., 38 F. Supp. 2d 720, 743 (N.D. Ind. 1999) (two-month period prevented establishment of a causal connection).

41. *See, e.g.*, Lucas v. PyraMax Bank, FSB, 539 F.3d 661, 667 (7th Cir. 2008) (acknowledging "unfortunate" remarks by employer regarding employee illness, "[b]ut none of these comments were made contemporaneously or in connection with either the demotion or discharge. Therefore, they fall in the category of 'stray remarks.'").

42. *See* Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 165 (1st Cir. 1998) (employer's comments about an employee taking too much time off and subsequently referencing leave in a performance evaluation insufficient for causation).

43. *See, e.g.*, King v. Preferred Tech. Grp., 166 F.3d 887, 892 (7th Cir. 1999); *see also* McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973).

meet partner expectations. This will likely be sufficient to meet the employer's burden of production.[44]

The burden of persuasion shifts back to Maria to establish that the employer's reasons were pretextual.[45] Maria's decision to take FMLA leave arguably contributed to her partnership denial by implying she prioritized family over work. However, this will likely be insufficient to establish pretext because the employer can point to her billable hours and work product, showing the stated reason is based in fact. The employer could also identify other associates denied partnership for similar reasons.[46] These justifications, coupled with her weak prima facie case, will likely relieve the employer of liability although Maria's FMLA leave was most likely a negative factor in partner evaluation.

C. *Negative Factor Test Illustrated*

In contrast to *McDonnell Douglas*, the Ninth Circuit, in *Bachelder v. America West Airlines*,[47] deferred to the DOL regulation and deemed the *McDonnell Douglas* framework inapplicable to claims of employer retaliation for taking leave.[48] The Ninth Circuit used a negative factor test to analyze whether an employer impermissibly considered a plaintiff's use of FMLA leave in a termination decision.[49] The court relied on the regulation to hold that the plaintiff "need only prove by a preponderance of the evidence that her taking of FMLA-protected leave constituted a negative factor in the decision . . . ." to take an adverse

44. Performance problems are typically sufficient to establish a legitimate, nondiscriminatory reason for adverse employment actions. *See, e.g.*, Maxwell v. GTE Wireless Serv. Corp., 121 F. Supp. 2d 649, 654–55, 658 (N.D. Ohio 2000) (poor performance and failure to meet quotas was a legitimate, non-discriminatory reason for termination).

45. *See McDonnell Douglas*, 411 U.S. at 804, 807.

46. *See, e.g.*, Hite v. Vermeer Mfg. Co., 446 F.3d 858, 867 (8th Cir. 2006) (employee can prove pretext by showing the employer's justification had no basis in fact, the employer deviated from normal policy or procedure, or by drawing upon the strength of the prima facie case). Arguably, the law firm made it harder for her to meet her billable hours by not assigning her sufficient work before and after her leave, but the *McDonnell Douglas* framework does not take this into consideration.

47. 259 F.3d 1112 (9th Cir. 2001).

48. *See Bachelder*, 259 F.3d at 1125. The Third and Sixth Circuits also apply versions of the "negative factor" test. *See* Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 146 n.9 (3d Cir. 2004) (negative factor test in a mixed-motive analysis); Cavin v. Honda of Am. Mfg., Inc., 346 F.3d 713, 727 (6th Cir. 2003) (employee can prevail on an FMLA interference claim if taking FMLA-protected leave constituted a negative factor in the termination decision).

49. *Id.* at 1121. Bachelder took FMLA leave in 1994 to recover from a broken toe and again in 1995 for maternity leave. In January 1996, there was a "corrective action discussion" regarding her attendance in which the two FMLA absences and other sick days were discussed. In February 1996, she was absent for three weeks, and she argued this leave was FMLA protected. In early April 1996, she called in sick for one day to care for her sick baby. On April 9, 1996, she was terminated for her sixteen absences since the January meeting, her failure to administer adequately the "Employee of the Month" program, and tardiness. *See id.* The Ninth Circuit ruled in favor of Bachelder because her FMLA-protected absences were a negative factor in the termination decision. *Id.* at 1131.

employment action.[50] An "[employee] can prove this claim, as one might any ordinary statutory claim, by using either direct or circumstantial evidence, or both."[51] The negative factor test makes employers accountable for considering FMLA leave as a negative factor in adverse employment decisions.[52]

The negative factor test is a more appropriate standard than *McDonnell Douglas* because it is more consistent with the legislative history, administrative interpretations, and policy goals of the FMLA. Further, it better protects employees who exercise their right to FMLA leave,[53] discourages employers from stigmatizing family leave, and allows employees to take leave without fear of employer retaliation.[54]

Much like a mixed motive analysis, employers are liable if the employer was even partly motivated by an illegitimate reason when taking an employment action.[55] Under the Civil Rights Act of 1991, the employer can avoid liability for monetary damages and certain injunctive relief if it can show it would have made the same decision absent the illegitimate factor, but a successful plaintiff can still obtain declaratory relief, other injunctive relief, and attorney's fees.[56] Few courts extend the mixed motive analysis to the FMLA, and its application was made more uncertain after the Supreme Court held in *Gross v. FBL Financial Services*[57] that the mixed-motive framework did not apply to the Age Discrimination in Employment Act.[58] *Bachelder* rejected the mixed motive test's applicability to the FMLA because "protected leave cannot be a negative factor 'at all.'"[59]

Other courts should follow the Ninth Circuit's negative factor test rather than *McDonnell Douglas*.[60] The negative factor test, which does

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50. *Id.* at 1125.

51. *Id.* (alteration in original).

52. *See id.* at 1131.

53. *See infra* Section II.

54. *See infra* Section III.

55. Kaitlin Picco, *The Mixed-Motive Mess: Defining and Applying A Mixed-Motive Framework*, 26 ABA J. LAB. & EMP. L. 461, 463 (2011) (citing 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (2006)). The employer can limit damages if it can establish the same decision would have been made absent the illegitimate reason. *See id.* For example, in *Price Waterhouse v. Hopkins*, the Supreme Court acknowledged that under Title VII, "gender must be irrelevant to employment decisions." 490 U.S. 228, 240 (1989).

56. *Mixed Motive [Supplemented]*, *in* ABA SECTION OF LABOR & EMPLOYMENT LAW, THE FAMILY MEDICAL LEAVE ACT 372–76 (Michael J. Ossip, et al. eds. 2006).

57. 557 U.S. 167 (2009).

58. *Id.* at 173. *See also Mixed Motive*, *supra* note 56 at 376, S.10-92.

59. Bachelder v. Am. W. Airlines, 259 F.3d 1112, 1131 (9th Cir. 2001); *Mixed Motive*, supra note 56, at 375.

60. The Supreme Court had an opportunity to resolve this split in *Lovland v. Employers Mutual Casualty Co.*, in which the Eighth Circuit acknowledged the validity of the negative factor test. The Eighth Circuit nonetheless applied *McDonnell Douglas* to be consistent with its precedent. 674 F.3d 806, 812 (8th Cir. 2012). The Supreme Court denied the plaintiff's writ of certiorari. Lovland v. Emp'rs Mut. Casual Co., 133 S. Ct. 345 (2012). Although the Supreme Court did not articulate its reason for denial,

not allow employers to escape liability by merely producing an alternative reason for discharge,[61] more closely matches the legislative history, administrative guidance, and policy goals of the FMLA that seek to protect employees such as Maria.[62] Under this test, Maria is only required to show, by a preponderance of the evidence, that her FMLA leave was a negative factor in the partnership denial.[63] Maria has circumstantial evidence that her FMLA leave was at least a negative factor. Her employer's words suggest its belief that she was more dedicated to family than work. Several other associates in her cohort, who notably did not take leave, were promoted to partner. She took only a few days to care for her sick daughter and did not exceed the sick leave allowance. She can also note that she met her hours, but it was difficult because she could not get sufficient work from senior partners before and after her leave, suggesting senior partners were subtly retaliating against her for taking leave. Maria's FMLA RFTL claim will probably succeed under the negative factor test, but would likely fail under *McDonnell Douglas*. The negative factor test would thus be a more effective deterrent against subtle retaliation for exercising FMLA rights.

II. Legislative History, Administrative Guidance, and Policy of the FMLA

A. *Legislative History of the FMLA*

Congressional recognition of the competing demands of work and family, and the necessity of legislation to alleviate those tensions, are central to the FMLA's legislative history.[64] According to both the Senate and House Committee Reports on the FMLA,

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it could be because petitioner could not show discriminatory intent. Reaching the question of which test to apply would therefore have been unnecessary to resolve the case. *See* Respondent's Brief in Opposition at 1, Lovland v. Emp'rs Mut. Cas. Co., 2012 WL 3724681, at *1 ("Consequently, any conflict among the Circuits is immaterial to the outcome here, and, based on the undisputed material facts, Petitioner would lose under any articulation of the law.").

61. *See* Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981). Plaintiffs can overcome the employer's alternate reason by establishing pretext. *See, e.g.*, Hite v. Vermeer Mfg. Co., 446 F.3d 858, 865 (8th Cir. 2006) ("The employee must present evidence that '(1) creates a question of fact regarding whether [the defendant's] reason was pretextual and (2) creates a reasonable inference that [the defendant] acted in retaliation.'") (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973)). However, to establish pretext, the employee has the more onerous burden of persuasion (*Burdine*, 450 U.S. at 256) and employers wizened by years of Title VII experience with *McDonnell Douglas* know the importance of carefully covering their tracks with seemingly legitimate reasons. *See generally* Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation:* St. Mary's Honor Center v. Hicks, *Pretext, and the "Personality" Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183 (1997).

62. *See infra* Section II.

63. *See Bachelder*, 259 F.3d 1125.

64. S. REP. NO. 103-3, at 4 (1993); *see also* H.R. REP. NO. 103-8, pt. 1, at 21 (1993).

> [p]rivate sector practices and government policies have failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family. This failure continues to impose a heavy burden on families, employees, employers and the broader society. [The FMLA] provides a sensible response to the growing conflict between work and family by establishing a right to unpaid family and medical leave for all workers covered under the act.[65]

Congressional findings highlight the increasing number of parents in the workforce, the importance of parental participation in early child-rearing, and the lack of employment policies accommodating working parents that can force choosing between job security and parenting.[66] Congress enacted the FMLA to balance workplace demands with family needs; promote family economic stability; and preserve family integrity by entitling employees to reasonable leave for the birth, adoption, or fostering of a child.[67] These goals are to be achieved in a manner that accommodates employers' legitimate interests.[68]

The House Report further emphasizes the importance of federal labor standards to address serious societal problems and relieve pressure on employers to compete in a race to the bottom.[69] Market forces that cause employers to seek low overhead costs and maximum profits discourage leave because it increases labor costs.[70] Absent legislation, workers like Maria must choose between careers and newborn care.[71] Many families cannot afford to make this choice because many women

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65. S. REP. NO. 103-3, at 4 (1993); H.R. REP. NO. 103-8, pt. 1, at 21 (1993).

66. Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 (2012).

67. *See id.*

68. *See id.* The statute does not define employers' "legitimate interests," but the House Report references "legitimate needs of employers to manage their work forces in the orderly fashion needed to produce a quality product. . . ." H.R. REP. NO. 103-8, pt. 1, at 68. Another minority view referenced "legitimate concerns of business to prevent abuse, and give employers sufficient flexibility." *Id.* at 87. From these comments, one can infer that "legitimate business interests" in the FMLA context means maintaining order among employees and preventing abuse of leave policies. Nowhere in the legislative history or statute did Congress suggest employers have a legitimate interest in restricting access to leave or retaliating against employees who rightfully use it.

69. *See* H.R. REP. NO. 103-8, pt. 1, at 22. The Senate and House Reports compare the FMLA to other social legislation that establishes minimum standards for employment, such as child labor laws, minimum wage, Social Security, safety and health laws, and pension and welfare benefits, which also arose in response to specific problems with broad implications. *Id.* at 21–22; S. REP. NO. 103-3, at 4–5.

70. *See* Christine Emba, *What's Stopping Paid Family Leave?*, WASH. POST (May 9, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/05/09/whats-stopping-paid-family-leave/ (increased cost is basis of opposition to paid leave); *see also* H.R. REP. NO. 103-8, pt. 1, at 22, S. REP. NO. 103-3, at 4–5 (historical need for labor standard regulation arose from misguided employers acting unfairly).

71. *See, e.g.*, Jessica Grose, *Moms Leave the Workforce Because They're Rational Actors, Not Maternal Softies*, SLATE (July 29, 2014), http://www.slate.com/blogs/xx_factor/2014/07/29/study_on_why_mothers_leave_the_workforce_it_s_a_rational_choice_not_a_maternal.html.

are sole or primary breadwinners,[72] and single mothers account for two-thirds of such households.[73] Congress specifically noted that "[o]ften families must struggle to fulfill the traditional role of bearing and caring for children . . . . When families fail to carry out these critical functions, the societal costs are enormous."[74] Congress enacted the FMLA to combat market forces and promote leave allowance in limited, but critical, circumstances.[75] If Congress intended to combat market forces by making leave available, it must also have intended to prevent employers from discouraging leave and retaliating against employees who use it.[76]

Notably, the FMLA emphasizes promoting equal employment opportunities for women and men pursuant to the Equal Protection Clause.[77] In enacting the FMLA, Congress acknowledged that workplaces remain modeled on the outdated notion that workers are unencumbered by family, and legislation was needed to protect families, employment, and society.[78] The FMLA appreciates that societal structures disproportionately burden women caretakers, affecting their working lives more than men's.[79] The congressional reports recognized the workforce's changing demographics, noting that over the previous forty years, one million more female workers had joined the workforce each year.[80] Recognition of the entry of women, and especially mothers, into the workforce influenced the FMLA.[81] Congress noted that the number of single mothers solely supporting families was rising, and the loss of a job as a result of leave was especially devastating for such household heads.[82] Interpreting the FMLA to allow employers to retaliate against women who take FMLA leave after the birth of a child runs directly counter to the Act's equal employment opportunity goal.[83]

72. *See, e.g.*, Bryce Covert, *Record Number of Families Rely On Women's Income, Many of Them Headed by Single Mothers*, THINKPROGRESS (May 29, 2013), http://thinkprogress.org/economy/2013/05/29/2071131/record-number-of-families-rely-on-womens-income-many-of-them-headed-by-single-mothers/.

73. *Id.*

74. H.R. REP. NO. 103-8, pt. 1, at 17.

75. *See id*. at 21–22; S. REP. NO. 103-3, at 4–5.

76. *See, e.g.*, 29 U.S.C. § 2615 (2012); *see also* Lisa B. Feinstein, Note, *The Forgotten Public Policies Behind the Family and Medical Leave Act: Burden of Proof Structures Placing Unnecessary Burdens on Employee's Statutory Entitlement*, 73 FORDHAM L. REV. 2561, 2568 (2005) (FMLA legislative history supports an inference that Congress intended to prohibit interference and retaliation).

77. *See* 29 U.S.C. § 2601(b)(4)–(5) (2012).

78. *See* H.R. REP. NO. 103-8, pt. 1, at 17.

79. *See* S. REP. NO. 103-3, at 5–6; H.R. REP. NO. 103-8, pt. 1, at 22–23.

80. *See* S. REP. NO. 103-3, at 6; H.R. REP. NO. 103-8, pt. 1, at 23.

81. *See* S. REP. NO. 103-3, at 5–6; H.R. REP. NO. 103-8, pt. 1, at 23.

82. *See* S. REP. NO. 103-3, at 6–7; H.R. REP. NO. 103-8, pt. 1, at 24–25.

83. *See* Remmers, *infra* note 115, at 379–80 (discussing how pregnancy discrimination is contradictory to Title VII).

Congressional reports discussed Beverly Wilkinson, a former secretary for a large corporation who lost her job after taking two weeks of vacation and five weeks of maternity leave after the birth of her first child.[84] The company told her the termination was due to a departmental reorganization, but she had good performance reviews, could perform other jobs at the large company, and was not offered another position.[85]

Wilkinson's employer retaliated against her for taking maternity leave.[86] This was the first testimony cited in the reports, showing Congress intended to protect employees from this type of retaliation. Wilkinson, much like Maria, believed her company supported women taking maternity leave and then suffered an adverse employment action for prioritizing her new child.[87]

Neither the Senate nor the House Report specifically address retaliation claims for exercising the right to leave. The reports elaborate only on retaliation claims for opposing employer practices in Section 105(a)(2) and refer to Title VII of the Civil Rights Act to construe such claims.[88] The Prohibited Acts section of the reports, referencing Title VII, cites examples of opposition provided by the Equal Employment Opportunity Commission (EEOC), such as complaining about allegedly unlawful practices or participating in a group opposing discrimination. None of these examples match Maria's retaliation claim. In the same Prohibited Acts section, the reports cite Section 105(a)(1), which makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided under the act," but neither the House nor Senate Report explain how to construe such claims.[89] Instead, Congress directed the Secretary of Labor to prescribe regulations to carry out the Act.[90]

The legislative history demonstrates that the FMLA should be interpreted to ensure new parents, especially women, do not face retaliation for using FMLA leave after the birth of a child. The goal of *McDonnell Douglas* was to sharpen "the inquiry into the elusive factual question of intentional discrimination" by establishing "an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases."[91] The claims at issue here are claims of retaliation for exercising statutorily granted substantive rights, and liability should exist if there is any evidence

84. *See* S. REP. NO. 103-3, at 8; H.R. REP. NO. 103-8, pt. 1, at 23–24.
85. *See* S. REP. NO. 103-3, at 8; H.R. REP. NO. 103-8, pt. 1, at 23–24.
86. S. REP. NO. 103-3, at 8; H.R. REP. NO. 103-8, pt. 1, at 23–24.
87. *See generally* S. REP. NO. 103-3, at 8; H.R. REP. NO. 103-8, pt. 1, at 23–24.
88. *See* S. REP. NO. 103-3, at 34 (1993); H.R. REP. NO. 103-8, pt. 1, at 46 (1993).
89. S. REP. NO. 103-3, at 34 (1993); H.R. REP. NO. 103-8, pt. 1, at 46 (1993).
90. *See infra* Section II.b.; *see, e.g.*, S. REP. NO. 103-3, at 4 (1993); *see also* 29 U.S.C. § 2654 (2012).
91. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993).

of retaliation. *McDonnell Douglas* sets too high a burden for the employees Congress sought to protect. *McDonnell Douglas* perpetuates societal stereotypes and forces women like Maria to choose between family and career or risk employer retaliation.

B. Administrative Guidance on FMLA Retaliation for Taking Leave Claims

Section 2654 of the FMLA delegates authority to the Secretary of Labor to prescribe regulations to carry out the statute.[92] In accord with this grant of authority, the DOL promulgated 29 C.F.R. § 825.220(c), which states:

> The Act's prohibition against interference prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights . . . . [E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies.[93]

Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,[94] when a court reviews an agency's statutory construction, it first asks if Congress spoke directly to the precise question.[95] Here, Congress has not spoken on RFTL claims; it addressed only claims for interference with taking leave and retaliation against employees who oppose practices made unlawful by the statute.[96]

Under *Chevron* and its progeny, the DOL regulation should be accorded considerable weight in judicial deliberation.[97] Congress delegated FMLA rulemaking authority to the DOL in 29 U.S.C. § 2654, and the DOL promulgated 29 C.F.R. § 825.220(c) in the exercise of that authority.[98] The statute's ambiguity regarding the existence and proper interpretation of RFTL claims makes "the question for the

92. 29 U.S.C. § 2654 (2012).
93. 29 C.F.R. § 825.220(c) (2016).
94. 467 U.S. 837 (1984).
95. *Id.* at 842.
96. *See supra* Section II(a); *see also* 29 U.S.C. § 2615 (2012).
97. *Chevron*, 467 U.S. at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.").
98. In *United States v. Mead Corp.*, the Supreme Court held:

> [A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking.

533 U.S. 218, 226–27 (2001).

court . . . whether the agency's answer is based on a permissible construction of the statute."[99] Courts afford deference to agencies even if the agency construction was not the only possible construction or the agency's construction is not the same the court would reach independently.[100]

The DOL interpretation, stating employers cannot retaliate against employees by using FMLA leave as a negative factor in an employment decision, is a permissible construction. Its construction is consistent with the FMLA's legislative history and congressional intent to combat market forces and ensure employees can take leave when necessary without adverse employment consequences.[101] An alternative interpretation would diminish RFTL claims by effectively giving employers license to retaliate against employees taking leave. Prohibiting employers from using leave as a "negative factor" holds them to a higher standard than *McDonnell Douglas*, reflecting the legislature's recognition that market forces would not promote leave without legislation.

In *Bachelder*, the Ninth Circuit deferred appropriately to the DOL regulations by applying the negative factor test to determine whether the employer impermissibly considered the employee's FMLA protected leave in its termination decision.[102] The court compared the FMLA to the National Labor Relations Act (NLRA), which prohibits employer activity that "tends to chill" an employee's willingness to exercise statutory rights.[103] Attaching negative consequences to the exercise of FMLA protected leave "tends to chill" an employee's willingness to exercise his or her right to take leave, running counter to the purposes of the FMLA.[104] The Ninth Circuit held that the DOL regulation reasonably interpreted the FMLA prohibition on "interference with" and "restraint of" employees' FMLA rights.[105] The court rejected *McDonnell Douglas* because the regulation plainly prohibits use of FMLA-protected leave as a negative factor in employment decisions. Thus, the plaintiff needed only to prove by a preponderance of the ev-

99. *Chevron*, 467 U.S. at 843.

100. *See id.* at 843 n.11.

101. *See* H.R. Rep. No. 103-8, pt. 1, at 21–22 (1993); S. Rep. No. 103-3, at 4–5 (1993).

102. Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1122 (9th Cir. 2001).

103. *See id.* at 1123 (citing Cal. Acrylic Indus. Inc. v. NLRB, 150 F.3d 1095, 1099 (9th Cir. 1998)).

104. *See id.* at 1123–24. The Eighth Circuit also adopted this reasoning when analyzing interference-with-leave claims under section 2615(a)(1) of the statute, expressing concerns that negative consequences chill employees' willingness to exercise FMLA rights. *See* Stallings v. Hussmann Corp., 447 F.3d 1041, 1050 (8th Cir. 2006) ("When an employer attaches negative consequences to the exercise of protected rights, it has 'chilled' the employee's willingness to exercise those rights because he or she does not want to be fired or disciplined for doing so.").

105. *See Bachelder*, 259 F.3d at 1122–23.

idence, direct or circumstantial, that use of FMLA leave was a negative factor in the adverse employment decision.[106]

In accord with *Chevron*, the DOL exercised its authority to promulgate FMLA regulations and determined retaliation claims exist if leave was a negative factor in an employment decision. This is a permissible construction of the statute. Other courts should follow the Ninth Circuit, defer to the regulation, and find violations of the FMLA whenever leave is a negative factor in an employment decision.

C. Policy of the FMLA

Recall Maria, the hypothetical lawyer denied a promotion mere months after taking twelve weeks of FMLA leave for the birth of her second child. The FMLA explicitly covers leave of up to twelve weeks to care for a newborn child,[107] and Maria was statutorily eligible for leave.[108] When denying her partnership, the firm told Maria she was "not fully dedicated to her job or ready to meet the demands of being a partner."

In the FMLA, Congress sought to protect employees like Maria. It recognized the dire social consequences of denying newborn children the care of their parents and wanted to ensure that new mothers like Maria could provide that care without workplace repercussions.[109]

Without proper FMLA leave protections, Maria must choose between her job and her child. Either choice would have dire consequences for her family. For many American families, a mother's employment is essential for financial wellbeing. In Maria's case, although she brings in substantial income, the burden of caregiving forces her to take time off when her baby is sick. Congress, in both the House and Senate reports, specifically discussed women's entry into the workforce and their dual roles as provider and caregiver.[110] Maria is part of the demographic revolution, the drastic increase in the number of working women, and she is among the fifty-one percent

106. *Id.* at 1125. In *Bachelder*, there was direct, undisputed evidence that the employer terminated the employee because of FMLA-protected absences that the court determined were protected by the FMLA. *Id.* at 1126. The employer was liable because the FMLA-protected absences were a negative factor in the employment decision.

107. *See* 29 U.S.C. § 2612(a)(1) (2012) (employees are eligible for up to twelve work weeks of leave in a twelve-month period "[b]ecause of the birth of a son or daughter of the employee and in order to care for such son or daughter").

108. *See* 29 U.S.C. § 2611 (2012) (defining "eligible employee" as someone who worked for the employer for the last twelve months and worked at least 1,250 hours during the previous twelve months).

109. *See* H.R. REP. NO. 103-8, pt. 1, at 24 (1993) ("[W]hen families fail, the community is left to grapple with the tragic consequences of emotionally and physically deprived children and adults."). Expert testimony in the House Report also cites the importance of present parents for the attachment and development of children and parents. *See id.* at 27.

110. *See, e.g.*, H.R. REP. NO. 103-8, pt. 1, at 22–24.

of mothers with children under one year old who work.[111] However, that revolution has not relieved Maria of her primary caregiving role, one that still falls disproportionately on women. Only thirty-two percent of fathers whose wives participate in the workforce are a regular source of care for their children.[112] Without effective statutory protections for caregiving time without employer retaliation, women will continue to leave the workforce at alarming rates. One poll found that "sixty-one percent of women said family responsibilities were a reason they were not working, compared with thirty-seven percent of men."[113]

The U.S. workplace continues to be modeled on the 1960s conception of the nuclear family, consisting of an "independent male breadwinner, a dependent female caregiver, and children."[114] The male breadwinner can focus his full attention on work because the dependent female is focused on homemaking and caregiving. Maria works for a competitive law firm whose clients expect exceptional work and attorneys readily available, even immediately following childbirth. Historically, men took almost no time off after the birth of a child, and thus, for them, the birth of children had little impact on work productivity.[115] Law firms and clients traditionally have little respect for work-life boundaries,[116] contributing to the departure of women from law firms.[117] Maria, like other high-earners, probably works more

111. *See* H.R. Rep. No. 103-8, pt. 1, at 23.

112. *See, e.g.*, Press Release, U.S. Census Bureau, One-Third of Fathers with Working Wives Regularly Care for Their Children (Dec. 5, 2011), https://www.census.gov/newsroom/releases/archives/children/cb11-198.html.

113. Claire C. Miller & Liz Alderman, *Why U.S. Women Are Leaving Jobs Behind*, N.Y. Times (Dec. 12, 2014), http://www.nytimes.com/2014/12/14/upshot/us-employment-women-not-working.html?_r=0 (three-fourths of women who identify as homemakers and have not looked for a job in the last year would consider working at a job if it allowed them to work from home or offered flexible hours).

114. Jill Maxwell, *Leveraging the Courts to Protect Women's Fundamental Rights at the Intersection of Family-Wage Work Structures and Women's Role as Wage Earner and Primary Caregiver*, 20 Duke J. Gender L. & Pol'y 127, 131 (2012) (quoting Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 Harv. C.R.-C.L. L. Rev. 415, 419 (2011)).

115. In the 1980s, sixty-three percent of Fortune 500 companies considered it inappropriate for men to take paternity leave and men were denied leave more often than women. Cynthia L. Remmers, *Pregnancy Discrimination and Parental Leave*, 11 Indus. Rel. L.J. 377, 408 (1989).

116. Leigh M. Abramson, *Law Firms Are Learning: Work-Life Balance Isn't Just for Moms*, The Atlantic (Sept. 24, 2015), http://www.theatlantic.com/business/archive/2015/09/lawyers-work-life-balance-men/407011/.

117. "Though women make up forty-five percent of associates in private practice, they represent only twenty percent of partners, according to statistics compiled by the American Bar Association." Leigh M. Abramson, *Parents in Law: Is it Possible to be Both an Attorney and a Committed Mom or Dad?*, The Atlantic (Sept. 17, 2015), http://www.theatlantic.com/business/archive/2015/09/mom-dad-parent-lawyer/405742/. "Women today are twice as likely as men to leave law firms for reasons like work-life balance . . . . [I]n a survey of more than 17,000 law firm associates, women rated their firms' culture, their job satisfaction and their compensation (to name just a few) much lower than

than forty hours per week.[118] Congress recognized market forces do not encourage extended leave allowances.[119] Maria's law firm appears to echo this notion because the six-week paid maternity leave policy is brief compared to the twelve weeks allotted by the FMLA. Retaliation against Maria could also be symptomatic of a continuing societal belief that women should stay home and care for young children.[120] Maria's dilemma illustrates why Congress adopted the FMLA, and she is the exact type of employee the FMLA was designed to protect.

Maria's RFTL claim would probably fail in circuits applying *McDonnell Douglas* if only circumstantial evidence is present. She will struggle at all three stages of this test because her employer will point to her merely satisfactory performance and compare her to other associates. She probably has insufficient evidence to prove her termination was pretextual. The *McDonnell Douglas* standard will fail Maria, and her employer may continue to retaliate against employees who exercise their right to FMLA leave, thereby discouraging other associates from taking leave.

In *Bachelder*, the court also asked whether the employer action tended to "chill" an employee's willingness to exercise FMLA rights.[121] If Maria wants to make partner in the future, she probably will not take FMLA leave or may even choose not to have more children. Through its negative employment action, Maria's employer also sent a message to other associates that prioritizing family and taking leave will be considered in partner decisions; therefore, serious associates should not take FMLA leave. Whenever stigma attaches to use of family friendly policies, fear of employer retaliation prevents men and women from using such policies.[122] All things considered, Maria's case probably succeeds under the negative factor test, thus ensuring the purpose of the FMLA is met and employers cannot retaliate against employees who exercise their right to leave.

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their male counterparts did." Selena Rezvani, *Large Law Firms Are Failing Women Lawyers*, WASH. POST (Feb. 18, 2014), https://www.washingtonpost.com/news/on-leadership/wp/2014/02/18/large-law-firms-are-failing-women-lawyers/.

118. Sixty-two percent of high-earning individuals work more than fifty hours per week, thirty-five percent work more than sixty hours per week, and ten percent work more than eighty hours a week. Sylvia A. Hewlett & Carolyn B. Luce, *Extreme Jobs: The Dangerous Allure of the 70-Hour Workweek*, HARV. BUS. REV. (Dec. 2006), https://hbr.org/2006/12/extreme-jobs-the-dangerous-allure-of-the-70-hour-workweek. Of high-earners studied, only twenty percent were women, and those women were less likely than men to love their work.

119. H.R. REP. NO. 103-8, pt. 1, at 22 (1993).

120. In 2007, forty-one percent of the general population says the trend toward more mothers working outside the home is bad for society, with more older adults holding such a view. *See Fewer Mothers Prefer Full-time Work: From 1997 to 2007*, supra note 6. Men are more likely than women to consider an at-home mother the ideal situation for children.

121. Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1123–24 (9th Cir. 2001).

122. *See supra* text accompanying notes 15–16.

III. Future Implications

Altering the evidentiary framework for RFTL claims is one of many legal actions that should be taken to protect employees who prioritize family. Too few employees currently receive FMLA protection and few employees can afford to use it.[123] The FMLA, as currently written, is just one tool to help women remain in the workforce. More legislative action is necessary to ensure women have equal opportunities and do not face greater work barriers than men.

The United States lags behind other developed countries in providing equal workplace opportunity.[124] In 1990, the United States had one of the highest employment rates for women, but as of 2014 fell behind several countries, including Switzerland, Australia, Germany, France, Canada, and Japan.[125] European countries are looking far beyond unpaid leave to enhance women's participation in the workforce by offering subsidized health care, generous paid parental leave, and taxation of individuals instead of households, resulting in lower overall taxation.[126]

One critical legislative action is equal paid leave for men and women.[127] Several states already have such legislation,[128] 2016 Democratic presidential nominee Hillary Clinton included paid leave on her agenda,[129] and the Trump White House has discussed paid leave for new parents.[130] If federally protected paid leave is on the horizon,

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123. Only fifty-nine percent of employees meet all three FMLA conditions to be eligible for protections, and only sixteen percent of eligible employees took FMLA leave in 2011–2012. *See* Abt Associates Inc., *Family and Medical Leave in 2012: Executive Summary* 1–2 (U.S. Dep't of Lab. ed., 2013), http://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Executive-Summary.pdf. Forty percent of employees cite the inability to afford leave as their reason for returning to work. *See id.*

124. Miller & Alderman, *supra* note 113.

125. *Id.*

126. *See id.*

127. *See, e.g.*, *id.*

128. The California Paid Family Leave insurance program provides up to six weeks of paid leave at fifty-five percent of employees' weekly wage under the same eligibility standards as the FMLA. *See State Family and Medical Leave Laws*, NAT'L CONF. OF STATE LEGISLATURES (Dec. 31, 2014), http://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx#2. New Jersey provides up to two-thirds of wages for employees who have worked twenty calendar weeks or earned 1,000 times the state minimum wage in the fifty-two weeks before leave. *See id.* The Rhode Island Temporary Caregiver Insurance Program provides four weeks of paid leave to employers who opt into the program. *See id.* In New York, the 2016–2017 state budget includes the "longest and most comprehensive" leave policy in the nation, where employees will be eligible for twelve weeks of paid leave. *Programs: Paid Family Leave: Strong Families, Strong NY*, NEW YORK STATE, https://www.ny.gov/programs/paid-family-leave-strong-families-strong-ny (last visited Oct. 27, 2016).

129. *Women's Issues are Family Issues, Economic Issues, and Crucial to Our Future Competitiveness*, HILLARY CLINTON, https://www.hillaryclinton.com/issues/womens-rights-and-opportunity/ (last visited Oct. 27, 2016).

130. *See, e.g.*, Danielle Paquette & Damian Paletta, *U.S. Could Get First Paid Family Leave Benefit Under Trump Budget Proposal*, WASH. POST (May 18, 2017),

the legislature and courts are likely to rely heavily on the FMLA as a model and use FMLA precedent to help interpret claims under the new legislation.

In 2002, California passed paid-leave legislation.[131] However, a 2011 study found thirty percent of workers still did not apply for paid family leave "because they feared making their employers 'unhappy' and possibly being fired."[132] Until workplace norms shift, employers will continue to foster cultures that discourage men and women from taking paid leave. It is critical that courts clarify the appropriate standard for analyzing retaliation claims and implement the most effective standard to discourage employer retaliation, the negative factor test.

Conclusion

In the FMLA, Congress sought to ensure that women with caregiving responsibilities continue to participate in the workforce by having the option to take leave after welcoming a new child into the home, care for oneself, or care for an ill family member.[133] Protecting women who exercise the right to maternity leave is critical for the continued economic advancement of women and for the development of our next generation. The *McDonnell Douglas* framework too often allows employers to escape liability when they retaliate against employees who exercise their right to leave. Adopting the Ninth Circuit's negative factor test matches the legislative purpose of the FMLA, follows the DOL regulation, and is in the best interest of employees.

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https://www.washingtonpost.com/news/wonk/wp/2017/05/18/u-s-could-get-first-paid-family-leave-benefit-under-trump-plan/?utm_term=.0e73429f5f24.

131. CAL. GOV'T CODE ANN. § 12945.2 (2015).

132. Judith Warner, *Lessons Learned: Reflections on 4 Decades of Fighting for Families* 3, CENTER FOR AMERICAN PROGRESS, https://www.americanprogress.org/issues/economy/reports/2013/04/26/61538/lessons-learned/ (citing Eileen Appelbaum & Ruth Milkman, *Leaves that Pay: Employer and Worker Experiences with Paid Family Leave in California* 4, WASHINGTON: CENTER FOR ECONOMIC AND POLICY RESEARCH (2011), http://www.cepr.net/documents/publications/paid-familyleave-1-2011.pdf).

133. *See generally* S. REP. NO. 103-3 (1993); H.R. REP. NO. 103-8, pt. 1(1993).

Appendix A: 2015 FMLA Retaliation-for-Taking-Leave Claims in the U.S. Courts of Appeals

Case	Test Applied	Plaintiff Claim Succeeds?	Rationale
Carter v. Chi. State Univ., 778 F.3d 651, 660–62 (7th Cir. 2015)	*McDonnell Douglas*	No	Plaintiff failed to establish prima facie case by failing to establish causal connection
Gordon v. U.S. Capitol Police, 778 F.3d 158, 162–64 (D.C. Cir. 2015)	*McDonnell Douglas*	Yes	Lower court dismissed case because employee could not establish pretext, Court of Appeals reversed motion by taking complaint as true
Bryant v. Tex. Dep't of Aging & Disability Servs., 781 F.3d 764, 771–72 (5th Cir. 2015)	None	No	Court determined plaintiff failed to establish a clearly established statutory right to overcome qualified immunity of government officials
Brown v. Diversified Distrib. Sys., LLC, 801 F.3d 901, 908–09 (8th Cir. 2015)	*McDonnell Douglas*	No	Plaintiff failed to establish causal connection between demotion after leave and taking FMLA leave, even though employer was only "considering" the demotion before her leave
Stranzl v. Delaware Cty., 604 F. App'x 210, 211 (3d Cir. 2015) (unpublished)	None	No	Plaintiff, who was relocated and could not access old files, did not suffer a materially adverse employment action that would dissuade an employee from taking leave
Burciaga v. Ravago Americas LLC, 791 F.3d 930, 934–37 (8th Cir. 2015)	*McDonnell Douglas*	No	Plaintiff failed to establish pretext because there was no evidence of discriminatory intent
Jarvela v. Crete Carrier Corp., 776 F.3d 822, 832 (11th Cir. 2015)	None	No	Plaintiff failed to establish causation and thus failed prima facie case
Rudy v. Walter Coke, Inc., 613 F. App'x 828, 831 (11th Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff failed to establish causal link between leave and termination
Basch v. Knoll, Inc., 619 F. App'x 457, 459–61 (6th Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff failed to establish pretext

Case	Test Applied	Plaintiff Claim Succeeds?	Rationale
Anderson v. Ark. Dep't of Human Servs., DCFS, 594 F. App'x 318, 318 (8th Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff failed to present sufficient evidence to establish pretext
Allen v. Wal-Mart Stores, Inc., 602 F. App'x 617, 621–22 (6th Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff failed to establish causal connection in his prima facie case
Ameen v. Amphenol Printed Circuits, Inc., 777 F.3d 63, 73–74 (1st Cir. 2015)	*McDonnell Douglas*	No	Plaintiff could not establish retaliatory animus to demonstrate pretext
Szostek v. Drexel Univ., 597 F. App'x 50, 53–54 (3d Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff could not establish pretext
Cunningham v. Nordisk, 615 F. App'x 97, 101–02 (3d Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff could not establish an adverse employment action
Caldwell v. Clayton Cty. Sch. Dist., 604 F. App'x 855, 862 (11th Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff could not establish pretext
Banks v. Bosch Rexroth Corp., 610 F. App'x 519, 538 (6th Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff could not establish pretext
Flanner v. Chase Inv. Servs. Corp., 600 F. App'x 914, 921–22 (5th Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff could not establish temporal proximity for causal connection of prima facie case
Parks v. UPS Supply Chain Sols., Inc., 607 F. App'x 508, 513, 518 (6th Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff could not establish pretext
Curry v. Brown, 607 F. App'x 519, 525–26 (6th Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff could not establish pretext
Henderson v. Chrysler Grp., LLC, 610 F. App'x 488, 493, 495 (6th Cir. 2015) (unpublished).	*McDonnell Douglas*	No	Plaintiff could not establish her prima facie case

Case	Test Applied	Plaintiff Claim Succeeds?	Rationale
McCollum v. Puckett Mach. Co., 628 F. App'x 225, 231–32 (5th Cir. 2015) (unpublished).	*McDonnell Douglas*	No	Plaintiff could not establish pretext
Didier v. Abbott Labs., 614 F. App'x 366, 377–78 (10th Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff could not establish pretext
Hawkins v. BBVA Compass Bancshares, Inc., 613 F. App'x 831, 840 (11th Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff could not establish pretext
Rowe v. United Airlines, Inc., 608 F. App'x 596 (10th Cir. 2015) (unpublished)	*McDonnell Douglas* variation	No	Affirmed lower court decision that plaintiff could not establish pretext
Castay v. Ochsner Clinic Found., 604 F. App'x 355, 356 (5th Cir. 2015) (unpublished)	*McDonnell Douglas* and Negative Factor variation	No	Plaintiff could not establish that discrimination was one of the reasons she was terminated
Beese v. Meridian Health Sys., Inc., 629 F. App'x 218, 221 (3d Cir. 2015) (unpublished)	*McDonnell Douglas* and Mixed Motive – undecided (see *infra* Appendix B)	No	Plaintiff could not establish causation
Augustus v. AHRC Nassau, 596 F. App'x 41, 42 (2d Cir. 2015) (unpublished) *cert. denied*, 136 S. Ct. 171 (2015) *reh'g denied*, 133 S. Ct. 577 (2015)	*McDonnell Douglas*	No	Plaintiff could not establish her prima facie case
Theiss v. Walgreen Co., 632 F. App'x 829, 833–34 (6th Cir. 2015)	*McDonnell Douglas*	No	Plaintiff could not establish pretext
Knox v. Town of Southeast, 599 F. App'x 411, 414 (2d Cir. 2015) (unpublished)	*McDonnell Douglas*	No	Plaintiff could not establish retaliatory intent in his prima facie case
Garcia v. Penske Logistics, L.L.C., F. App'x 204, 212 (5th Cir. 2015)	*McDonnell Douglas*	No	Plaintiff could not establish pretext

Appendix B: Tests Applied by Circuit in Retaliation-for-Taking-Leave Claims

Circuit	Case	Test applied in FMLA retaliation-for-taking-leave claims
1st	Colburn v. Parker Hannifin/Nichols Portland Div., 429 F.3d 325, 335 (1st Cir. 2005)	*McDonnell Douglas*
2nd	Graziadio v. Culinary Inst. of Am., 817 F.3d 415, 429 (2d Cir. 2016); Potenza v. City of New York, 365 F.3d 165, 168 (2d Cir. 2004)	*McDonnell Douglas*, but acknowledged the potential applicability of the "negative factor" test. *Potenza* declined to enter the dispute by following its own precedent. *Graziadio* also acknowledged the split, but the plaintiff met the "stricter" *McDonnell Douglas* test and the court declined to decide the appropriate test.
3rd	Beese v. Meridian Health Sys., Inc., 629 F. App'x 218 (3d Cir. 2015)	*McDonnell Douglas* and mixed-motive (undecided because it would not impact result)
4th	Yashenko v. Harrah's NC Casino Co., 446 F.3d 541, 550–51 (4th Cir. 2006)	*McDonnell Douglas*
5th	Hunt v. Rapides Healthcare Sys. LLC, 277 F.3d 757, 768 (5th Cir. 2001)	*McDonnell Douglas*
6th	Donald v. Sybra, Inc., 667 F.3d 757, 762 (6th Cir. 2012)	*McDonnell Douglas*, but acknowledged the potential applicability of the "negative factor" test. Court declined to enter the dispute by following its own precedent.
7th	King v. Preferred Tech. Grp., 166 F.3d 887, 892 (7th Cir. 1999)	*McDonnell Douglas*
8th	Lovland v. Emp'rs Mut. Cas. Co., 674 F.3d 806, 811 (8th Cir. 2012)	*McDonnell Douglas*, but acknowledged the potential applicability of the "negative factor" test. Court declined to enter the dispute by following its own precedent.
9th	Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1121 (9th Cir. 2001)	Negative Factor
10th	Metzler v. Fed. Home Loan Bank of Topeka, 464 F.3d 1164, 1171 (10th Cir. 2006)	*McDonnell Douglas*

Circuit	Case	Test applied in FMLA retaliation-for-taking-leave claims
11th	Brungart v. BellSouth Telecommc'ns, Inc., 231 F.3d 791, 798 (11th Cir. 2000)	*McDonnell Douglas*
D.C.	Gleklen v. Democratic Cong. Campaign Comm. Inc., 199 F.3d 1365, 1367 (D.C. Cir. 2000)	*McDonnell Douglas*