

ABA JOURNAL OF  
**Labor & Employment Law**

The Journal of the ABA Section of Labor and Employment Law  
Volume 32, Number 1, Fall 2016

<b>The Editors' Page</b>	<b>v</b>
<i>Stephen F. Befort &amp; Laura J. Cooper</i>	
<b>Whistleblowers and Safety at Work: An Analysis of Section 11(c) of the Occupational Safety and Health Act</b>	<b>1</b>
<i>Emily A. Spieler</i>	
<b>Changing Definitions of Sex under Title VII</b>	<b>25</b>
<i>Lisa J. Banks &amp; Hannah Alejandro</i>	
<b>The Equal Employment Opportunity Commission as a Change Agent: Tracing the EEOC's Relentless Pursuit of "Retaliatory" Waiver Provisions in Employer Severance Agreements</b>	<b>45</b>
<i>Leslie E. Silverman</i>	
<b>Does Title VII Preempt State Fair Pay Laws?</b>	<b>65</b>
<i>Allan G. King</i>	
<b>Deference to EEOC Rulemaking and Sub-Regulatory Guidance: A Flip of the Coin?</b>	<b>93</b>
<i>Eric Dreiband &amp; Blake Pulliam</i>	
<b>E.I. Dupont and Manhattan Beer: How Far Do Weingarten Rights Extend? A Union Perspective</b>	<b>113</b>
<i>Kate M. Swearingen</i>	
<b>Factors in Police Misconduct Arbitration Outcomes: What Does It Take to Fire a Bad Cop?</b>	<b>133</b>
<i>Tyler Adams</i>	

**EDITORIAL STATEMENT:** The *ABA Journal of Labor & Employment Law* is a journal of ideas and developments in all areas of labor and employment law designed to provide balanced analysis for practitioners, judges, administrators, and the interested public. The journal provides an opportunity for members of the labor and employment bar to share insights and perspectives on practical issues of current interest while encouraging discussion of their broader policy implications. The *ABA Journal of Labor & Employment Law* may be cited as follows, by volume and page: 32 A.B.A. J. LAB. & EMP. L. \_\_ (2016).

**EDITORIAL GUIDELINES FOR AUTHORS:** The *ABA Journal of Labor & Employment Law* welcomes contributions from all interested persons. Articles preferably should be submitted electronically as a Microsoft Word document attachment to [abajlel@umn.edu](mailto:abajlel@umn.edu), or by mail to the *ABA Journal of Labor & Employment Law*, University of Minnesota Law School, Walter F. Mondale Hall, 229 19th Avenue South, Minneapolis MN 55455. Questions may be directed to the faculty co-editors: Professor Stephen F. Befort ([befor001@umn.edu](mailto:befor001@umn.edu), 612-625-7342) and Professor Laura J. Cooper ([lcooper@umn.edu](mailto:lcooper@umn.edu), 612-625-4320). Manuscripts should generally be shorter than forty pages with text and footnotes double-spaced. Citations of authority should appear in the footnotes. In preparing both text and footnotes, authors should refer to the following works for style: The Bluebook: A Uniform System of Citation (20th ed.) (Harvard Law Review Association, Cambridge, Mass.); for matters of literary style not covered by this manual, The Chicago Manual of Style (16th ed.) (The University of Chicago Press, Chicago, Ill.) or The Elements of Style by William Strunk Jr. and E.B. White (4th ed.).

**STUDENT SUBMISSIONS:** The *ABA Journal of Labor & Employment Law* does not accept direct submission of articles from law students. We do, however, publish the winning article in the American Bar Association Section of Labor and Employment Law and College of Labor and Employment Lawyers Annual Law Student Writing Competition, which is open only to U.S. law students. For competition rules, see <https://www.law.umn.edu/journals/aba-journal-labor-employment-law/2016-2017-national-student-writing-competition>.

**PERMISSIONS:** To request to reproduce any portion of the ABA Journal of Labor & Employment Law, please visit [americanbar.org/reprint](http://americanbar.org/reprint).

**DISCLAIMER:** The material contained herein represents the opinions of the authors and does not express the views or the positions of the American Bar Association or the Section of Labor and Employment Law, unless adopted pursuant to the bylaws of the Association and the Section and so indicated. © 2017 American Bar Association. All rights reserved. Printed in the United States of America. Produced by ABA Publishing.

**SUBSCRIPTION PRICES:** Any member of the American Bar Association may join the Section upon payment of its annual dues of \$75.00. Section membership includes a subscription to the *ABA Journal of Labor & Employment Law*. Law Student Division members of the American Bar Association may join the Section without charge. Institutions and individuals not eligible for Association membership may subscribe to the *ABA Journal of Labor & Employment Law* for \$45.00. Membership dues in the American Bar Association are not deductible as a charitable contribution for federal income tax purposes. However, such dues may be deductible as a business expense.

**ORDER INFORMATION:** Current issues of the ABA Journal of Labor & Employment Law may be obtained from the ABA Service Center, American Bar Association, 321 North Clark Street, Chicago IL 60654-7598; phone: 800-285-2221; fax: 312-988-5550; e-mail: [service@americanbar.org](mailto:service@americanbar.org). Back issues of the ABA Journal of Labor & Employment Law or its predecessor title, *The Labor Lawyer*, published two years ago and earlier may be purchased from William S. Hein & Co., 2350 N. Forest Road, Getzville, NY 14068; phone: 800-828-7571.

**FREQUENCY AND POSTAGE:** The *ABA Journal of Labor & Employment Law* (ISSN: 8756-2995) is published three times per year by the American Bar Association, Section of Labor and Employment Law. Third-class postage is paid at Chicago, IL, and additional mailing offices.

**ADDRESS CHANGES:** Send all address changes to the *ABA Journal of Labor & Employment Law*, ABA Service Center, American Bar Association, 321 North Clark Street, Chicago, IL 60654-7598; phone: 800-285-2221; e-mail: [service@americanbar.org](mailto:service@americanbar.org).

**INTERNET ACCESS:** Visit the *ABA Journal of Labor & Employment Law* home page at the University of Minnesota Law School: <http://abajlel.law.umn.edu>. Articles previously published in the *ABA Journal of Labor & Employment Law* or its predecessor title, *The Labor Lawyer*, are available at [http://www.americanbar.org/publications/aba\\_journal\\_of\\_labor\\_employment\\_law\\_home/aba\\_journal\\_of\\_labor\\_employment\\_law\\_archive.html](http://www.americanbar.org/publications/aba_journal_of_labor_employment_law_home/aba_journal_of_labor_employment_law_archive.html).



ABA JOURNAL OF  
**Labor & Employment Law**

The Journal of the ABA Section of Labor & Employment Law

**EDITORS**

Professor Stephen F. Befort  
*Gray, Plant, Mooty,  
Mooty, & Bennett  
Professor of Law*

Professor Laura J. Cooper  
*J. Stewart and Mario Thomas McClendon  
Professor in Law and  
Alternative Dispute Resolution*

University of Minnesota Law School  
Minneapolis, Minnesota

**AMERICAN BAR ASSOCIATION EDITORIAL BOARD**

Ellen C. Kearns, *Chair*

Thomas D. Allison  
Christine Godsil Cooper  
Robert M. Dohrmann  
Stephen D. Gordon

Barry A. Hartstein  
Paul W. Mollica  
Howard Shapiro  
Patricia Costello Slovak

**STUDENT EDITORIAL BOARD**

VOLUME 32 2016–2017

**EDITOR-IN-CHIEF**

Paige Haughton

**LEAD MANAGING EDITOR**

Tyler Adams

**MANAGING EDITORS**

Chelsey Jonason  
Benjamin Streckert  
Shuang Xu

**NOTE AND ARTICLE EDITORS**

Michael Lyon  
Dana Swanson

**EDITORIAL STAFF**

Brandon Blakely  
Paul Hallgren  
Jacob Harksen  
Theodore Heckel  
Samuel Johnson

Jordan Leitzke  
Lauren Seawright  
Luke Wolf  
Lauren Zenk

University of Minnesota Law School  
Minneapolis, Minnesota



## The Editors' Page

The University of Minnesota Law School has been the editorial home of the ABA Journal of Labor & Employment Law since 2009. Today, the Journal's editorial work is accomplished collaboratively by two Faculty Co-Editors, seven third-year student editors, and nine second-year student staff members. The ABA Section of Labor and Employment Law provides funds to the Law School to facilitate our work and enrich the students' education in labor and employment law and their engagement with attorneys who practice labor and employment law. This year, we had sufficient funds to pay the travel expenses for all of our student editors to attend the Section's Tenth Annual Labor and Employment Law Conference in Chicago in November 2016. Six of our seven editors were able to attend. This was an extraordinary experience for our students and we are enormously grateful to the Section for making it possible.

Editor-in-Chief Paige Haughton, who will be clerking next year at the Minnesota Court of Appeals, welcomed exposure to such a wide variety of labor and employment law topics in such a few days and the multiple opportunities for both practical learning and networking. She especially appreciated "how willing attorneys were to share their wisdom and experience."

Lead Managing Editor, Tyler Adams, who will be an associate next year at a boutique plaintiffs' employment law firm, liked being able to make connections with attorneys across the country all in one place. He said, "It was a great experience that I anticipate repeating as a practicing lawyer."

Managing Editor Chelsey Jonason, headed to a clerkship at Maine's Supreme Judicial Court, found the breadth of topics addressed at the conference "both overwhelming and exciting." She said she appreciated "the commitment to diverse perspectives on the panels because, more than ever, it is imperative to talk to people across the line."

Another Managing Editor, Benjamin Streckert, who will join a Midwest law firm representing businesses, was grateful to learn from the "top legal minds in the country" and was impressed by the warm welcome from Section members. He said, "All of the attorneys I met were willing to share insights into the profession, their career paths, and details about their day-to-day practices." The experience persuaded him to become active in the Section and attend future conferences.

Note and Article Editor Michael Lyon, who will join a large New York City firm, remarked on being able to talk with legal leaders about issues facing their practices. He felt that he had "left with a richer understanding of labor and employment law that will jump-start my future legal career."

Another Note and Article Editor, Dana Swanson, who will work at a management-side labor and employment law firm in Boston, was grateful to share with fellow student editors the conference experience of meeting

“amazing and influential practitioners.” She particularly appreciated some of the smaller panels that addressed specialty areas in labor and employment law.

Section members may be unaware that all law students may register for its annual conferences without payment of a fee. Law students at other schools surely would benefit, as our students so greatly did, from attending a Section annual conference. The next one will be in Washington, D.C. in November 2017. We encourage you to reach out to law students at your alma mater and those who work at your firm to let them know about this wonderful opportunity.

The articles in this issue of the Journal, like the Section’s annual conferences, reflect the broad substantive scope of labor and employment law practice, and the legal insights and practical guidance that leading experts generously share with Section members.

**In Whistleblowers and Safety at Work: An Analysis of Section 11(c) of the Occupational Safety and Health Act**, Northeastern University School of Law Professor Emily A. Spieler brings her experience as Chair of the Whistleblower Protection Advisory Committee to examine the effectiveness of protection for employees reporting workplace safety hazards. The Occupational Safety and Health Act (OSH Act) relies on worker reporting to monitor and enforce the Act, but employees will only come forward if they expect protection from retaliation. Professor Spieler’s detailed review of data on processing and litigation of OSH Act whistleblower claims reveals the ineffectiveness of current statutory protections. She compares these weaknesses with the strengths of other federal workplace whistleblower protection laws and draws from that comparison specific suggestions for improving OSH Act whistleblower protection.

For decades, courts and federal agencies had held that Title VII did not protect discrimination based on gender identity or sexual orientation. In **Changing Definitions of Sex under Title VII**, plaintiffs’ employment attorneys Lisa J. Banks and Hannah Alejandro highlight the administrative and judicial trend of reinterpreting existing legal doctrine to expand Title VII protection to sexual orientation and gender identity discrimination. The authors explain how legal definitions of sex and gender differ from those used by medical and social science professionals. They next describe the evolution of the Equal Employment Opportunity Commission’s (EEOC) view that Title VII does prohibit transgender and sexual orientation discrimination. Here, the EEOC relies on the Supreme Court’s holding in *Price Waterhouse* that adverse employer treatment of an employee who fails to comply with societal gender norms can constitute discrimination “because of sex.” The authors identify the limitations of this argument, and anticipate that the issue will ultimately be resolved by the Supreme Court.

Management attorney and former EEOC Vice Chair Leslie E. Silverman criticizes an EEOC initiative to invalidate severance agreements conditioned on waiver of employees’ rights to interact with the EEOC. **The Equal**

**Employment Opportunity Commission as a Change Agent: Tracing the EEOC's Relentless Pursuit of "Retaliatory" Waiver Provisions in Employer Severance Agreements** details the agency's development of a theory that relies on section 707(a) of Title VII to challenge such waivers as a "pattern or practice of resistance" to employees' enjoyment of Title VII rights. She objects that this resistance theory allows the EEOC to sue whenever severance agreement language could potentially interfere with an employee's ability to interact with the EEOC, even if the employer never acts in reliance on the agreement. Silverman predicts that courts are unlikely to permit the EEOC's use of resistance theory to challenge waivers because it depends on an overly broad interpretation of section 707(a), and bypasses procedural requirements of section 706 of Title VII.

In a provocative article, management attorney Allan G. King asserts that federal law preempts state legislation requiring employers to eliminate gender pay differences that do not violate Title VII or the Equal Pay Act, or that provide remedies greater than federal law. His article, **Does Title VII Preempt State Fair Pay Laws?**, notes that Title VII's prohibition of race- or gender-conscious decisionmaking is far narrower than California, New York, and Massachusetts fair pay laws. King offers a detailed examination of these state laws and concludes that they are preempted by Title VII because, if employers were to comply with some state fair pay law provisions, they would violate the federal law's prohibition of preferences for protected groups.

The Supreme Court's jurisprudence on the extent of deference to be afforded agency rulemaking and sub-regulatory guidance creates a complex analytical structure for employment law attorneys bringing and defending claims under Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Equal Pay Act, and the Genetic Information Nondiscrimination Act. Former EEOC General Counsel and current management attorney Eric Dreiband joins his associate, Blake Pulliam, in **Deference to EEOC Rulemaking and Sub-Regulatory Guidance: A Flip of the Coin?** to explain the Supreme Court's three alternative tests of judicial deference to agency action, and how these tests are applied significantly differently under each of these nondiscrimination statutes. The authors draw from the Supreme Court's jurisprudential theories and holdings to offer practical advice to attorneys arguing for or against deference to EEOC regulations and sub-regulatory guidance, including specific questions to address under each of the deference tests.

In ***E.I. Dupont and Manhattan Beer: How Far Do Weingarten Rights Extend? A Union Perspective***, union attorney Kate M. Swearingen provides a detailed description of two recent National Labor Relations Board cases on unionized workers' rights to representation in employer disciplinary investigations. *E.I. Dupont* protects employees forced to attend interviews without union representation from adverse consequences resulting from the lack of representation by granting make-whole relief in

some circumstances. *Manhattan Beer* extends representational rights to non-traditional employer investigations, such as drug testing. Swearengen contends both cases are consistent with the text of the National Labor Relations Act and are logical and reasonable applications of the *Weingarten* doctrine. The Article concludes by highlighting the practical effects for union employees of the newly-recognized rights.

Tyler Adams, a third-year student at the University of Minnesota Law School and the Lead Managing Editor of the Journal, conducted original empirical research investigating why labor arbitrators regularly reinstate police officers discharged for misconduct. In **Factors in Police Misconduct Arbitration Outcomes: What Does It Take to Fire a Bad Cop?**, Adams analyzes ninety-two arbitration awards involving police officers discharged for misconduct and finds that the principal reasons for overturning discharges are police departments' failures to provide sufficient evidence of guilt and to observe required procedures. Evaluation of an officer's personal character often proved influential when arbitrators assessed whether an officer's conduct in a particular incident warranted discharge.

*Professor Stephen F. Befort*  
*Professor Laura J. Cooper*  
*Editors*

**American Bar Association Section of Labor  
and Employment Law and  
The College of Labor and Employment Lawyers  
Annual Law Student Writing Competition for 2016–2017**

The ABA Section of Labor and Employment Law and the College of Labor and Employment Lawyers are pleased to announce their 2016–2017 writing competition. This competition is open to articles written while the author is a student at an accredited law school in the United States. Authors may not have graduated from law school prior to December 1, 2016. Graduate students in law school (LL.M. candidates) are not eligible. Entries should address aspects of public or private sector labor and/or employment law relevant to the American labor and employment bar. Students are encouraged to discuss a public policy issue, practical implications of a leading case or doctrine, a statute or the need for statutory modification, or a common law doctrine. Articles may address U.S. law, international law of relevance to U.S. labor and employment attorneys, or how a legal topic is treated in states across the country. Papers limited to the law of a single state will not be considered. Papers must be analytical in nature, not merely a summary of the law. Students must present and discuss competing points of view with respect to the issue addressed and must distinguish their conclusions from opposing positions with sound logic and reference to multiple primary and secondary sources. We discourage students from writing articles about a recent Supreme Court decision or a case pending before the Supreme Court unless the article focuses upon case law or statutory developments subsequent to the Supreme Court's decision.

The following prizes may be awarded by the College of Labor and Employment Lawyers: First Place: \$3000, Second Place: \$1000, Third Place: \$500. The first-place winning article will be published in the ABA Journal of Labor & Employment Law. In addition, the author will be a guest at the annual CLE program of the ABA Section of Labor and Employment Law and honored at the Annual Induction Dinner of the College of Labor and Employment Lawyers. The College and the Section reserve the right not to select any article for publication or award any prizes if, in their judgment, the submissions do not meet their standards for outstanding legal writing.

Articles must be submitted to [swan@laborandemploymentcollege.org](mailto:swan@laborandemploymentcollege.org), using the subject line "Writing Competition," by midnight (EDT) on **June 15, 2017**. To assure that competition judges are not provided information on authors' identity, a separate cover page must also be submitted that includes the paper's title, author's name, law school, graduation date, e-mail, street address and telephone number. No personal information should appear on the manuscript itself; however, the title should appear at the top of the first page and pages should be numbered. Do not include your name as part of the file names of your Word or PDF documents; instead use a descriptive name related to the subject matter of your article, such as "Sexual Harassment" or "Union Organizing." For more information about the rules of the competition, please visit: <https://www.law.umn.edu/journals/aba-journal-labor-employment-law/2016-2017-national-student-writing-competition>.

### **Web Access to Journal Issues and Indexes**

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:

[http://www.americanbar.org/publications/aba\\_journal\\_of\\_labor\\_employment\\_law\\_home/aba\\_journal\\_of\\_labor\\_employment\\_law\\_archive.html](http://www.americanbar.org/publications/aba_journal_of_labor_employment_law_home/aba_journal_of_labor_employment_law_archive.html)

# Whistleblowers and Safety at Work: An Analysis of Section 11(c) of the Occupational Safety and Health Act

Emily A. Spieler\*

## Introduction

The Occupational Safety and Health Act (OSH Act) was designed “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.”<sup>1</sup> The overall enforcement framework has, however, been legitimately criticized as weak, underfunded, over-bureaucratized, and dysfunctional.<sup>2</sup> The statute includes a specific provision, section 11(c), that extends protection to private sector workers who face retaliation for raising safety concerns.<sup>3</sup> Given

---

\* Edwin W. Hadley Professor of Law and Dean Emerita, Northeastern University School of Law. Professor Spieler serves as Chair of the Whistleblower Protection Advisory Committee, a federal advisory committee to the U.S. Department of Labor. Special thanks to Lou Mattei and Juliana Shulman-Laniel, who provided research assistance for this article, and to the staff of the Directorate of the Whistleblower Protection Programs at the Occupational Safety and Health Administration (OSHA) and others at the U.S. Department of Labor for providing the data included here.

1. 29 U.S.C. § 651(b) (2012).

2. See THOMAS MCGARITY ET AL., *CTR. FOR PROGRESSIVE REFORM, WORKERS AT RISK: REGULATORY DYSFUNCTION AT OSHA 1* (2010), [http://www.progressivereform.org/articles/osha\\_1003.pdf](http://www.progressivereform.org/articles/osha_1003.pdf) (“OSHA is a picture of regulatory dysfunction.”); see also Lynn Rhinehart, *Workers at Risk: The Unfulfilled Promise of the Occupational Safety and Health Act*, 111 W. VA. L. REV. 117 (2008) (providing an overview of OSHA and its limitations). See generally THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, *WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION* (1993). The AFL-CIO notes that the OSHA inspectorate-to-worker ratio does not come close to the International Labour Organization (ILO) standard of 1 per 10,000 workers. See *Number of OSHA Inspectors by State Compared with ILO Benchmark Number of Labor Inspectors*, AFL-CIO, <http://www.aflcio.org/content/download/23061/260591> (last visited Oct. 1, 2016); see also AFL-CIO, *DEATH ON THE JOB: THE TOLL OF NEGLECT 51–52* (25th ed. 2016), [http://www.aflcio.org/content/download/174867/4158803/1647\\_DOTJ2016.pdf](http://www.aflcio.org/content/download/174867/4158803/1647_DOTJ2016.pdf).

3. Section 11(c) of the OSH Act, 29 U.S.C. § 660(c) (2012) provides:

(c) Discharge or discrimination against employee for exercise of rights under this chapter; prohibition; procedure for relief

(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

the critiques of the Occupational Safety and Health Administration (OSHA), it seems reasonable to ask whether reliance on individual reporting of hazards can significantly improve regulatory effectiveness and therefore workplace safety.

In the context of occupational safety, it is important to remember that the non-reporting of safety hazards may have significant effects beyond the individual worker. Co-workers' safety may be threatened,<sup>4</sup> leading to an increase in injuries and resulting in higher costs for critical social programs designed to support people with disabilities.<sup>5</sup> A poor safety record can adversely affect productivity and profitability of a firm.<sup>6</sup> Inadequate reporting to government agencies hampers pub-

(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

(3) Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph (2) of this subsection.

Regulations governing this cause of action can be found at 29 C.F.R. pt. 1977 (2015).

4. See generally Memorandum from Richard E. Fairfax, Deputy Assistant Sec'y, Occupational Safety & Health Admin., to Reg'l Adm'rs., Whistleblower Program Managers (Mar. 12, 2012), <https://www.osha.gov/as/opa/whistleblowermemo.html> (noting that if workers do not feel free to report injuries, "the entire workforce is put at risk").

5. For research regarding the costs of occupationally caused disability and the transfer to the Social Security system, see, for example, Xuguang (Steve) Guo & John F. Burton, Jr., *The Growth in Applications for Social Security Disability Insurance: A Spillover Effect from Workers' Compensation*, 72 SOC. SEC. BULL., no. 3 (2012), at 69. <https://www.ssa.gov/policy/docs/ssb/v72n3/v72n3p69.pdf>; Melissa McInerney & Kosali Simon, *The Effect of State Workers' Compensation Program Changes on the Use of Federal Social Security Disability Insurance*, 51 INDUS. REL. 57 (2012); Paul O'Leary et al., *Workplace Injuries and the Take-Up of Social Security Disability Benefits*, 72 SOC. SEC. BULL., no. 3, 2012, at 1, <https://www.ssa.gov/policy/docs/ssb/v72n3/v72n3p1.pdf>; Robert T. Reville & R.F. Schoeni, *The Fraction of Disability Caused at Work*, 65 SOC. SEC. BULL. no. 4, 2003/2004, at 31, <https://www.ssa.gov/policy/docs/ssb/v65n4/v65n4p31.pdf>. All of these papers found spillover effects from work-related injuries into Social Security Disability Insurance.

6. See, e.g., Raymond Fabius et al., *The Link Between Workforce Health and Safety and the Health of the Bottom Line: Tracking Market Performance of Companies That Nurture a "Culture of Health"*, 55 J. OCCUPATIONAL HEALTH & ENVTL. MED. 993 (2013) (finding companies with proven health, safety, and environmental programs outperformed the market).

lic health and regulatory interventions.<sup>7</sup> Workplace hazards can lead to serious environmental disasters, threatening entire communities.<sup>8</sup>

Individual whistleblower rights at work are generally situated within an at-will legal regime. Few American private sector workers are unionized,<sup>9</sup> and even fewer of these workers have individual contracts that provide protection against discharge.<sup>10</sup> Fear of retaliation, as well as actual retaliation, can discourage people from asserting legitimate safety concerns.<sup>11</sup> Individual workers are unlikely to raise concerns unless they can realistically expect that their employers will not retaliate or that whistleblower protections will be effectively enforced. The strength of the protections offered to whistleblowers

---

7. There is a large literature concerning the underreporting of injuries and illnesses in workplaces. The majority staff report of the U.S. House of Representatives Committee on Education and Labor provides a comprehensive review of the problem. COMM. ON EDUC. & LABOR, U.S. HOUSE OF REPRESENTATIVES, HIDDEN TRAGEDY: UNDERREPORTING OF WORKPLACE INJURIES AND ILLNESSES (2008), <http://www.bls.gov/iif/laborcommreport061908.pdf>. Underreporting was also a theme in at least one U.S. Government Accountability Office (GAO) report. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-10, WORKPLACE SAFETY AND HEALTH: ENHANCING OSHA'S RECORDS AUDIT PROCESS COULD IMPROVE THE ACCURACY OF WORKER INJURY AND ILLNESS DATA (Oct. 15, 2009), <http://www.gao.gov/new.items/d1010.pdf> [hereinafter GAO-10-10]. See also Emily A. Spieler & Gregory R. Wagner, *Counting Matters: Implications of Undercounting in the BLS Survey of Occupational Injuries and Illnesses*, 57 AM. J. INDUS. MED. 1077 (2014) (discussing findings regarding underreporting and the implications for public health).

8. There are many examples of community threats from workplace safety hazards. The 2010 BP oil spill in the Gulf of Mexico is one glaring example. Eleven workers died and thousands were affected by the oil spill. See generally Mireya Navarro, *Spill Takes Toll on Gulf Workers' Psyches*, N.Y. TIMES (June 16, 2010), <http://www.nytimes.com/2010/06/17/us/17human.html>. The ammonium nitrate explosion in the fertilizer plant in West, Texas, in 2013 is another. The explosion killed fifteen people, injured more than 160, and damaged or destroyed more than 150 buildings. Mark Berman, *Deadly Texas Fertilizer Facility Fire, Explosion in 2013 Intentionally Set, ATF Says*, WASH. POST (May 11, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/05/11/atf-deadly-texas-fertilizer-plant-fire-explosion-in-2013-was-intentionally-set>. Two workers died and thousands were at risk in a 2008 explosion near a tank holding methyl isocyanate (MIC) at the Bayer CropScience facility in Institute, West Virginia. Matthew L. Wald, *Lawmakers Say Chemical Company Withheld Information About Explosion*, N.Y. TIMES (Apr. 21, 2009), <http://www.nytimes.com/2009/04/22/us/22chemical.html>. MIC caused the Bhopal, India, disaster in 1984, where thousands died and over 500,000 were exposed to poisonous gas. Rama Lakshmi, *India Moves to Clean Up Site of Deadly 1984 Union Carbide Gas Leak*, WASH. POST (July 9, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/09/AR2010070903209.html>.

9. In 2015, only 6.7% of private sector workers were unionized. Economic News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members Summary (Jan. 28, 2016), <http://www.bls.gov/news.release/union2.nr0.htm>.

10. See Stewart J. Schwab, *Predicting the Future of Employment Law: Reflecting or Refracting Market Forces*, 76 IND. L. J. 29, 37 (2001).

11. The literature suggests two leading reasons why workers do not report concerns: fear of retaliation and a belief that nothing will be done. See Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1073 (2014) (a review of survey data, finding that forty-three percent of participating workers who experienced workplace problems did not raise a concern because of fear of employer retaliation and the belief that their claim would have no effect).

may therefore be critical in evaluating whether individuals feel able to exercise these statutory rights.

On Workers' Memorial Day, April 29, 2014, the Subcommittee on Employment and Workplace Safety of the U.S. Senate Committee on Health, Education, Labor, and Pensions held a hearing to explore growing concerns regarding the adequacy of section 11(c) of the OSH Act.<sup>12</sup> The Committee specifically asked whether existing protections were adequate to build a safer workplace. Testimony at that hearing was the genesis for this article.<sup>13</sup>

The whistleblower provision in the OSH Act is not unique. Perhaps by default, Congress appears to be turning to individual employees to strengthen enforcement of a wide variety of regulatory laws through whistleblower protections.<sup>14</sup> Since 1970, numerous whistleblower statutes have been enacted and assigned to OSHA in the Department of Labor (DOL) for investigation.<sup>15</sup> OSHA is now responsible for complaints under twenty-two of these statutes,<sup>16</sup> several of which focus on safety in specific industries or specific hazards.<sup>17</sup> The remain-

12. *Workers' Memorial Day: Are Existing Private Sector Whistleblower Protections To Ensure Safe Workplaces Adequate?: Hearing Before the Subcomm. on Emp't and Workplace Safety of the S. Comm. on Health, Educ., Labor & Pensions*, 113th Cong. (2014), <http://www.help.senate.gov/hearings/workers-memorial-day-are-existing-private-sector-whistleblower-protections-adequate-to-ensure-safe-workplacesd>; 29 U.S.C. § 660(c) (2012).

13. For testimony at the hearing, see *Workers' Memorial Day*, *supra* note 12.

14. A remarkable number of these laws exist. Some entice whistleblowers to report wrongdoing by offering substantial potential rewards. See, e.g., Internal Revenue Code, 26 U.S.C. § 7623 (2012); Commodity Exchange Act (Dodd-Frank), 7 U.S.C. § 26 (2012). Others focus on employment rights of whistleblowers and are similar to section 11(c) in forbidding employer retaliation against employees who raise concerns protected within a specific statutory framework. See, e.g., Title VII, 42 U.S.C. § 2000e-3(a) (2012); Americans with Disabilities Act, 42 U.S.C. § 12203(a), (b) (2012); Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (2012); Clean Air Act, 42 U.S.C. § 7622 (2012); Consumer Product Safety Improvement Act, 15, U.S.C. § 2087 (2012); Mine Safety and Health Act, 30 U.S.C. § 815(c) (2012). For a reasonably complete listing of federal whistleblower laws, see JON O. SHIMABUKURO ET AL., CONG. RESEARCH SERV., SURVEY OF FEDERAL WHISTLEBLOWER AND ANTI-RETALIATION LAWS (7-5700, Apr. 22, 2013), <https://www.fas.org/sgp/crs/misc/R43045.pdf>.

15. See OCCUPATIONAL SAFETY & HEALTH ADMIN., DIRECTORATE OF WHISTLEBLOWER PROT. PROGRAMS (DWPP), WHISTLEBLOWER STATUTES DESK AID (2016), [http://www.whistleblowers.gov/whistleblower\\_acts-desk\\_reference.pdf](http://www.whistleblowers.gov/whistleblower_acts-desk_reference.pdf) [hereinafter WHISTLEBLOWER STATUTES DESK AID].

16. See *The Whistleblower Protection Program: Statutes*, OCCUPATIONAL SAFETY & HEALTH ADMIN., [http://www.whistleblowers.gov/statutes\\_page.html](http://www.whistleblowers.gov/statutes_page.html) (last visited Oct. 1, 2016) (list of statutes with retaliation provisions investigated by the agency). For additional information, see WHISTLEBLOWER STATUTES DESK AID, *supra* note 15.

17. The safety statutes with retaliation provisions investigated by OSHA, in addition to section 11(c), are the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121 (2012) (protecting employees of air carriers from retaliation for reporting violations of laws related to aviation safety); the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109 (2012) (protecting employees of railroad carriers from retaliation for reporting a work-place injury or illness, a hazardous safety or security condition, a violation of any federal law or regulation relating to railroad safety or security, or for refusing to work when confronted by a hazardous safety condition); the

der involve whistleblower protection for employees who allege retaliation for raising other types of issues, including financial misconduct, product safety, and environmental concerns.<sup>18</sup> Whistleblower statutes assigned to other agencies for investigation also address issues of retaliation at work—from safety-related reprisals under the Mine Safety and Health Act to retaliation under anti-discrimination and wage-and-hour laws.<sup>19</sup> Section 11(c) of the OSH Act stands out, however, as an extraordinarily weak statute among the myriad of federal whistleblower and anti-retaliation laws.

Part I of this article outlines the basic anti-retaliation provisions of the OSH Act. Part II reviews data on the processing and litigation of section 11(c) claims and OSHA’s efforts to enhance claimant protection. Part III compares section 11(c) to other similar federal laws and briefly describes possible strategies to improve protection for safety whistleblowers. The concluding section suggests that changes are essential to bring protection for safety whistleblowers into reasonable parity with protections afforded under other whistleblower laws.

## I. Section 11(c) Basics

Section 11(c)<sup>20</sup> was passed in 1970 as an integral part of the original OSH Act. It has never been amended.<sup>21</sup> It allows workers who believe they have suffered retaliation in violation of the Act to file complaints against any “person,”<sup>22</sup> subject to a remarkably short thirty-day statute of limitations.<sup>23</sup> These complaints are initially filed with

---

National Transit Systems Security Act (NTSSA), 6 U.S.C. § 1142 (2012) (protecting transit employees from retaliation for reporting a hazardous safety condition, a violation of any federal law relating to public transportation agency safety, or for refusing to work when confronted by a hazardous safety condition); the Seaman’s Protection Act, 46 U.S.C. § 2114 (2012) (protecting seamen from retaliation for reporting to the Coast Guard or another federal agency a violation of a maritime safety law or regulation, or for refusing to work when they reasonably believe an assigned task would result in serious injury or impairment of health to themselves, other seamen, or the public); and the Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105 (2012) (protecting truck drivers and other covered employees from retaliation for refusing to violate regulations related to the safety or security of commercial motor vehicles or for reporting violations of those regulations).

18. See WHISTLEBLOWER STATUTES DESK AID, *supra* note 15. Sarbanes-Oxley (SOX), 18 U.S.C. §1514A (2012) is the most notable of the statutes unrelated to safety.

19. See *supra* note 14.

20. 29 U.S.C. § 660(c) (2012); see also 29 C.F.R. § 1977 (2015).

21. Most recent efforts to amend section 11(c) were incorporated into the Protecting America’s Workers Act, which contained proposals to enhance retaliation protections. See Protecting America’s Workers Act, S. 1112, 114th Cong. § 201 (2015).

22. 29 U.S.C. § 661(c)(1) (“No person shall discharge or in any manner discriminate against any employee . . .”). See also 29 C.F.R. § 1977.4.

23. 29 U.S.C. § 661(c)(2) (2012). See also 29 C.F.R. § 1977.15 (2015); *Donovan v. Hahner, Foreman & Harness, Inc.*, 736 F.2d 1421, 1424 (10th Cir. 1984) (holding the 30-day limit to be non-jurisdictional and, therefore, subject to equitable tolling).

OSHA.<sup>24</sup> OSHA compliance officers (also called investigators) in the regional offices review the complaints, screen out those that are facially invalid, and then docket and investigate the remainder.<sup>25</sup> Investigators determine whether the complaint is meritorious and attempt to facilitate settlement.<sup>26</sup> A decision that a docketed case is not meritorious is subject only to an informal review process within OSHA.<sup>27</sup> The statute requires OSHA to complete its investigation and notify the complainant of its determination within ninety days, although in a majority of cases this statutory time limit is not met.<sup>28</sup> Notably, section 11(c) cases constituted 61% of all whistleblower cases docketed by OSHA over the most recent ten-year period, dwarfing the number of complaints filed under each of the other twenty-one whistleblower statutes within OSHA's investigatory jurisdiction.<sup>29</sup>

Meritorious cases that are not settled are referred to the appropriate regional office of the Solicitor of Labor (SOL) for potential litigation in federal district court.<sup>30</sup> A decision by SOL not to pursue a case is en-

24. Complaints may be filed in writing or online. See *How to File a Safety and Health Complaint*, OCCUPATIONAL SAFETY & HEALTH ADMIN., [https://www.osha.gov/workers/file\\_complaint.html](https://www.osha.gov/workers/file_complaint.html) (last visited Oct. 1, 2016).

25. The compliance officers follow procedures set out in an internal investigation manual. See generally OCCUPATIONAL SAFETY & HEALTH ADMIN., WHISTLEBLOWER INVESTIGATIONS MANUAL 7-2 to 7-4 (Jan. 28, 2016), [https://www.osha.gov/OshDoc/Directive\\_pdf/CPL\\_02-03-007.pdf](https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-03-007.pdf) [hereinafter WHISTLEBLOWER INVESTIGATIONS MANUAL].

26. See *id.*

27. See generally 29 C.F.R. § 1977 (2015); WHISTLEBLOWER INVESTIGATIONS MANUAL, *supra* note 25.

28. See 29 U.S.C. § 660(c)(3) (2000). *But see* OFFICE OF INSPECTOR GEN., COMPLAINANTS DID NOT ALWAYS RECEIVE APPROPRIATE INVESTIGATIONS UNDER THE WHISTLEBLOWER PROTECTION PROGRAM 6-7 (2010), <http://www.oig.dol.gov/public/reports/oa/2010/02-10-202-10-105.pdf> [hereinafter OIG REPORT] (OSHA has struggled to meet the deadline. "In Fiscal Year (FY) 2009, OSHA took an average of 150 days to complete an investigation and completed only 41 percent within the statutory time frames." The failure to meet the deadline, however, has no effect on parties' rights.).

29. This percentage is derived from data posted on the OSHA website for all 22 statutes, FY 2005-FY 2015. See DIRECTORATE OF WHISTLEBLOWER PROT. PROGRAMS (2015), [http://www.whistleblowers.gov/wb\\_data\\_FY05-15.pdf](http://www.whistleblowers.gov/wb_data_FY05-15.pdf) [hereinafter WB DATA]. Over the ten-year period (FY 2006-2015), a total of 25,442 complaints under all twenty-two statutes were docketed by OSHA. Of these, 86% were related to safety retaliation: 15,437 were OSHA 11(c) complaints and an additional 6,491 were filed under other safety retaliation statutes. The other statute with a significant number of docketed cases was Sarbanes-Oxley (1,928, or 8% of the total). See *Whistleblower Protection Program*, *supra* note 16 (list of whistleblower statutes for which OSHA is responsible).

30. The Office of the Solicitor of Labor operates through a vertical organizational structure separate from the executive agencies. See, e.g., *Solicitor of Labor Organizational Chart*, U.S. DEP'T OF LABOR, <https://www.dol.gov/sol/organizations/charts/regchart.htm> (last visited Sept. 23, 2016). The regional solicitors who are responsible for decisions regarding litigation of claims report to the Solicitor of Labor and not to the heads of the executive agencies or their designees. See *id.* DOL employees have told the author that the quality of coordination between SOL and OSHA regarding section 11(c) cases has improved significantly in recent years.

tirely non-reviewable.<sup>31</sup> Unlike agency proceedings under other statutes, there is neither a provision for de novo adjudication before an administrative law judge within the DOL nor a right for the complainant to sue independently in federal court (called a “kick-out” provision by OSHA) after exhausting administrative remedies.<sup>32</sup>

The most famous litigation arising under section 11(c), *Whirlpool Corp. v. Marshall*,<sup>33</sup> involved a challenge to an early OSHA regulation that created a limited right to refuse dangerous work.<sup>34</sup> Despite noting that “review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace,”<sup>35</sup> *Whirlpool* upheld OSHA’s regulation.<sup>36</sup>

While complaints do sometimes involve a discharge for refusing to perform dangerous work,<sup>37</sup> the protection is broader and encompasses any concerns—raised internally to management or to regulatory bodies—involving safety, including participation in workplace safety and health activities; reporting injuries or hazardous conditions; or participating in OSHA inspections or administrative proceedings.<sup>38</sup> The agency construes retaliation broadly to include all forms of reprisal, including discharge, threats or intimidation, and reduction in pay or hours.<sup>39</sup> Complainants bear the burden of proof to show that the protected activity “was a substantial reason” or the “but-for” reason for the retaliatory

31. *Workers’ Memorial Day*, *supra* note 12 (written statement of Emily A. Spieler, Professor of Law, Northeastern University School of Law), <http://www.help.senate.gov/imo/media/doc/Spieler1.pdf>.

32. See WHISTLEBLOWER STATUTES DESK AID, *supra* note 15.

33. 445 U.S. 1 (1980).

34. 29 C.F.R. § 1977.12 (2015). *Whirlpool Corp.*, 445 U.S. at 3.

35. *Whirlpool Corp.*, 445 U.S. at 4 n.3.

36. *Id.* at 22.

37. For an in-depth discussion of refusal-to-work law in the safety context, see generally JEFFREY HILGERT, HAZARD OR HARDSHIP: CRAFTING GLOBAL NORMS ON THE RIGHT TO REFUSE UNSAFE WORK (2013). This book analyzes 326 OSHA refusal-to-work case files, noting that employees were not represented in 95.9% of cases; that in one-third the investigator lost touch with the complainant; and that 66.3% of cases were dismissed as being without merit. *Id.* at 108, 113–14.

38. See, e.g., Discrimination Against Employees Exercising Rights Under the Williams-Steiger Occupational Safety and Health Act of 1970, 29 C.F.R. §§ 1977.9–12 (2015); 29 C.F.R. § 1977.9 (c) (2015) provides:

[T]he salutary principles of the Act would be seriously undermined if employees were discouraged from lodging complaints about occupational safety and health matters with their employers . . . . Such complaints to employers, if made in good faith, therefore would be related to the Act, and an employee would be protected against discharge or discrimination caused by a complaint to the employer.

See also WHISTLEBLOWER INVESTIGATIONS MANUAL, *supra* note 25.

39. See WHISTLEBLOWER INVESTIGATIONS MANUAL, *supra* note 25, at 3-11–12.

action.<sup>40</sup> Litigation under the statute has been sparse, leaving many unanswered questions regarding burdens of proof and statutory scope.<sup>41</sup> Individual relief may include reinstatement, back pay, and compensatory and punitive damages.<sup>42</sup>

The federal agency directly enforces section 11(c) in twenty-nine states; the remaining twenty-one states have adopted state plans that cover the private sector pursuant to section 18 of the OSH Act.<sup>43</sup> After approving state plans, OSHA exercises only general oversight over the state agencies;<sup>44</sup> the state plan agencies are directly responsible for both enforcement of safety and health requirements and anti-retaliation protections.<sup>45</sup> State provisions must be at least as protective as the federal scheme, and some states provide broader protection.<sup>46</sup>

## II. Section 11(c) in Practice

A study of section 11(c) investigations and litigation reveals historically problematic enforcement, rooted in weak statutory provisions and exacerbated by the failure of administrators to embrace the whistleblower component of the agency's mission.<sup>47</sup> Between 2009 and

40. See 29 C.F.R. § 1977.6(b) (2015) ("If protected activity was a substantial reason for the action, or if the discharge or other adverse action would not have taken place 'but for' engagement in protected activity, section 11(c) has been violated . . . . Ultimately, the issue as to whether a discharge was because of protected activity will have to be determined on the basis of the facts in the particular case.") (internal citations omitted). This standard is further interpreted by OSHA in the Whistleblower Investigations Manual. See WHISTLEBLOWER INVESTIGATIONS MANUAL, *supra* note 25, at 3-6 ("OSHA must have reasonable cause to believe that the employer would not have carried out the adverse action but for the protected activity. The but-for causation test is more stringent than the contributing factor or the motivating factor tests, but it does not require a showing that the protected activity was the sole reason for the adverse action.")

41. See *infra* text accompanying notes 62–63.

42. The statute provides for "all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay." 29 U.S.C. § 660(c)(2) (2012). Courts have held that "all appropriate relief" includes compensatory and punitive damages. See, e.g., *Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1194 (1st Cir. 1994) ("We conclude, in accordance with the meaning of the same words as used in [*Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60, 63 (1992)], that the statutory power to award 'all appropriate relief' gave the district court authority, where such relief is in fact appropriate, to award compensatory and even such traditional other relief as exemplary damages.") (alteration in original).

43. 29 U.S.C. § 667 (2012). See also *State Plans: Frequently Asked Questions*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/dcspp/osp/index.html> (last visited Oct. 1, 2016) (enumerating state plan details).

44. The Directorate of Cooperative and State Programs of OSHA is responsible for annual monitoring through the Federal Annual Monitoring Evaluation (FAME) process. See *State Plans: Frequently Asked Questions*, *supra* note 43.

45. See WHISTLEBLOWER INVESTIGATIONS MANUAL, *supra* note 25, at 7-5 to 7-11 (describing process of deferral and treatment of dual-filed complaints). Generally, whistleblower complaints filed with Federal OSHA from state-plan states are referred to the appropriate state administrators. *Id.*

46. 29 C.F.R. § 1977.23 (2015). See *infra* text accompanying notes 95 and 113.

47. This conclusion is based upon the author's personal observations, interviews with current and past agency officials, as well as on several federal agency reports re-

2016, federal OSHA attempted to address this failure, but enforcement has remained hampered by limited resources and the basic statutory framework.<sup>48</sup> The data on section 11(c) claims illustrate the barriers to effective federal OSHA enforcement.<sup>49</sup>

Tables 1 and 2 on the following page provide information regarding the screening out process for 11(c) complaints.<sup>50</sup> Table 1 shows that OSHA investigators screen out and do not docket about two-thirds of these complaints. Table 2 provides the reasons that complaints are screened out.

When investigators indicate lack of cooperation, it usually means that they were unable to maintain contact with the complainant. Complaints are generally brought pro se by complainants unaware of precise legal definitions and requirements.<sup>51</sup> This undoubtedly contributes to the number of complaints that fail to allege facts that fall within section 11(c) jurisdiction.

The short statute of limitations of only thirty days<sup>52</sup> likely deprives some workers of adequate time to assess their situations, and, if appropriate, consult with attorneys.<sup>53</sup> Table 2 shows that 7% of all

---

garding functioning of the whistleblower program. See generally OIG REPORT, *supra* note 28 at 6–7; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-106, WHISTLEBLOWER PROT. PROGRAM: BETTER DATA AND IMPROVED OVERSIGHT WOULD HELP ENSURE PROGRAM QUALITY AND CONSISTENCY (2009), <http://www.gao.gov/assets/290/285189.pdf> [hereinafter GAO-09-106]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-286, WHISTLEBLOWER PROT. PROGRAM: OPPORTUNITIES EXIST FOR OSHA AND DOT TO STRENGTHEN COLLABORATIVE MECHANISMS (2014), <http://www.gao.gov/assets/670/661768.pdf>.

48. These issues have not gone without notice. David Michaels, Assistant Secretary of Labor for OSHA, testified regarding his own frustration with the statute's inadequacies before the Subcommittee on Employment and Workplace Safety of the U.S. Senate Committee on Health, Education, Labor, and Pensions. *Occupational Safety and Health Admin. U.S. Dep't of Labor Before the Subcomm. On Emp't and Workplace Safety of the S. Comm. on Health, Educ., Labor and Pensions*, 113th Cong. (2014) (statement of David Michaels, Assistant Sec'y, Occupation Safety and Health Admin.), <http://www.help.senate.gov/imo/media/doc/Michaels2.pdf>.

49. The information provided here comes from twenty-nine federal OSHA states; equivalent data are not available for the state-administered plans. See E-mail from Anthony Rosa, Deputy Dir., Directorate of Whistleblower Prot. Programs, Occupational Safety & Health Admin. to author (July 13, 2016, 1:12 PM) (on file with author).

50. Data in these tables were provided to the author by e-mail from Anthony Rosa, Deputy Director of the Directorate of Whistleblower Protection Programs (DWPP). E-mail from Anthony Rosa, Deputy Dir., Directorate of Whistleblower Prot. Programs, Occupational Safety & Health Admin. to author (July 13, 2016, 1:12 PM) (on file with author). Some of this information is also available on the Directorate of Whistleblower Protection Programs website. See WB DATA, *supra* note 29.

51. The fact that complainants file pro se was confirmed by Anthony Rosa, Deputy Dir., Directorate of Whistleblower Prot. Programs (DWPP), Occupational Safety & Health Admin. by telephone call with the author (July 11, 2016). See also HILGERT, *supra* note 37, at 113 (noting that employees were unrepresented in 95.9% of the cases studied).

52. See U.S.C. § 660(c)(2) (2012); 29 C.F.R. § 1977.15 (2015).

53. Currently, investigators refer complainants whose cases are screened out due to the statute of limitations and whose information suggests that there may be a violation of section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (2012), to the National Labor Relations Board (NLRB) to file a charge. Memorandum from William

**Table 1: Complaints Received, Screened-Out & Docketed, FY 2011–2015**

	Total complaints received	Total complaints screened out	Percent screened-out	Number docketed	Percent docketed
FY 2011	3,561	1,869	52%	1,692	48%
FY 2012	4,348	2,562	59%	1,786	41%
FY 2013	4,589	2,904	63%	1,685	37%
FY 2014	6,051	4,254	70%	1,797	30%
FY 2015	6,267	4,225	67%	2,042	33%

**Table 2: Major Reasons for Screening-out of Initial Complaints**

Reason for Screen-out:	Number by reason	Percentage of screened-out complaints by reason	Percentage of total complaints received
Lack of cooperation	3,655	23%	15%
No protected activity alleged	3,489	22%	14%
No OSHA jurisdiction	3,373	21%	14%
Late filing	1,789	11%	7%
No adverse action	1,732	11%	7%
Improper work refusal	630	4%	3%

filed claims and 11% of all of the cases eliminated through this process were screened out due to late filing.<sup>54</sup> Almost half of these complaints would have been timely if the statute of limitations were extended to sixty days, and 84% would have been timely under a 180-day time limit (see Table 3).

Once a case survives this winnowing process and is docketed, it can be dismissed, withdrawn, settled by either the agency or by the private parties, or referred to SOL. Table 4 shows that, after investigation, OSHA dismissed over half of these cases as non-meritorious. If OSHA dismisses a complaint, the complainant may seek informal agency review of the decision, but has no other recourse.

Table 5 shows the characteristics of the settlements. As can be seen from these data, the settlement amounts are generally small: the average monetary settlement in the period 2009–2015 was about \$7,300.<sup>55</sup> These

---

Donovan, Acting Dir., Directorate of Whistleblower Prot. Programs, & Lafe Solomon, Senior Advisor, Office of the Solicitor, to the Assistant Sec’y, Occupational Safety & Health Admin. (Mar. 16, 2014), <http://www.whistleblowers.gov/memo/2014-03-06DWPPDecisionMemoReferralstoNLRB.html>.

54. This is fewer than one might expect, given the short time allowed.

55. Information for years before 2009 was not available. A review of settlements of administrative claims before other agencies may show similarly low damage awards.

**Table 3: Complaints Screened-out for Late Filing, FY 2011–2015**

Number of days at time of filing:	31–60	61–90	91–120	121–180	181+
Total screened out due to late filing:	935	353	187	225	312
% of late filings screened out by time period:	46%	18%	9%	11%	16%

**Table 4: Ten Years of Determinations in Section 11(c) Cases, FY 2006–2015\***

	Total	Dismissed		Withdrawn		Settled		Cases Referred to SOL	
		Number	%	Number	%	Number	%	Number	%
FY 2006	1,276	787	62%	196	15%	279	22%	14	1%
FY 2007	1,204	766	64%	176	15%	248	21%	14	1%
FY 2008	1,318	830	63%	227	17%	247	19%	14	1%
FY 2009	1,200	726	61%	187	16%	265	22%	22	2%
FY 2010	1,183	672	57%	177	15%	310	26%	24	2%
FY 2011	1,282	694	54%	177	14%	388	30%	23	2%
FY 2012	1,717	977	57%	340	20%	382	22%	20	1%
FY 2013	1,946	921	47%	415	21%	570	29%	40	2%
FY 2014	1,863	955	51%	426	23%	470	25%	13	1%
FY 2015	1,981	963	49%	461	23%	540	27%	17	1%
Total	14,970	8,291	55%	2,782	19%	3,699	25%	201	1%

\*The annual number of determinations will not be the same as the number of complaints docketed that year because determinations may involve complaints filed in prior years and docketed complaints may be resolved in subsequent years. Thus, the totals in Tables 1 and Table 4 are not identical.

**Table 5: Settlement Terms in Section 11(c) Cases**

Fiscal Year	Total cases settled	Total damages collected	Average damages per settled case	Settlements with reinstatement	Percent with reinstatement
FY 2009	265	\$1,839,299	\$6,941	42	16%
FY 2010	310	\$1,741,863	\$5,619	49	16%
FY 2011	388	\$2,478,212	\$6,387	45	12%
FY 2012	382	\$2,435,831	\$6,377	38	10%
FY 2013	570	\$4,939,444	\$8,666	60	11%
FY 2014	470	\$3,557,951	\$7,570	39	8%
FY 2015	540	\$4,253,587	\$7,877	42	7%
Total	2,925	\$21,246,187	\$7,264	315	11%

monetary damages may provide welcome relief to individual workers, but are unlikely to be large enough to discourage employers from unlawful retaliation. The settlements are also unlikely to reflect the full value of lost wages and other relief that might have been awarded in a fully litigated case.<sup>56</sup> Only 315 (11%) of the cases settled over this seven-year period included reinstatement. These settlements generally do not include any admission that the Act was violated and thus do not provide notice to other employees or employers regarding the outcome of the claim.<sup>57</sup>

If OSHA is unable to settle a claim that it believes meritorious, it refers the case to the appropriate SOL regional office for litigation.<sup>58</sup> As shown by Table 4, only 1% to 2% of docketed section 11(c) cases fall into this category. At this point, OSHA considers its work on the case complete (unless OSHA staff are asked to assist in litigation), and SOL may pursue settlement or litigation in federal district court. OSHA itself has not maintained any consistent data on claims referred to SOL, nor does SOL systematically track these claims. As a result, SOL data are incomplete, and no data are posted on a public website. Although OSHA whistleblower staff consider all cases referred to SOL to be strong, a referral to SOL does not guarantee that further action will be taken on a complaint. Table 6 shows that SOL chose not to pursue almost 60% of cases referred for litigation by OSHA in the period 1996–2008.<sup>59</sup> Complainants in these cases had no further recourse.

More recently, SOL has substantially changed its approach to these referrals by taking a more aggressive litigation stance and working to improve cooperation between OSHA and SOL regional offices. For example, SOL took positive action on 72% of referred cases from 2011 through the first part of 2013<sup>60</sup> and on at least 58% of cases referred in

---

56. Of course, it is impossible to know under any statutory scheme whether litigation would yield better results for complainants. Decisions to settle claims represent assessments of a variety of factors including the strength of the claim, the time value of money, and the desire of the parties to terminate litigation for other reasons.

57. OCCUPATIONAL SAFETY & HEALTH ADMIN., MEETING OF THE WHISTLEBLOWER PROT. PROGRAM ADVISORY COMM. 177 (Jan. 29, 2013), <https://www.whistleblowers.gov/wpac/MWPPAC01-29-2013.pdf> (committee meeting transcript). Again, as noted in *supra* note 56, this may not differ from settlements in other types of claims, in which confidentiality and limits on relief are common, sometimes due to the strength (or weakness) of the initial claim.

58. See WHISTLEBLOWER INVESTIGATIONS MANUAL, *supra* note 25, at 1-8.

59. See *Whistleblower and Victim's Rights Provisions of the Protecting America's Workers Act: Hearing on H.R. 2067 Before the Subcomm. on Workforce Protections, H. Comm. on Educ. and Labor*, 111th Cong. 80 (2010), <https://www.gpo.gov/fdsys/pkg/CHRG-111hhrg56055/pdf/CHRG-111hhrg56055.pdf> (data submitted by Lynn C. Woolsey, Chairwoman, Subcommittee on Workforce Protections, and drawn from the Integrated Management Information System (IMIS), OSHA's primary information system).

60. In this period, OSHA referred sixty-six cases to SOL, but later withdrew five. SOL approved thirty-seven for litigation and settled seven, representing 72% of the remaining sixty-one cases. In addition, SOL returned one case to OSHA for further investigation, and litigation analysis was pending at the close of the period on seven cases. No information was available on the remainder. Data for these years were provided to the

**Table 6: SOL Action on Section 11(c) Cases Referred by OSHA, 10/1/1995 to 3/24/2009**

	Number	% of total
Total referred by OSHA	467	
Rejected by SOL, no further action	279	60%
Settled before litigation	156	33%
Total litigated	32	7%
Settled during litigation	21	4%
Litigated and lost	3	1%
Litigated and won	8	2%

2014.<sup>61</sup> Despite the fact that SOL still does not collect complete case information, there appears to be a clear trend toward increased litigation.

This improvement in enforcement can also be seen in the growth of reported federal decisions in cases brought by the Secretary. Between 2009 and 2016, fifteen cases resulted in federal court decisions.<sup>62</sup> This contrasts with only nine reported cases between 1992 and 2008.<sup>63</sup> Of course, the number of cases approved for litigation out-

---

author in preparation for the April 29, 2014, Senate committee hearing, *supra* note 12. E-mail from Deborah Berkowitz, Chief of Staff, Occupational Safety & Health Admin. to author (Apr. 23, 2014, 6:38 PM) (on file with author).

61. In 2014, OSHA referred nineteen cases to SOL. SOL approved eleven for litigation and returned four for further investigation. Four were still under review at the close of the year. E-mail from Ann Rosenthal, Associate Solicitor of Labor, U.S. Dep't of Labor (June 6, 2016, 5:55 PM) (on file with author). Additional data on missing years were not available at the time of this writing.

62. The search for case law involving section 11(c) cases that were brought by SOL used broad queries. Because there are so few, here is the complete list: *Perez v. Ohio Bell Tel. Co.*, 655 F. App'x 404 (6th Cir. 2016); *Sec'y, U.S. Dep't of Labor v. Lear Corp. Eeds & Interiors*, No. 15-12060, 2016 WL 2788693 (11th Cir. May 13, 2016); *Solis v. Blue Bird Corp.*, 404 F. App'x 412, 413 (11th Cir. 2010); *Perez v. Champagne Demolition, LLC*, No. 1:12-CV-1278 (FJS/TWD), 2016 WL 3629095 (N.D.N.Y. June 29, 2016); *Perez v. Clearwater Paper Corp.*, 184 F. Supp. 3d 831 (D. Idaho 2016) (appeal pending); *Perez v. U.S. Postal Serv.*, 76 F. Supp. 3d 1168 (W.D. Wash. 2015); *Perez v. N. Terry Fayad, D.M.D., P.C.*, 101 F. Supp. 3d 129 (D. Mass. 2015); *Perez v. Pac. Ship Repair & Fabrication, Inc.*, No. C14-1773-JCC, 2015 WL 7292594 (W.D. Wash. Nov. 16, 2015); *Perez v. Sandpoint Gas N Go & Lube Ctr., Inc.*, No. 2:14-CV-00357-BLW, 2015 WL 10889991 (D. Idaho Sept. 29, 2015); *Perez v. Panther City Hauling, Inc.*, No. 13-CV-0337-MJR-DGW, 2014 WL 2882919 (S.D. Ill. June 25, 2014); *Perez v. Renaissance Arts & Educ., Inc.*, No. 8:12-CV-514-T-MAP, 2014 WL 408334 (M.D. Fla. Feb. 3, 2014); *Sec'y of Labor v. Am. Bronze Foundry, Inc.*, No. 6:12-CV-1100-ORL-18, 2013 WL 5720146 (M.D. Fla. Oct. 21, 2013); *Solis v. Brighton Med. Clinic*, No. 11-CV-02786-WYD-MJW, 2012 WL 4378427 (D. Colo. Sept. 25, 2012); *Sec'y of Labor v. Niles Family Dentistry Assocs., Inc.*, No. 4:11(c) V1374, 2012 WL 3913032 (N.D. Ohio Sept. 7, 2012); *Solis v. Consol. Gun Ranges*, 780 F. Supp. 2d 1165 (W.D. Wash. 2011).

63. *Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187 (1st Cir. 1994); *Reich v. Hoy Shoe Co.*, 32 F.3d 361 (8th Cir. 1994); *Chao v. Party Rental Enters., Inc.*, No. 507-CV-0449, 2008 WL 3851812 (N.D.N.Y. Aug. 15, 2008); *Chao v. Norse Dairy Sys.*, No. C-2-05-0826, 2007 WL 2838958 (S.D. Ohio Sept. 26, 2007); *Chao v. Karamourtopoulos*, No. CIV. 04-

numbers the number of reported decisions: reported cases generally represent a small percentage of cases initially filed.<sup>64</sup> Nevertheless, these numbers are all indisputably—perhaps astonishingly—small.

A comparison with another statute is revealing. Eight times as many section 11(c) complaints as Sarbanes-Oxley (SOX) complaints were filed with OSHA from 2006 through 2015.<sup>65</sup> Over 300 unique federal district court cases and an equivalent number of administrative decisions were issued in SOX whistleblower cases since its passage in 2002.<sup>66</sup> After exhausting their administrative options at OSHA, SOX complainants can bring their cases to a DOL administrative law judge or use the kick-out provisions to litigate independently in federal court.<sup>67</sup> The relatively small number of section 11(c) cases reflects three basic structural factors: only SOL can litigate these cases; the SOL regional office resources are inherently limited; and the same regional lawyers are responsible for enforcement of a large number of other critical labor and employment laws.<sup>68</sup>

The Government Accountability Office (GAO) and Office of the Inspector General (OIG) have repeatedly criticized OSHA for its investigations of whistleblower complaints under all whistleblower statutes within its investigatory jurisdiction.<sup>69</sup> In 2010, the OIG found that OSHA failed to perform adequate investigations on eighty percent of

---

CV-82SM, 2006 WL 889563 (D.N.H. Mar. 31, 2006); *Chao v. Xanadu Boutique, Inc.*, 380 F. Supp. 2d 134 (E.D.N.Y. 2005); *Herman v. Crescent Publ'g Grp., Inc.*, No. 00 CIV. 1665 SAS, 2000 WL 1371311 (S.D.N.Y. Sept. 21, 2000); *Reich v. State Credit Inc.*, 897 F. Supp. 1014 (N.D. Ohio 1995); *Reich v. Sysco Corp.*, 870 F. Supp. 777 (S.D. Ohio 1994).

64. Unfortunately, it is virtually impossible to review federal district court dockets to determine the number of cases filed under section 11(c) by SOL because there is no unique designation for these cases in the databases. Due to settlements and other unreported dispositions, the number of reported cases would certainly be smaller than the number of cases filed.

65. During this ten-year period, 15,437 section 11(c) complaints and 1,928 SOX complaints were filed with OSHA. *See* WB DATA, *supra* note 29. These filings are an administrative prerequisite for further litigation under both statutes.

66. The search for SOX cases included both federal court cases and administrative cases involving whistleblower complaints. For court cases, the search, using the Westlaw and Lexis search engines, looked for unique federal court cases brought under SOX by any party. The search for administrative cases used the Westlaw categorization of Administrative Decisions, Department of Labor, Sarbanes Oxley Administrative Decisions. This search was not as comprehensive as was performed for cases under section 11(c).

67. For further discussion of this issue, *see infra* notes 91–95 and accompanying text.

68. These other laws include the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–219 (2012); the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401–531 (2012); the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001–1461 (2012); and the Mine Safety and Health Act (MSHA), 30 U.S.C. §§ 811–966 (2012).

69. *See generally* OIG REPORT, *supra* note 28; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-722, WHISTLEBLOWER PROT.: SUSTAINED MANAGEMENT ATTENTION NEEDED TO ADDRESS LONG-STANDING PROGRAM WEAKNESSES (Aug. 17, 2010), [hereinafter GAO-10-722]; GAO-09-106, *supra* note 47.

docketed complaints.<sup>70</sup> That same year, the GAO submitted a report to Congress raising serious concerns regarding OSHA's treatment of all whistleblower complaints:

For over 20 years, we have repeatedly found that OSHA lacks sufficient internal controls to ensure that standards for investigating whistleblower complaints are consistently followed. Little progress has been made in implementing our recommendations and significant internal control problems remain . . . . The problems we have identified appear systemic and sustained management attention is needed to address them.<sup>71</sup>

After the 2010 report was issued, the *Washington Post* lambasted the agency: "The federal agency responsible for worker safety and other protections for tens of millions of Americans has failed for decades to establish a system to shield whistleblowers from retaliation from their employers. . . ." <sup>72</sup> Over time, the number of whistleblower statutes assigned to OSHA has grown, and staffing has not kept pace.<sup>73</sup>

In April 2010, an OSHA whistleblower program review team conducted an internal investigation, found deficiencies in the Whistleblower Protection Program, and made extensive recommendations regarding procedures and performance measures.<sup>74</sup> In response to the external criticism and its own internal assessment of weaknesses, OSHA signaled a serious commitment to improve its enforcement activities in the whistleblower arena. In 2012, a new Directorate of Whistleblower Protection Programs (DWPP) was created and a federal advisory committee was convened to elicit public input and offer expert advice regarding OSHA's entire whistleblower program.<sup>75</sup> Regional Assistant Administrators for whistleblower investigations have been appointed

70. OIG REPORT, *supra* note 28, at 2 ("We estimate that 80 percent of applicable investigations under OSHA 11(c), SOX and STAA did not meet one or more of eight elements from the Whistleblower Investigations Manual that were essential to the investigative process.")

71. GAO-10-722, *supra* note 69, at 38.

72. Lisa Rein, *GAO Report: OSHA Failing to Protect Whistleblowers*, WASH. POST (Sept. 21, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/21/AR2010092105775.html>.

73. For a graphic illustration of this problem, see GAO-10-722, *supra* note 69, at 16-17.

74. See generally U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMIN., OSHA'S WHISTLEBLOWER PROTECTION PROGRAM REVIEW: FINDINGS AND RECOMMENDATIONS (Dec. 2010), [http://www.peer.org/assets/docs/osha/1\\_18\\_11\\_Whistleblower\\_Top-to-Bottom\\_report.pdf](http://www.peer.org/assets/docs/osha/1_18_11_Whistleblower_Top-to-Bottom_report.pdf).

75. See OCCUPATIONAL SAFETY & HEALTH ADMIN., MEETING OF THE WHISTLEBLOWER PROT. PROGRAM ADVISORY COMM. 56 (Jan. 29, 2013), <https://www.whistleblowers.gov/wpac/MWPPAC01-29-2013.pdf> (committee meeting transcript). Summaries of all of the administrative changes listed in this paragraph appear in the minutes and transcripts of the Whistleblower Protection Advisory Committee. See generally *Whistleblower Prot. Advisory Comm.: Meeting Agendas, Minutes and Transcripts*, U.S. DEP'T OF LABOR, <http://www.whistleblowers.gov/wpac.html#mtgs> (last visited Oct. 1, 2016) [hereinafter Committee Agendas, Minutes & Transcripts].

in most of the regional OSHA offices to supervise the investigatory process for all OSHA-administered whistleblower laws.<sup>76</sup> Concern that safety incentive programs might discourage employees from reporting injuries or illnesses led OSHA to issue an internal memorandum listing problematic policies that would lead to scrutiny under section 11(c).<sup>77</sup> More careful procedures have been implemented for review of non-merit findings.<sup>78</sup> A mediation pilot project for whistleblower complaints was initiated and eventually expanded to all regions.<sup>79</sup> As noted above, coordination between OSHA and regional solicitors has improved.<sup>80</sup> Training has been enhanced.<sup>81</sup> The new central directorate is overhauling procedures, creating new databases, and working to improve consistency among the regions.<sup>82</sup> The Whistleblower Investigations Manual was revised.<sup>83</sup> In 2014, OSHA announced a new policy to refer complainants who do not meet the 30-day statute of limitations under section 11(c) to the National Labor Relations Board, thereby allowing workers who were engaged in concerted activity to keep their whistleblower cases alive if they can meet the 180-day time limit under the National Labor Relations Act.<sup>84</sup> In May 2016, OSHA Region 7 announced a Severe Violator Program, targeting “employers that continually and willfully disregard the rights of whistleblowers.”<sup>85</sup> As of August 23, 2016, settlements in whistleblower cases are being reviewed by OSHA

---

76. See OCCUPATIONAL SAFETY & HEALTH ADMIN., MEETING OF THE WHISTLEBLOWER PROT. PROGRAM ADVISORY COMM. 51 (Mar. 11, 2014), [https://www.whistleblowers.gov/wpac/WPACTranscript\\_03112014.pdf](https://www.whistleblowers.gov/wpac/WPACTranscript_03112014.pdf) (committee meeting transcript).

77. To address inappropriate incentives, Deputy Assistant Secretary Richard Fairfax issued a memorandum to all regions indicating that discouraging employees from reporting injuries or illnesses through various forms of incentive programs would lead to scrutiny under section 11(c). Memorandum from Richard E. Fairfax, *supra* note 4.

78. See OCCUPATIONAL SAFETY & HEALTH ADMIN., MEETING OF THE WHISTLEBLOWER PROT. PROGRAM ADVISORY COMM. 140 (Jan. 29, 2013), <https://www.whistleblowers.gov/wpac/MWPPAC01-29-2013.pdf> (committee meeting transcript).

79. See OCCUPATIONAL SAFETY & HEALTH ADMIN., MEETING OF THE WHISTLEBLOWER PROT. PROGRAM ADVISORY COMM. 34–35 (Apr. 20, 2015), [https://www.whistleblowers.gov/wpac/WPACTranscript\\_04202015.pdf](https://www.whistleblowers.gov/wpac/WPACTranscript_04202015.pdf) (committee meeting transcript).

80. See *id.* at 71.

81. See *id.* at 74–75.

82. See OCCUPATIONAL SAFETY & HEALTH ADMIN., MEETING OF THE WHISTLEBLOWER PROT. PROGRAM ADVISORY COMM. 39, 98–99, 145–46 (Nov. 10, 2015), [https://www.whistleblowers.gov/wpac/WPACTranscript\\_11102015.pdf](https://www.whistleblowers.gov/wpac/WPACTranscript_11102015.pdf) (committee meeting transcript).

83. See WHISTLEBLOWER INVESTIGATIONS MANUAL, *supra* note 25, at i. The last edition was issued January 28, 2016.

84. Memorandum from William Donovan, *supra* note 53, at 2.

85. See Press Release, U.S. Dep’t of Labor, Occupational Safety & Health Admin., Whistleblower-Severe Violator Pilot Program Further Protects Workers Who Report Violations of Law, Safety and Health in Kansas City Region (May 31, 2016), [https://www.osha.gov/pls/oshaweb/owadispl.show\\_document?p\\_table=NEWS\\_RELEASES&p\\_id=32388](https://www.osha.gov/pls/oshaweb/owadispl.show_document?p_table=NEWS_RELEASES&p_id=32388). Of course, this does not change the underlying weaknesses of section 11(c) nor does it alter regulatory requirements. It appears to primarily be an exercise in “naming and shaming.” See Christopher Brown, *OSHA Program to Shame Employers Accused of Retaliation*, 46 O.S.H. Rep. (BNA) 548 (2016).

to ensure that they do not include provisions that might restrict the right of the complainant to participate in a range of protected activity.<sup>86</sup> Newly issued regulations governing record-keeping requirements for employers prohibit various policies that might discourage employees from reporting hazards and injuries.<sup>87</sup>

In 2015, the OIG reviewed the program again.<sup>88</sup> While acknowledging that “OSHA has improved the administration of its Whistleblower Programs” and noting that the error rate was reduced to eighteen percent<sup>89</sup>—without question a significant improvement—the new report continued to raise concerns regarding consistency, timeliness, and thoroughness of OSHA-conducted investigations. These continuing administrative challenges further illustrate the core problem with section 11(c): complainants are entirely dependent on OSHA and SOL to vindicate their rights.

### III. Section 11(c) in Context

To fully understand the challenges posed by section 11(c), one must see it within the context of other federal whistleblower laws. This Part explores the comparative weaknesses of the OSH Act provision, briefly

---

86. *See generally* Memorandum from MaryAnn Garraghan, Dir., Directorate of Whistleblower Protection Programs, Occupational Safety & Health Admin., to Reg'l Adm'rs., Whistleblower Program Managers (Aug. 23, 2016) (discussing OSHA oversight of settlement agreements and providing that the following language must now be prominently positioned within the settlement: “Nothing in this Agreement is intended to or shall prevent, impede or interfere with complainant’s non-waivable right, without prior notice to Respondent, to provide information to the government, participate in investigations, file a complaint, testify in proceedings regarding Respondent’s past or future conduct, or engage in any future activities protected under the whistleblower statutes administered by OSHA, or to receive and fully retain a monetary award from a government-administered whistleblower award program for providing information directly to a government agency.”).

87. 29 C.F.R. §§ 1904.35–1904.36 (2015). The new rule is further explained on the OSHA website ([https://www.osha.gov/recordkeeping/modernization\\_guidance.html](https://www.osha.gov/recordkeeping/modernization_guidance.html)) and in a memorandum issued by Deputy Assistant Secretary Dorothy Dougherty to Regional Administrators on October 19, 2016. Memorandum from Dorothy Dougherty, Deputy Assistant Secretary, Occupational Safety & Health Admin. (Oct. 19, 2016) [https://www.osha.gov/recordkeeping/finalrule/interp\\_recordkeeping\\_101816.html](https://www.osha.gov/recordkeeping/finalrule/interp_recordkeeping_101816.html) (noting that amended 29 C.F.R. § 1904.35 adds “two new provisions: section 1904.35(b)(1)(i) makes explicit the long-standing requirement for employers to have a reasonable procedure for employees to report work-related injuries and illnesses, and (b)(1)(iv) incorporates explicitly into Part 1904 the existing prohibition on retaliating against employees for reporting work-related injuries or illnesses under section 11(c) of the OSH Act, 29 U.S.C. § 660(c)”). Thus, 29 C.F.R. § 1904.35(b)(1)(iv) explicitly makes activities that would violate section 11(c) a violation of the record-keeping requirements. *See Final Rule Issued to Improve Tracking of Workplace Injuries and Illnesses*, OSHA, <https://www.osha.gov/recordkeeping/finalrule> (last visited Nov. 19, 2016). As of the time of this writing, the rule was being challenged; the motion for a preliminary injunction had been denied but the case was still pending. *See TEXO ABC/AGC, Inc. v. Perez*, No. 3:16-CV-1998-L, 2016 WL 6947911 (N.D. Tex. Nov. 28, 2016).

88. U.S. DEP’T OF LABOR, OFFICE OF THE INSPECTOR GEN., OSHA NEEDS TO CONTINUE TO STRENGTHEN ITS WHISTLEBLOWER PROT. PROGRAMS (2015) <https://www.oig.dol.gov/public/reports/oa/2015/02-15-202-10-105.pdf>.

89. *Id.* at 2.

analyzes the effects of these weaknesses, and concludes with a discussion of strategies for improving protection for safety whistleblowers.

A. *Key Comparative Weaknesses of OSH Act Section 11(c) Provisions*

All of the federal whistleblower laws passed after 2000 have stronger provisions than section 11(c). Four critical differences illustrate section 11(c)'s weaknesses.<sup>90</sup>

1. Right to Bring Actions After Exhaustion of Administrative Requirements

In general, agencies bring very few of the enforcement actions under worker protection statutes. Agency litigation is usually substantially supplemented by more numerous actions filed by individual employees. For example, the number of cases filed in federal court by private plaintiffs to enforce federal civil rights employment laws was forty-eight times the number filed by the EEOC between 1997 and 2012; the number of enforcement actions filed by individuals in wage-and-hour cases was thirty-eight times the number filed by the DOL between 2000 and 2011.<sup>91</sup> The experience under the SOX whistleblower provisions, discussed above, is also illustrative.<sup>92</sup> All federal anti-retaliation whistleblower and retaliation laws other than section 11(c) include either the opportunity for a complainant to appeal to an administrative law judge for a *de novo* hearing or a right to remove the case into federal court—or both.<sup>93</sup> If administrative filing procedures are properly exhausted, complainants can take these actions regardless of whether the agency concludes the case is meritorious.<sup>94</sup>

---

90. One additional, but important, issue is omitted in this list of four: the question of how the Federal Arbitration Act, 9 U.S.C.A. § 1 et seq. (2012), is applied to whistleblower claims. The SOX whistleblower provision was amended by the Dodd-Frank Act to invalidate pre-dispute arbitration agreements for claims under the statute, 18 U.S.C. § 1514A(d)(2) (2010) (“No pre-dispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.”). The application of the Federal Arbitration Act to section 11(c) has not been litigated because actions brought by an enforcing agency are unaffected by these agreements. See generally *EEOC v. Waffle House*, 534 U.S. 279 (2002) (upholding right of federal agency to pursue claim, including individual relief, despite existence of pre-dispute arbitration agreement between employer and individual complainant).

91. Alexander & Prasad, *supra* note 11, at 1070.

92. See *supra* text accompanying notes 65–66.

93. The only exception is the National Labor Relations Act (NLRA). See 29 U.S.C. §§ 151–169 (2012). Because the NLRA is designed to protect collective voice, rather than individual rights, it is excluded from this analysis.

94. Other statutes investigated by OSHA that allow complainants to use *either* a kick-out provision to take cases to federal district court (after a statutorily set time period allowing for investigation) or appeal an OSHA finding of merit (or non-merit) to an administrative law judge for a *de novo* hearing include STAA and FRSA in addition to Sarbanes-Oxley. WHISTLEBLOWER INVESTIGATIONS MANUAL, *supra* note 25, at 10-5, 12-4, 14-5, 16-9, 17-6, & 18-8. Some statutes allow only for a hearing before an administrative law judge. The process of a kick-out resembles the exhaustion and filing requirements

Notably, a number of OSHA state plans specifically make provision for private rights of action.<sup>95</sup>

There is no equivalent avenue of relief for complainants under section 11(c), leaving complainants in federal OSHA states without any recourse through private actions under the statute. It is the litigation by private individuals that provides the basic enforcement mechanism for other statutes. The failure to provide this structural protection under section 11(c) substantially weakens employees' protection. This basic flaw infects each step of the process, from the decision to file a complaint, to settlement negotiations, to the ultimate development of substantive law.

## 2. Statute of Limitations

Section 11(c)'s thirty-day statute of limitations mirrors some other early whistleblower statutes,<sup>96</sup> but every whistleblower law passed after 2000 allows at least 180 days for filing with the appropriate administrative agency.<sup>97</sup> Earlier anti-retaliation provisions under the civil rights anti-retaliation provisions<sup>98</sup> and the wage-and-hour laws<sup>99</sup> similarly provide for longer time periods. Without question, a thirty-day time limit is very short—and almost all section 11(c) filings would meet a 180-day deadline if the time period were extended.<sup>100</sup>

---

after receipt of a right-to-sue letter under Title VII and other federal civil rights laws, although the specific requirements vary somewhat among statutes. *See id.*, at 1-8 (complete list of provisions of the twenty-two whistleblower laws investigated by OSHA). There is also a private right of action under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2012), as well as under the anti-retaliation provisions of the Employee Relations Income Security Act, 29 U.S.C. §§ 1001-1461 (2012).

95. These statutes include, *inter alia*, CAL. LAB. CODE § 98.7 (West 2015); MINN. STAT. ANN. § 182.669 (West 2015); N.C. GEN. STAT. ANN. § 95-241 (West 2015); VT. STAT. ANN. tit. 21, § 232 (West 2016); VA. CODE ANN. § 40.1-51.1:2 (West 2016); WASH. REV. CODE ANN. § 49.17.160 (West 2015). Some states allow the complainant to pursue the statutory remedy through an administrative adjudicatory hearing. *See, e.g.*, MINN. STAT. ANN. § 182.669 (West 2015); UTAH CODE ANN. § 34A-6-203 (effective 2016).

96. *See* 29 U.S.C. § 660(c) (2012). *Accord* Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-9, at 300j-9(i) (2012) (effective 1974); Federal Water Pollution Control Act, 33 U.S.C.A. §§ 1251-1376, at 1367 (2012) (effective 1972); Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-29, at 2622 (2012) (effective 1976); Clean Air Act, 42 U.S.C. §§ 7401-7671q, at 7622 (2012) (effective 1977).

97. *See generally* WHISTLEBLOWER STATUTES DESK AID, *supra* note 15 (starting in the 1980s, the limitations on actions began to lengthen, and all statutes investigated by OSHA passed after 2000 have statutes of limitations of 180 days).

98. *See* 42 U.S.C. § 2000e-5(e)(1) (2012). For example, from its inception, the statute of limitations for filing an administrative complaint with the EEOC under Title VII has been 180 days (extended to 300 days if a state or local agency enforces a law that prohibits employment discrimination on the same basis.) *See id.*

99. *See* 29 U.S.C. § 255(a) (2006). Plaintiffs generally have two years, extended to three years for willful violations, to file unpaid wages complaints under FLSA. *Id.* There is no administrative exhaustion requirement. *Id.*

100. *See supra* Table 3 (data on section 11(c) screened out cases due to the thirty-day statute of limitations). *See generally* WB DATA *supra* note 29 (cases received from each type of claim from 2005 to 2015).

### 3. Right to Reinstatement During Pendency of Action

Under most twentieth-century federal employment statutes, including section 11(c), discharged employees may be reinstated only after a claim is settled or resolved through litigation. There is one remarkable exception: under the Mine Safety and Health Act of 1977, reinstatement may be ordered immediately during the investigation if the “complaint was not frivolously brought.”<sup>101</sup> Recent whistleblower statutes all provide for preliminary reinstatement if the investigating agency finds reasonable cause to believe the claim has merit.<sup>102</sup> Without preliminary reinstatement authority, OSHA investigators report that they have less leverage in settlement negotiations with employers. This limitation is particularly problematic because of the diminished expectation of further litigation under section 11(c).

### 4. Burden of Proof

The burden of proof to establish a meritorious claim also affects the number of cases settled, litigated, and dismissed. Section 11(c) requires proof that an illegal motivation be the “but-for” reason for the employer’s action, although not the “sole” cause.<sup>103</sup> In contrast, all post-2000 whistleblower laws employ a less stringent standard of proof requiring that the unlawful motivation be “a contributing factor;” employers can then avoid liability only by a showing with “clear and convincing” evidence that they would have taken the same action anyway.<sup>104</sup>

### *B. Effects of the Weaknesses of Section 11(c)*

The weaknesses of section 11(c) are both exceptional when compared to other comparable federal statutes and unacceptable when the goals of the statute are considered. To be effective, section 11(c) would need to be amended to include the whistleblower protections typical of all other post-2000 whistleblower laws.

101. See 30 U.S.C. § 815(c)(2) (2012) (“[I]nvestigation shall commence within 15 days of the Secretary’s receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.”).

102. This includes all safety-related whistleblower statutes (STAA, FRSA, NTSAA, AIR21, and the Seaman’s Protection Act). See generally WHISTLEBLOWER STATUTES DESK AID, *supra* note 15; WHISTLEBLOWER INVESTIGATIONS MANUAL, *supra* note 25, at 2-35.

103. See 29 C.F.R. § 1977.6(b) (2015); see also *supra* text accompanying note 40.

104. See WHISTLEBLOWER INVESTIGATIONS MANUAL, *supra* note 25, at 3-6 to 3-7. For example, under FRSA, pursuant to 49 U.S.C. § 20109(i) (2012), burdens of proof are governed by the legal burden of proof set forth in AIR21, which requires the complainant to make a prima facie showing that the retaliatory behavior was “a contributing factor in the unfavorable personnel action alleged in the complaint” and the employer may then “demonstrate[]l, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.” 49 U.S.C. § 42121(b) (2012). See also WHISTLEBLOWER STATUTES DESK AID, *supra* note 15.

At this point, more complaints are filed under section 11(c) than under all of the other OSHA-investigated whistleblower statutes. The number is quite small, however, when compared with the volume of complaints under some other federal laws.<sup>105</sup> To the extent potential complainants are aware of section 11(c)'s weaknesses, they are likely to be discouraged from filing at all. Labor-side members of the Whistleblower Protection Advisory Committee have strongly suggested that many people do not raise safety concerns because of fears of retaliation and do not bring their retaliation concerns to OSHA if retaliation occurs.<sup>106</sup> Evidence of underreporting of work injuries<sup>107</sup> and analyses of survey data<sup>108</sup> confirm that many legitimate injuries are likely to go unreported. Safety "incentive" programs may discourage workers from reporting hazards and injuries.<sup>109</sup>

OSHA investigators insist that they consistently seek justice for meritorious complainants. But investigators' ability to obtain reasonable and timely settlements at the agency level is undoubtedly undermined by the statutory weaknesses.<sup>110</sup> The fact that cases are unlikely to be pursued into litigation lessens incentives to reach early and fair resolution. The lack of a provision for preliminary reinstatement as well as the requirement for a relatively stringent burden of proof further exacerbate the problem. All of these factors change the complexion of settlement negotiations in the pre-litigation phase. The ultimate non-reviewable power of SOL to terminate a case—similar to prosecutorial discretion in criminal matters—means that complainants who persist in meritorious cases can still hit a dead end.

Not surprisingly, private parties have sought to assert rights involving retaliation for safety whistleblowing through alternative path-

---

105. See generally WB DATA, *supra* note 29. The number of section 11(c) complaints (15,437 filed over the period 2006 to 2015) pales in comparison to the annual number of retaliation complaints filed, for example, with the Equal Employment Opportunity Commission, where retaliation complaints rose to 39,757 in 2015 alone. See CHARGE STATISTICS FY 1997 THROUGH FY 2015, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (2015). Like OSHA, however, the EEOC finds merit in a small number of cases and litigates even fewer: almost 90,000 complaints were filed with the EEOC in FY 2015 and 172 civil actions were filed by the agency in that year. See *id.* Similar numbers can be found for other federal agencies. See Alexander & Prasad, *supra* note 11, at 1070.

106. See generally Committee Agendas, Minutes & Transcripts, *supra* note 75. See also Charlotte S. Alexander, Transmitting the Costs of Unsafe Work (draft on file with author) (describing worker surveys demonstrating that fear of retaliation discourages filing of complaints).

107. See Spieler & Wagner, *supra* note 7 at 1079.

108. See Alexander & Prasad, *supra* note 11 at 1072. See also Alexander, *supra* note 106.

109. See U.S. GOV'T ACCOUNTABILITY OFFICE, WORKPLACE SAFETY AND HEALTH: BETTER OSHA GUIDANCE NEEDED ON SAFETY INCENTIVE PROGRAMS (2012); see also *supra* text accompanying note 77.

110. See *supra* Table 5 for the settlement terms for these cases.

ways. Some have brought civil actions under section 11(c), but these attempts have universally failed.<sup>111</sup> Plaintiffs have had more variable success asserting common law causes of action under retaliatory discharge theories.<sup>112</sup> Some state statutes extend whistleblower protection lacking under section 11(c) to safety whistleblowers, including a private right of action.<sup>113</sup>

### C. Improving Protections for Safety Whistleblowers

What does this comparison of enforcement structures of various federal whistleblower protection laws tell us? At the hearing convened on April 29, 2014, witnesses argued for expanded federal statutory protection to make section 11(c) consistent with modern whistleblower laws.<sup>114</sup> It would certainly be appropriate to extend the same protections to workers in general industry that are enjoyed by employees covered by industry-specific safety statutes, such as the Surface Transportation Assistance Act and the Federal Railway Safety Act, or those who raise concerns about consumer products, financial fraud, or other matters of public concern. Leaving aside current political realities,

---

111. Courts have consistently dismissed cases in which individuals have attempted to assert a private right of action under section 11(c). *See, e.g.,* George v. Aztec Rental Ctr., Inc., 763 F.2d 184 (5th Cir. 1985); Taylor v. Brighton Corp., 616 F.2d 256, 259 (6th Cir. 1980); Holmes v. Schneider Power Corp., 628 F. Supp. 937 (W.D. Pa. 1986), *aff'd*, 806 F.2d 252 (3d Cir. 1986).

112. Individuals may have a private right of action rooted in the common law tort of retaliatory discharge. *See generally* Gregory G. Sarno, *Liability for Retaliation Against At-Will Employees for Public Complaints or Efforts Relating to Health or Safety*, 75 A.L.R. 4th 13 (1989) (overview of all safety-retaliation causes of action). Some states have found that there is a justiciable claim under state common law principles governing retaliatory discharge. *Id.* at 18–25. Analysis of this issue varies considerably by jurisdiction, based on differing underlying rules regarding retaliatory discharge, divergent analyses of the state-federal intersection governing safety, and whether the state has adopted an OSHA state plan or other more inclusive statutory whistleblower protection. *Id.* In addition, most states prohibit retaliation for filing workers' compensation claims, based either in common law or specific statutory provisions, although this cause of action is specifically focused on the nexus between the filing of a claim and the adverse employment action. *See generally* Theresa Ludwig Kruk, *Recovery for Discharge from Employment in Retaliation for Filing Workers' Compensation Claims*, 32 A.L.R. 4th 1221 (1984). A full discussion of this private litigation is beyond the scope of this article.

113. Section 11(c) is a floor, not a ceiling, for the framing of anti-retaliation provisions in state-plan states. *See* 29 U.S.C. § 660(c) (2012). In addition to the states that provide for independent civil actions by workers, *see supra* note 95, states have also addressed some other weaknesses of the federal statute. For example, some states have longer statutes of limitations. *See, e.g.,* N.C. GEN. STAT. ANN. § 95-242 (West 2015) (180 days); *cf.* KY. REV. STAT. ANN. § 338.121 (West 2016) (filing "within a reasonable time after such violation occurs"). Some state laws include fee-shifting provisions allowing complainants who bring civil actions to recover attorney fees. *See* CAL. LAB. CODE § 98.7(c) (West 2015); MINN. STAT. ANN. § 182.669 (West 2015); N.C. GEN. STAT. ANN. § 95-243(c) (West 2015). Kentucky allows orders for preliminary reinstatement. *See* KY. REV. STAT. ANN. § 338.121 (West 2016).

114. *See supra* note 12.

Congress should consider amending the OSH Act to make it consistent with whistleblower statutes enacted in the last fifteen years. These amendments should include creating a right for individual complainants to pursue claims before administrative law judges and in federal court; providing for SOL assistance for complainants in litigation before administrative law judges; reducing the burden of proof to “a contributing factor;” establishing a right to preliminary reinstatement in meritorious cases; restricting the use of pre-dispute arbitration agreements; and expanding remedies to include attorney fees in successfully litigated cases. Each of these provisions can be found in one or more of the other post-2000 whistleblower laws. Each provision is appropriate to provide enhanced protection for workers seeking to protect their own health and safety and the health and safety of others.

Expanded protection for safety whistleblowers need not wait for congressional action, however. Change can come within states without federal authorization. States with state plans have full authority to strengthen statutory protections, as some have already done.<sup>115</sup> Moreover, any state may extend retaliatory discharge law to cover those who raise safety concerns. The ability of state courts and legislatures to expand protection to safety whistleblowers is not preempted by the OSH Act and is not limited to states with OSHA state-plans.<sup>116</sup> Although a full exploration of potential state responses to the weaknesses of section 11(c) is beyond the scope of this article, it is important to remember that federal law is not the only mechanism available for the assertion of these rights.

---

115. See *supra* notes 95, 113 (for examples of state plan statutes).

116. The preemption provision of the OSH Act only preempts the right of states to promulgate laws that relate to OSHA standards. 29 U.S.C. §667(a) (2012) (“Nothing in this Chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 665.”). In a whistleblower case interpreting the language of the Energy Reorganization Act, the Supreme Court found an employee’s state law claim for intentional infliction of emotional distress was not preempted by existence of a federal remedy. See *English v. Gen. Elec. Co.*, 496 U.S. 72, 72 (1990) (interpreting the boundaries of the preemptive field). The reasoning in *English* has been applied to whistleblower cases under the OSH Act. See, e.g., *Flenker v. Willamette Indus., Inc.*, 967 P.2d 295, 299 (Kan. 1998) (on certified question to Kansas Supreme Court, noting the Tenth Circuit said “Congress did not intend for OSHA § 11(c) to occupy this field of law, nor does OSHA conflict with state law, thereby preempting it” and holding 11(c) procedures were inadequate to supplant the state common cause of action). Rejection of common law causes of action do not generally turn on preemption issues, but rather on whether the state court views the federal remedy as adequate. See, e.g., *Lopez v. Burris Logistics Co.*, 952 F. Supp. 2d 396 (D. Conn. 2013) (holding availability of remedy under the OSH Act precluded employees’ wrongful discharge claim under Connecticut law alleging they were fired in violation of public policy in retaliation for expressing safety concerns). See also *supra* note 112.

**Conclusion**

Section 11(c), the OSH Act provision intended to protect workers from retaliation for expressing safety concerns, is simply too weak to encourage workers to report safety hazards. Despite OSHA's efforts to address preexisting challenges, the underlying problems cannot be solved through administrative efforts alone. Statutory amendments are needed. If the OSH Act is not amended, states should use their existing authority to provide better protection to safety whistleblowers.

# Changing Definitions of Sex under Title VII

Lisa J. Banks\* & Hannah Alejandro\*\*

## Introduction

Since Title VII was passed as part of the Civil Rights Act of 1964 more than fifty years ago, American attitudes about sexual minorities<sup>1</sup> have changed dramatically.<sup>2</sup> This change has been hard-won by activists, medical professionals, social scientists, and others who have advocated for greater tolerance and social inclusion of sexual minorities in society. As is often the case, jurisprudence has slowly, but steadily, reflected changing popular opinion. Federal and state courts, as well as the executive branch, have recently recognized crucial rights for sexual minorities under equal protection principles, including the right to privacy in sexual relations in *Lawrence v. Texas*<sup>3</sup> and the right to marriage in *Obergefell v. Hodges*.<sup>4</sup>

Progress toward full legal equality for sexual minorities has been piecemeal and significant gaps in protection remain. One of the most important gaps is the exclusion of sexual minorities from Title VII's prohibition against employment discrimination "because of such indi-

---

\* Lisa J. Banks is a founding partner with Katz, Marshall & Banks, LLP, a Washington, D.C. civil rights firm representing plaintiffs in employment, whistleblower, civil rights, and civil liberties matters.

\*\* Hannah Alejandro is Senior Counsel at Katz, Marshall & Banks, LLP.

1. This article uses "sexual minorities" to describe persons whose sex, gender, sexual orientation, or other sex-based characteristics do not match those of the statistical majority. This includes gay and transgender individuals who comprise approximately 3.5% and 0.3% of the American population, respectively. Gary J. Gates, Williams Inst., *LGBT Demographics: Comparisons Among Population-Based Surveys*, at 4 (2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgbt-demogs-sep-2014.pdf>; Gary J. Gates, Williams Inst., *How Many People Are Lesbian, Gay, Bisexual, and Transgender?*, at 1 (2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>. Mr. Gates' 2014 demographic analysis reviewed the National Survey of Family Growth, 2006–2010; the General Society Survey, 2008, 2010, 2012; the National Health Interview Survey, 2013; and the Gallup Daily Tracking Survey, 2014. Gates, *LGBT Demographics*, *supra*.

2. For example, the percentage of Americans who find homosexuality "morally acceptable" rose from 38% in 2002 to 63% in 2015. Following this trend, the percentage of Americans supporting gay marriage rose from 35% in 1999 to 60% in 2015. Jeffrey M. Jones, *Majority in U.S. Now Say Gays and Lesbians Born, Not Made*, GALLUP (May 20, 2015), <http://www.gallup.com/poll/183332/majority-say-gays-lesbians-born-not-made.aspx>. Justin McCarthy, *Record-High 60% of Americans Support Same-Sex Marriage*, GALLUP (May 19, 2015), <http://www.gallup.com/poll/183272/record-high-americans-support-sex-marriage.aspx>.

3. 539 U.S. 558, 578 (2003).

4. 135 S. Ct. 2584, 2607 (2015).

vidual's . . . sex."<sup>5</sup> For decades, courts and federal agencies have relied upon a blend of plain language statutory construction, congressional intent, and so-called common sense to hold that discrimination "because of sex" does not include discrimination against gay or transgender individuals.<sup>6</sup> Employment discrimination jurisprudence is not impervious to larger trends in society, however. There is a growing movement to reinterpret Title VII precedent and the statute's language to bring sexual minorities within its protection.<sup>7</sup> In making this doctrinal shift, or, more frankly, reversal, courts and federal agencies have revisited the fundamental question of how to define "sex" itself.

Part I of this article briefly explains definitions of sex used in medical and social science to establish an independent context for concepts discussed thereafter. Part II examines the evolving definition of sex in Title VII doctrine, beginning in Part II.A by looking at how the Supreme Court and the Equal Employment Opportunity Commission (EEOC) have understood the relationship between sex and gender. Part II.B discusses the way both authorities have construed the related, but distinct, connection between sex and sexual orientation. Part III addresses the apparent limits of an expanding definition of sex as the law evolves.

## I. Definitions of Sex in Medical and Social Science

To determine what "sex" is in the context of the law, it is helpful to start with widely accepted definitions currently used by medical, social science, and activist communities. In these fields, sex comprises a set of biological and physiological characteristics, such as reproductive organs and hormonal chemistry with which all human beings (and most animals) are born.<sup>8</sup> While common perception recognizes two sexes, male and female, there is also a third sex, "intersex," that describes people born with physiological characteristics that are both male and female.<sup>9</sup>

---

5. 42 U.S.C. § 2000e-2(a)(1) (2012). For an overview of Title VII issues related to LGBT employees, see Lisa J. Banks et al., Katz, Marshall & Banks, LLP, *Developing Law on LGBT Rights in the Workplace* (2015), [http://www.kmblegal.com/sites/default/files/Lisa%20Banks\\_Nov%202015\\_Developing%20Law%20on%20LGBT%20Rights%20in%20the%20Workplace.pdf](http://www.kmblegal.com/sites/default/files/Lisa%20Banks_Nov%202015_Developing%20Law%20on%20LGBT%20Rights%20in%20the%20Workplace.pdf).

6. See e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984).

7. See discussion *infra* Part II.

8. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 20–21 (1995); *GLAAD Media Reference Guide—Transgender Issues*, GLAAD, <http://www.glaad.org/reference/transgender> (last visited July 29, 2016) [hereinafter *GLAAD Guide*].

9. See *Comprehensive\* List of LGBTQ+ Vocabulary Definitions*, IT'S PRONOUNCED METROSEXUAL, <http://itspronouncedmetrosexual.com/2013/01/a-comprehensive-list-of-lgbtq-term-definitions/> (last visited July 29, 2016) [hereinafter *LGBTQ+ Vocabulary*].

Gender comprises a set of socially determined behaviors, attitudes, and norms assigned to people based on their sex at birth.<sup>10</sup> As with sex, there are two generally recognized genders: masculine and feminine. In recent times, activists have advocated for the recognition of a wider spectrum of nuanced gender identities within and outside of these two basic categories.<sup>11</sup> A category that is currently gaining more attention is “transgender,” which describes a person whose experienced or expressed gender does not match the one assigned at birth.<sup>12</sup> Its counterpart is “cisgender,” which describes a person whose sex and gender assigned at birth match throughout their lives.<sup>13</sup> Another addition to the traditional masculine/feminine binary is “gender fluid,” which describes a person who experiences and expresses both masculine and feminine gender in varying degrees or different contexts.<sup>14</sup>

“Sexual orientation” is the nature of one’s emotional and sexual attractions to others, as defined by the biological sex of the partners.<sup>15</sup> Heterosexual people are emotionally and sexually attracted to people of the opposite sex; homosexual people are emotionally and sexually attracted to people of the same sex.<sup>16</sup> Here, as with sex and gender, recognition is growing of a richer diversity of human behavior than is captured by these two traditional categories—bisexuality comprises attraction to both opposite and same-sex people; asexuality comprises no sexual attraction to others of either sex, etc.<sup>17</sup> In addition to these concepts of sex, gender, and sexual orientation, there is an ongoing effort to develop and refine additional terms to describe the great variety of emotional and sexual connections between people and how we identify ourselves.<sup>18</sup>

It is important to note that the distinctions between and within sex, gender, and sexual orientation are often tied to history and culture.<sup>19</sup> While it might appear that new identities have emerged overnight, understandings of sex, gender, and sexual orientation have always shifted over time and have varied drastically in different

---

10. See Valdes, *supra* note 8, at 21–22.

11. See, e.g., *id.*; *GLAAD Guide*, *supra* note 8.

12. *GLAAD Guide*, *supra* note 8. The label commonly used in the past, “transsexual,” has recently been used more specifically to describe people who change their physiological and biological sex characteristics from one sex to another (through surgery, hormone therapy, etc.). See *id.* Because many transgender people are not able or do not want to undergo these physical changes, the broader, more inclusive term “transgender” is generally preferred. See *id.*

13. *LGBTQ+ Vocabulary*, *supra* note 9.

14. *Id.*

15. *Id.*; Valdes, *supra* note 8, at 22–23.

16. *LGBTQ+ Vocabulary*, *supra* note 9.

17. See, e.g., *id.*

18. See *id.*; *GLAAD Guide*, *supra* note 8.

19. See Kevin Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 515 (2016).

cultures around the world.<sup>20</sup> Many cultures have long recognized gender fluidity or transgender, for example, as part of the spectrum of sexual identity.<sup>21</sup> More importantly, it is vital to recognize that while we struggle to describe or define accurately these very intimate, subjective aspects of human life, the underlying diversity of experience to which the words relate has always existed. Only the vocabulary is new.

Social and medical science, and sexual minorities themselves, have been developing increasingly precise definitions for sex, gender, and sexual orientation over the past few decades in part to better understand and protect people whose sex or gender identities do not fit conventional norms and who often struggle to explain how their appearance, behavior, desires, or psychology depart from traditionally-recognized categories.<sup>22</sup> Experts and activists have sought to clarify that sex is not synonymous with such categories as gender, sexual orientation, and relationship preferences, although it is obviously related.<sup>23</sup> The law, however, has moved much more slowly to disentangle these concepts, often conflating them or drawing hazy, even inconsistent, distinctions among them.<sup>24</sup>

## II. Defining Sex in Title VII Jurisprudence

While social attitudes, political views, and legal doctrine are all moving toward increased recognition and protection of sexual minorities, the law has taken a unique path to a more sophisticated conception of sex, gender, and sexuality.<sup>25</sup> Legal doctrine has always been imprecise when engaging with sex-related concepts, often with the result (and perhaps motive) of denying legal protections to sexual minorities.<sup>26</sup> Unlike sociology and medicine, which are developing more granular definitions for behavior and identity, legal advocates have recently had significant success taking the opposite tack by arguing for a more capacious understanding of the fundamental concept of “sex.”<sup>27</sup> As the law moves toward a more inclusive application of equal protection, the focus has not been on emphasizing distinctions

---

20. *See id.*

21. *See id.* (historical sources that recount practices in a wide variety of cultures that we now deem transgender, transvestism, or other non-conforming gender behavior).

22. *See Understanding Gender*, GENDER SPECTRUM, <https://www.genderspectrum.org/quick-links/understanding-gender/> (last visited Nov. 26, 2016).

23. *See, e.g., Definitions Related to Sexual Orientation and Gender Diversity in APA Guidelines and Policy Documents*, AM. PSYCHOLOGICAL ASS'N, <https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf> (last visited Nov. 26, 2016).

24. *See* discussion *infra* Part II.

25. *See generally* Valdes, *supra* note 8.

26. For an in-depth analysis of this topic, see Valdes, *supra* note 8. Valdes argues that the conflation of these concepts has historically served to favor heterosexual males and its “impact on life and law is neither natural, nor neutral, nor benign.” *Id.* at 8.

27. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

between sex, gender, and sexual orientation, but rather on articulating how these concepts are interrelated.<sup>28</sup>

The reason for this is, in part, an accident of history. When Title VII was passed as part of the Civil Rights Act of 1964, legal and popular culture did not yet have a conception of “sex” that clearly distinguished between biological and social factors. Generally speaking, “sex” and “gender” were used interchangeably to categorize people as simply men or women.<sup>29</sup> It was only in the decades after 1964 that activists, medical experts, social scientists, and theorists articulated distinctions between physical biological sex, socially determined gender, and sexual orientation that came into mainstream use.<sup>30</sup> Prior to these developments, the word “sex” was effectively synonymous with “gender,” and there was little acknowledgement of the difference between biology and behavior.<sup>31</sup> At its inception, “sex” in Title VII was an amorphous term, laden with interrelated, but distinct, concepts.

#### A. Sex and Gender

Because the relationship between sex and gender was muddled at the passage of Title VII, courts have historically struggled to parse the difference between the two when construing the statute.<sup>32</sup> Twenty-five years after Title VII became law, the Supreme Court articulated a construction of “because of sex” that explicitly included the concept of gender in *Price Waterhouse v. Hopkins*.<sup>33</sup> The Court held that “sex stereotyping,” such as deeming a female employee’s behavior inappropriate solely because she was a woman displaying “masculine” qualities (such as aggressiveness, etc.), was prohibited under Title VII.<sup>34</sup> The Court’s reasoning in *Price Waterhouse* is clumsy by modern theoretical

28. See Stephen F. Befort & Michael J. Vargas, *Same-Sex Marriage and Title VII*, 56 SANTA CLARA L. REV. 207, 213–19 (2016).

29. Eric S. Dreiband & Brett Swearingen, Jones Day, *The Evolution of Title VII—Sexual Orientation, Gender Identity, and the Civil Rights Act of 1964*, at 3 (2015), [http://www.jonesday.com/files/Publication/07f7db13-4b8c-44c3-a89b-6dcfe4a9e2a1/Presentation/PublicationAttachment/74a116bc-2cfe-42d2-92a5-787b40ee0567/dreiband\\_lgbt.authcheckdam.pdf](http://www.jonesday.com/files/Publication/07f7db13-4b8c-44c3-a89b-6dcfe4a9e2a1/Presentation/PublicationAttachment/74a116bc-2cfe-42d2-92a5-787b40ee0567/dreiband_lgbt.authcheckdam.pdf).

30. See *Timeline: Milestones in the American Gay Rights Movement*, PBS, <http://www.pbs.org/wgbh/americanexperience/features/timeline/stonewall/> (last visited Sept. 10, 2016).

31. To the degree that the distinction between sex and gender was acknowledged, it was nearly always done in relation to those whose behavior did *not* comport with their physical sex and who were therefore labeled as deviant. See Valdes, *supra* note 8, at 47–51. The notion of the “unnaturalness” of a masculine woman or a feminine man is based on the premise that biological sex and conditioned gender should be consistent (female/feminine; male/masculine). See *id.*

32. Befort & Vargas, *supra* note 28, at 213.

33. 490 U.S. 228, 241–42 (1989).

34. *Id.* at 235, 250, 258. *Price Waterhouse* was not a unanimous decision, but the minority justices differed only on whether Title VII mandates a but-for causation standard. The dissenters did not challenge the majority’s sex stereotyping theory. *Id.* at 258–95 (Kennedy, J., dissenting). The dissent openly conceded that “Hopkins plainly presented a strong case both of her own professional qualifications and of the presence of

standards, conflating sex and gender so completely that it purported to find reference to gender “on the face of the statute,” although its own citation clearly indicated that “gender” did not appear in Title VII’s text:

Congress’ intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute. In now-familiar language, the statute forbids an employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment,” or to “limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual’s . . . sex.” We take these words to mean that gender must be irrelevant to employment decisions.<sup>35</sup>

Notwithstanding this equivalence of sex and gender, the Court’s articulation of the appropriate Title VII causation standard evinced an effort, albeit confused, to describe the relationship between the two concepts:

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.<sup>36</sup>

In these passages, the Court’s articulation of sex-based concepts differs from our current understanding in two significant ways. First, the Court wholly conflates sex and gender by using the two terms as synonyms.<sup>37</sup> Second, the Court coins the term “sex stereotyping” for what is, in essence, our modern concept of gender (behaviors expected because of a person’s biological sex).<sup>38</sup>

*Price Waterhouse* established a nascent awareness, which now appears relatively crude, that sex and gender interrelate. With our more precise contemporary sense of these concepts, we can clarify *Price Waterhouse* in this way: “sex stereotyping,” i.e., holding individuals to standards of conduct based on gendered norms, is discrimination “because of sex” because gender itself is defined by expected behaviors

---

discrimination in *Price Waterhouse*’s partnership process.” *Id.* at 295 (Kennedy, J., dissenting).

35. *Id.* at 239–40 (citation omitted).

36. *Id.* at 250 (footnote omitted).

37. *See id.* at 239–40.

38. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

based on one's biological sex.<sup>39</sup> This analysis—which concludes that “sex” in Title VII includes related characteristics, identity, or status for which sex is an essential component—has been the emerging legacy of *Price Waterhouse* in recent EEOC and federal court opinions concerning gender identity and sexual orientation.<sup>40</sup> In the current period between increasing protection for sexual minorities throughout law and society<sup>41</sup> and the inevitable day when the Supreme Court will rule directly on the question of sexual minorities under Title VII, *Price Waterhouse* is fueling the shift toward greater inclusivity in lower court and agency rulings.<sup>42</sup> While some decision-makers have rejected this application of *Price Waterhouse*,<sup>43</sup> the opinion has prompted important Title VII doctrinal developments.<sup>44</sup>

One of the most significant effects of *Price Waterhouse* has been growing recognition that transgender discrimination constitutes sex discrimination.<sup>45</sup> In 2000, the Ninth Circuit became the first federal appeals court to hold that *Price Waterhouse* mandates the inclusion of transgender individuals in the protected class of sex and gender in *Schwenk v. Hartford*,<sup>46</sup> which interpreted the Gender Motivated Violence Act (GMVA).<sup>47</sup> The court noted that following *Price Waterhouse*, “the terms ‘sex’ and ‘gender’ have become interchangeable” under both Title VII and the GMVA and held that transgender discrimination is, in essence, sex stereotyping discrimination.<sup>48</sup> Four years later, in *Smith v. City of Salem*,<sup>49</sup> the Sixth Circuit also held that discrimination on the basis of transgender identity is unlawful sex stereotyping under *Price Waterhouse*.<sup>50</sup> In 2011, the Eleventh Circuit joined the emerging consensus when it held in *Glenn v. Brumby*<sup>51</sup> that “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender” because “[a] person is defined as transgender precisely

39. *See id.* at 228. In a sense, gender itself *is* “sex stereotyping,” in that it is defined as the behavior, appearance, and character taught to and expected from a person’s physical sex at birth. To the degree these expectations are static and imposed irrespective of a person’s characteristics or preferences, they are arguably stereotypes.

40. *See, e.g.*, *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000); *Macy v. Holder*, EEOC Doc. No. 0120120821, 2012 WL 1435995, at \*5 (EEOC Apr. 20, 2012).

41. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

42. *See, e.g.*, *Schwenk*, 204 F.3d at 1201; *Macy*, 2012 WL 1435995, at \*5.

43. *See, e.g.*, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1223–24 (10th Cir. 2007).

44. *See, e.g.*, *Schwenk*, 204 F.3d at 1201.

45. *See, e.g.*, *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000).

46. *Id.* at 1201–03.

47. *Id.* at 1192; 42 U.S.C. § 13981 (2000).

48. *Schwenk*, 204 F.3d at 1201–02.

49. 378 F.3d 566 (6th Cir. 2004).

50. *Id.* at 574–75.

51. 663 F.3d 1312 (11th Cir. 2011).

because of the perception that his or her behavior transgresses gender stereotypes.”<sup>52</sup>

The EEOC has arguably been the most active tribunal, relying on *Price Waterhouse* in recent years to expand statutory protections; the agency’s Title VII jurisprudence for federal employees illustrates the evolution toward a more comprehensive definition of “because of sex.” For nearly thirty years, the EEOC’s position was that “sex” did not include transgender status.<sup>53</sup> Five years before *Price Waterhouse*, the EEOC decided *Casoni v. USPS*,<sup>54</sup> which appears to be its first opinion involving a “transsexual” employee. It held that “nothing in the legislative history of Title VII indicates that such claims were intended to be covered by its provisions.”<sup>55</sup> Even after *Price Waterhouse* was decided in 1989, the EEOC declined for many years to extend the logic of that case’s sex and gender analysis to claims of transgender discrimination.<sup>56</sup>

In 2012, however, the EEOC issued a Strategic Enforcement Plan (SEP) that included “coverage of lesbian, gay, bisexual and transgen-

52. *Id.* at 1316–17. The Eleventh Circuit noted that several federal district courts also found that *Price Waterhouse*’s sex stereotyping analysis extended sex discrimination protection to transgender persons. *Id.* at 1317–18 (listing cases from federal trial courts in Pennsylvania, New York, the District of Columbia, and Texas); *cf.* *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1223–24 (10th Cir. 2007) (“transsexuals” are not *per se* a protected class under Title VII, while acknowledging that some courts have permitted claims to proceed under *Price Waterhouse*’s sex stereotyping theory).

53. *See, e.g.,* *Kowalczyk v. Brown*, EEOC Doc. No. 01942053, 1994 WL 744529 (EEOC Dec. 27, 1994); *Casoni v. U.S. Postal Serv.*, EEOC Doc. No. 01840104, 1984 WL 485399 (EEOC Sept. 28, 1984).

54. *Casoni*, 1984 WL 485399.

55. *Id.* at \*2.

56. Most EEOC cases between 1984 and 2012 offered little independent rationale for their holdings. *See, e.g.,* *Kowalczyk*, 1994 WL 744529, at \*2 (summarily rejecting transsexualism and homosexuality as grounds for sex discrimination claims). These cases often simply cited the pre-*Price Waterhouse* case, *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), without further elaboration. *Id.* In *Ulane*, the Seventh Circuit held that Title VII did not provide discrimination protections to “transsexuals” because Congress did not intend “such a broad sweeping of the untraditional and unusual within the term ‘sex’ as used in Title VII.” *Ulane*, 742 F.2d at 1086. Reversing the lower court, which found that transsexual discrimination was “because of . . . sex,” *Ulane* took shifting positions that evinced discomfort with the social implications of protecting sexual minorities. *See id.* at 1084. The court first claimed to construe Title VII according to “ordinary, common” meanings of the statutory words, but then focused on the legislative intent of the sex discrimination provision without much explanation. *Id.* at 1085. Citing Congress’s failure to pass amendments to Title VII that specifically protect homosexuals and transsexuals (two groups the court purported to see distinctly while nonetheless discussing together throughout), the court determined that Congress had implicitly rejected extending Title VII to these individuals. *Id.* at 1085–86. *Ulane*’s analysis of the congressional intent behind including sex as a protected classification rested on the premise that “sex” was added to the statute as a joke or scuttling tactic that merited no serious intent or debate. *See id.* For a refutation of this standard account, which is almost ubiquitous in legal writing, see Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137 (1997).

der individuals under Title VII's sex discrimination provisions" as one of the agency's national priorities.<sup>57</sup> Just a few months later, the EEOC fulfilled that promise in *Macy v. Holder*.<sup>58</sup> Reaching past its own more recent precedents to rely heavily on *Price Waterhouse*, the EEOC held that sex discrimination under Title VII includes discrimination on the basis of gender identity.<sup>59</sup> *Macy* observed that *Price Waterhouse* and subsequent federal decisions established that "sex" and "gender" are "used interchangeably to describe the discrimination prohibited by Title VII."<sup>60</sup> The EEOC noted

That Title VII's prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex, is important. If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the statute's protections sweep far broader than that, in part because the term "gender" encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity.<sup>61</sup>

The agency went on to conclude:

When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment "related to the sex of the victim." This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that "an employer may not take gender into account in making an employment decision."<sup>62</sup>

*Macy* thus reflects distinctions between sex and gender that have long been well established outside the law and provides a straightforward analysis of how the two fundamental concepts relate in the context of discrimination: because bias against gender identity, i.e., transgender status, is based on attitudes about how people should behave

---

57. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN FY 2013–2016 (2012), <https://www.eeoc.gov/eeoc/plan/upload/sep.pdf>.

58. EEOC Doc. No. 0120120821, 2012 WL 1435995 (EEOC Apr. 20, 2012).

59. *Id.* at \*5–11.

60. *Id.* at \*5.

61. *Id.* at \*6.

62. *Id.* at \*7 (citing *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). The EEOC's evolving sophistication about sexual minorities is also apparent in the shift from *Casoni*'s discussion of "transsexuals" to *Macy*'s discussion of the larger "transgender" community. Compare *Casoni v. U.S. Postal Serv.*, EEOC Doc. No. 01840104, 1984 WL 485399, at \*2 (EEOC Sept. 28, 1984) with *Macy*, 2012 WL 1435995, at \*7.

based on their biological sex, disparate treatment on this basis is gender discrimination.<sup>63</sup> Under *Price Waterhouse*, gender discrimination is included within sex discrimination and is therefore prohibited by Title VII.<sup>64</sup> As an EEOC decision, *Macy* is not precedential authority for federal courts, but the opinion has bolstered extension of *Price Waterhouse* by its persuasive force.<sup>65</sup> Since *Macy*, the EEOC has pursued federal court claims on behalf of private sector transgender employees and has settled several such cases.<sup>66</sup> While *Macy* was ostensibly grounded in a purely logical application of *Price Waterhouse* and the basic concepts of sex and gender, *Price Waterhouse* had been precedent for twenty-three years when *Macy* was decided. In that time, as discussed above, many federal courts and the EEOC itself had not found that *Price Waterhouse* required the inclusion of transgender status within “sex.”<sup>67</sup> The fitful development of the law indicates that routine application of precedent alone is not shaping the emerging definitions of sex under Title VII. Instead, legal decision-makers are revisiting long-standing precedent and finding that general principles can be transformative (maybe even radical) if taken to their fullest logical extent to protect some sexual minorities under Title VII.

Some observers might protest that these developments reveal a willingness to bend the law into whatever ideological direction certain groups might prefer. Yet these developments can also be viewed as the delayed vindication of equal protection principles mandated by Title VII’s language. As the EEOC acknowledged in *Macy*, it is almost certain that Congress did not contemplate transgender individuals during the passage of Title VII.<sup>68</sup> *Macy* notes, however, that the Supreme Court has made clear that the content of a statutory provision must ultimately guide its interpretation:

To be sure, the members of Congress that enacted Title VII in 1964 and amended it in 1972 were likely not considering the problems of discrimination that were faced by transgender individuals. But as the Supreme Court recognized in *Oncale v. Sundowner Offshore Services, Inc.*: “[S]tatutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably com-

---

63. See *Macy*, 2012 WL 1435995, at \*7.

64. See *Price Waterhouse*, 490 U.S. at 239–48.

65. See, e.g., *Roberts v. Clark Cty. Sch. Dist.*, 312 F.R.D. 594 (D. Nev. 2016); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509 (D. Conn. 2016).

66. See *Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N (July 8, 2016), [http://www.eeoc.gov/eeoc/litigation/selected/lgbt\\_facts.cfm](http://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm) [hereinafter *EEOC LGBT Fact Sheet*] (noting three pending EEOC lawsuits on behalf of transgender employees and two recent settlements as of July 2016).

67. See *supra* text accompanying notes 53–56. Surprisingly, *Macy* lacks any discussion of these prior decisions by the EEOC and federal courts. See *Macy v. Holder*, EEOC Doc. No. 0120120821, 2012 WL 1435995 (EEOC Apr. 20, 2012).

68. *Id.* at \*9.

parable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits “discrimination . . . because of . . . sex” in . . . employment. [This] . . . must extend to [sex-based discrimination] of any kind that meets the statutory requirements.<sup>69</sup>

Although the increased visibility of transgender persons is a relatively new phenomenon in American society, discrimination on the basis of transgender identity fits squarely within *Price Waterhouse’s* sex stereotyping analysis.<sup>70</sup> As the federal district court in *Fabian v. Hospital of Central Connecticut* noted, “There is nothing unplain, untraditional, unusual, or new-fangled about this understanding. It is simply attentive to what the words in the statute mean, and what they have meant since long before the statute was formulated.”<sup>71</sup>

### B. Sex and Sexual Orientation

While the relationship between “sex” and “gender” under Title VII has been complicated by the fact that the two words were used interchangeably for decades, the relationship between sex and sexual orientation in discrimination law has been complicated by courts’ unwillingness to acknowledge any intrinsic connection between the latter two concepts. This refusal has been based, in part, on deeply held biases against homosexuality and judicial reluctance to protect gay and lesbian employees without explicit congressional instruction.<sup>72</sup>

The first Supreme Court Title VII case addressing sexual orientation, *Oncale v. Sundowner Offshore Services, Inc.*,<sup>73</sup> arose in complex factual circumstances that did not squarely require the Court to decide whether “sex” includes sexual orientation.<sup>74</sup> The male plaintiff in *Oncale* worked on an oil rig and had been targeted for aggressive harassment by other male employees, including physical assault “in a sexual manner” and threats of rape.<sup>75</sup> In a relatively short opinion, the Court held that same-sex harassment was actionable under Title VII if the plaintiff could show that the harassment was “because of sex.”<sup>76</sup> *Oncale* both expanded and contracted the protections of Title VII by rejecting the per se rule barring same-sex harassment claims while

---

69. *Id.* at \*9–10 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998); *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 679–81 (1983) (rejecting argument that discrimination against men does not violate Title VII while recognizing that discrimination against women was plainly the principal problem Title VII sought to combat)).

70. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989).

71. *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 526 (D. Conn. 2016).

72. *See Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698 (7th Cir. 2016).

73. 523 U.S. 75 (1998).

74. *See generally id.*

75. *Id.* at 77.

76. *Id.* at 79–80.

simultaneously rejecting the per se rule that sexualized harassment was, in itself, sex discrimination.<sup>77</sup>

While the take-away headline from *Oncale* was that Title VII prohibited same-sex harassment, the ruling was more limited in its protections of gay and lesbian employees than it might have been. The Court carefully avoided expressly protecting employees on the basis of sexual orientation, focusing instead on the harasser's sexual orientation (consistent with the sexual desire model of opposite-sex harassment).<sup>78</sup> As a result, the opinion failed to provide meaningful protections for gay and lesbian employees in two ways. First, *Oncale* did not affirmatively recognize any cause of action for plaintiffs targeted for workplace humiliation and assault because of their actual or perceived sexual orientation.<sup>79</sup> Second, because the Court focused on the alleged harasser's sexual orientation, *Oncale* did not clarify whether the plaintiff could prevail on a Title VII claim if his co-workers actually identified as heterosexual and had used the threat of sexual violence only to bully the plaintiff.<sup>80</sup> In short, *Oncale* primarily applied the sexual desire model of sexual harassment to gay harassers, while giving some nominal mention of same-sex harassment motivated purely by sex-based animus. It did not, and did not purport to, address whether sexual orientation discrimination is sex discrimination.

Following *Oncale*, popular opinion about sexual orientation drastically changed and the Supreme Court issued three landmark decisions explicitly recognizing the privacy interests and marriage rights of gays and lesbians.<sup>81</sup> The Court, however, has yet to state that Title VII prohibits discrimination on the basis of sexual orientation. In the absence of such a ruling, courts have reached a variety of conclusions.<sup>82</sup>

---

77. Before *Oncale*, most litigants and scholars assumed that all sexualized harassment was "because of sex" under Title VII. Following the decision, there was a distinct requirement to show that the conduct was motivated by the sex of the plaintiff, separate from its sexual nature. See David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PENN. L. REV. 1697, 1701 (2002).

78. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998).

79. *Id.*

80. *Id.* The extremely scant account of the facts in *Oncale* suggests that the Court did not want to delve into the specifics of the sexual orientation questions at issue. Single-sex environments that involve harassment and assault raise complicated issues of real and perceived gender identity and sexual orientation. It is perhaps unsurprising that the Court's analysis was as abstract as possible under the circumstances.

81. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003).

82. Compare, e.g., *Smith v. City of Salem*, 378 F.3d 566, 571 (6th Cir. 2004) (homosexual employee properly stated a Title VII sex discrimination claim where he alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind employer's adverse actions); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874–75 (9th Cir. 2001) (same); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (claim for sex discrimination could be grounded in comments targeting gay man for "effeminate behavior," but dismissing

Just as the EEOC stepped out ahead of many federal courts on transgender protections under Title VII in *Macy*, the agency recently took a strong stance on sexual orientation discrimination in *Baldwin v. Foxx*.<sup>83</sup> In an exceptionally careful and comprehensive opinion, *Baldwin* held that “sexual orientation is inherently a ‘sex-based consideration,’ and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.”<sup>84</sup> In the EEOC’s view, “[s]exual orientation’ as a concept cannot be defined or understood without reference to sex,” and sexual orientation discrimination is therefore “premised on sex-based preferences, expectations, stereotypes, or norms.”<sup>85</sup> Consistent with the trend toward more detailed and precise theoretical explications of sex and gender, *Baldwin* articulated three descriptions of the “inescapable link” between sex discrimination and sexual orientation discrimination, all of which bring the latter within the protections of the former.<sup>86</sup>

First, “[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex.”<sup>87</sup> The EEOC provided the example of a female employee who displays a photo of her female spouse and is suspended, whereas a male co-worker who does the same thing (displays a photo of his female spouse) faces no discipline.<sup>88</sup> In this scenario, the

---

claim because sex stereotyping theory had not been advanced before trial court), *with Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084–85 (7th Cir. 2000) (“Congress intended the term ‘sex’ to mean ‘biological male or biological female,’ and not one’s sexuality or sexual orientation. Therefore, harassment based solely upon a person’s sexual preference or orientation (and not on one’s sex) is not an unlawful employment practice under Title VII.”) (citation omitted); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001) (no cause of action under Title VII for claim of sexual orientation harassment); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (discharge for homosexuality not prohibited by Title VII); *Oiler v. Winn–Dixie Louisiana, Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, at \*6 (E.D. La. Sept. 16, 2002) (discrimination on the basis of sexual preference or orientation is not actionable under Title VII because it is not discrimination based on a person’s “sex”); *Mims v. Carrier Corp.*, 88 F. Supp. 2d 706, 714 (E.D. Tex. 2000) (“[n]either sexual orientation nor perceived sexual orientation constitute protected classes under the Civil Rights Act.”); *Broadus v. State Farm Ins. Co.*, No. 98-4254CVCSOWECF, 2000 WL 1585257, at \*4 n.2 (W.D. Mo. 2000).

Due in part to the unsettled nature of the law in this area, many LGBT advocates have pursued explicit federal legislation to protect LGBT employees, such as the Employment Non-Discrimination Act and, more recently, the Equality Act, H.R. 3185, 114th Cong. (2015), which would remove the issue from judicial interpretation. These efforts are ongoing and it is not yet clear how they will overlap with or disrupt developments related to Title VII interpretation. See *The 2016 Election: Know the Facts About the Equality Act*, GLAAD, <http://www.glaad.org/vote/topics/equality-act> (last visited Oct. 15, 2016).

83. *Baldwin v. Foxx*, EEOC Doc. No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015).

84. *Id.* at \*5.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Baldwin v. Foxx*, EEOC Doc. No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015).

female employee has been singled out for worse treatment simply because of her sex.<sup>89</sup> This conception of sexual orientation discrimination is not focused on the nature of sexual orientation as an extension of personal identity or any other theory of sexuality as an innately sex-based characteristic. Instead, the analysis is purely disparate treatment based: two workers who do the very same thing face different consequences because of their sex.<sup>90</sup> The EEOC noted that the same analysis would hold true if disparate treatment were directed at a straight employee disciplined for displaying a photo of a spouse and a gay employee was not.<sup>91</sup>

Second, “[s]exual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex.”<sup>92</sup> Here, the EEOC drew on the Title VII associational discrimination analysis in the context of race discrimination claims in which an employee suffers adverse actions for associating with people of a certain race.<sup>93</sup> The EEOC reasoned that same-sex relationships are defined by association with others, and bias against such associations is clearly sex-based if derived from reactions to the sex of the people involved.<sup>94</sup>

Third, “[s]exual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes.”<sup>95</sup> This rationale builds directly on *Price Waterhouse*, which held that Title VII prohibits discrimination related to gender stereotypes about what “feminine” behavior for women and “masculine” behavior for men entails.<sup>96</sup> The EEOC noted that discrimination against gay men and lesbians is “often, if not always, motivated by a desire to enforce heterosexually defined gender norms.”<sup>97</sup> Bias against homosexuality is grounded in an idea of what “real” men and women are, or should be, and what behavior is acceptable from each with regards to sexual or romantic desire. Discrimination against gay men and lesbians therefore fits comfortably within the gender stereotyping behavior that the Supreme Court has already acknowledged is prohibited under Title VII.<sup>98</sup>

*Baldwin* explicitly stated that the EEOC was not crafting a new definition of “sex” to “create a new class of covered persons,” but was

---

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at \*6.

93. *Baldwin v. Foxx*, EEOC Doc. No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015).

94. *Id.*

95. *Id.* at \*7.

96. *Id.*; *Price Waterhouse v. Hopkins*, 490 U.S. 228, 254 (1989).

97. *Baldwin*, 2015 WL 4397641, at \*8 (citing *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)).

98. *See Price Waterhouse*, 490 U.S. at 258.

simply logically applying the underlying principles of sex discrimination to the claims of gay and lesbian employees.<sup>99</sup> This explanation might be a strategic attempt to minimize controversy following the decision, which the EEOC acknowledged is contrary to district court decisions that have summarily rejected the theory that sexual orientation discrimination falls within sex discrimination.<sup>100</sup> However, the claim is consistent with the opinion's analysis. The three grounds of reasoning articulate separate, but related (and perhaps occasionally overlapping), bases for the legal conclusion cast within existing Title VII doctrines. The opinion makes no great contortions; if anything, the analysis is exceedingly simple and straightforward. Within *Baldwin*, any disparate treatment based on another person's conception of what sex or gender should mean constitutes, quite literally, sex discrimination. What pictures an employee may display at a workstation (such as that of a same-sex spouse), with whom the employee may associate during the employee's free time (such as a same-sex romantic or sexual partner), and what sex or gender the employee generally prefers for relationships are all distinctions turning on the employee's sex and consequent gender expectations.

*Baldwin* does not provide a complete definition of "sex" within the law and has limited persuasive authority.<sup>101</sup> At its heart, it holds that sexual orientation is intrinsically related to one's sex because we define orientation on the basis of the sexual identities of the people involved. In this conclusion, the EEOC adhered to Title VII's plain language and the fundamental concepts involved to arrive at an outcome consistent with the larger trend toward greater rights and protections for gay and lesbian employees. It is true, however, that the definition of sex under *Macy* and *Baldwin* is certainly broader than Congress contemplated in 1964 and that some courts have found since.

In an effort to shape the law in this area, the EEOC has increased its litigation efforts on behalf of sexual minorities in the private sector.<sup>102</sup> As of July 2016, the EEOC had one sexual orientation lawsuit pending in

---

99. *Baldwin*, 2015 WL 4397641, at \*9.

100. *Id.* at 8–9.

101. As noted above, EEOC decisions are not binding authority on federal courts. *Burrows v. Coll. of Cent. Fla.*, No. 5:14-CV-197-OC-30PRL, 2015 WL 5257135, at \*2 (M.D. Fla. Sept. 9, 2015) (denying a motion for reconsideration based on the EEOC's decision in *Baldwin*). One 2016 decision from a Mississippi district court even goes so far as to essentially deny *Baldwin*'s holding that federal agencies must process sexual orientation claims as sex discrimination claims. *See Brown v. Subway Sandwich Shop of Laurel, Inc.*, No. 2:15-CV-77-KS-MTP, 2016 WL 3248457, at \*2 (S.D. Miss. June 13, 2016) (asserting *Baldwin*, though "involving a discrimination claim based on sexual orientation, explicitly takes no position on the merits of the claim and resolves only timeliness and jurisdictional issues," without acknowledging that said "jurisdictional" issue was whether sexual orientation discrimination was sex discrimination).

102. *See EEOC LGBT Fact Sheet*, *supra* note 66.

federal district court in Pennsylvania,<sup>103</sup> relying on *Baldwin* and three lawsuits on behalf of transgender employees pending before federal district courts in North Carolina, Michigan, and Louisiana.<sup>104</sup> At the appellate level, the EEOC has filed numerous amicus briefs in the past two years, including cases before the Second, Fifth, and Eleventh Circuits, urging federal circuit courts to adopt its construction of Title VII.<sup>105</sup>

*Baldwin* may very well herald the future of Title VII jurisprudence for sexual orientation discrimination, but a recent opinion from the Seventh Circuit, *Hively v. Ivy Tech Community College*,<sup>106</sup> shows that some courts may remain reluctant to adopt the EEOC's conclusion that such discrimination is per se sex discrimination without direct guidance from Congress or the Supreme Court.<sup>107</sup> In *Hively*, the Seventh Circuit acknowledged that it could summarily dispatch a Title VII sexual orientation claim under precedent from *Ulane v. Eastern Airlines*,<sup>108</sup> an oft-cited case (pre-dating *Price Waterhouse*) that rejected sexual orientation claims under Title VII.<sup>109</sup> Mindful of the increasing chaos in sexual orientation case law, however, and of the potentially explosive impact of *Baldwin* on federal courts going forward, the court declined to take this route. Instead, it discussed at length how district and circuit courts have used sex stereotyping doctrine to reach some, but not all, discrimination against homosexuals, and concluded that *Price Waterhouse* alone cannot overturn precedents that rejected sexual orientation as a sex-based characteristic.<sup>110</sup>

*Hively* is a curious exercise in jurisprudence. It openly admits that the court is committed to a line of legal reasoning that grows ever more "arbitrary and unhelpful" and "paradoxical" over time, which it readily accepts might "not hold up under future rigorous analysis."<sup>111</sup> As for its view of *Baldwin*, the court also appears to acknowledge that the EEOC has staked a clear and cogent position by holding that sexual orientation discrimination is per se sex discrimination, but inexplicably stops short of joining district courts that have adopted this position.<sup>112</sup> Ultimately professing itself helpless against *Ulane's* holding that Title VII

103. EEOC v. Scott Med. Health Ctr., EEOC Doc. No. 2:16-cv-00225-CB (W.D. Pa. filed Mar. 1, 2016).

104. EEOC v. Bojangles Rests., Inc., EEOC Doc. No. 5:16-cv-00654-BO (E.D.N.C. filed July 6, 2016); EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., EEOC Doc. No. 2:14-cv-13710-SFC-DRG (E.D. Mich. filed Sept. 25, 2014); Broussard v. First Loan Tower LLC, EEOC Doc. No. 2:15-cv-01161-CJB-SS (E.D. La. filed Apr. 13, 2015).

105. See *EEOC LGBT Fact Sheet*, *supra* note 66.

106. 830 F.3d 698 (7th Cir. 2016).

107. *Id.* at 701–02.

108. 742 F.2d 1081 (7th Cir. 1984).

109. *Id.* at 1087.

110. *Hively*, 830 F.3d at 717.

111. *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 712, 714 (7th Cir. 2016).

112. *Id.* at 702, 718.

does not protect sexual orientation, *Hively* makes multiple overt pleas to the Supreme Court and Congress to clarify the law.<sup>113</sup>

Two things become increasingly clear in light of *Hively* and the EEOC's continued pursuit of an aggressive litigation and amicus strategy on the issue of protection for sexual minorities. First, notwithstanding the Seventh Circuit's reluctance to take the first leap, some federal appellate courts will almost certainly adopt the agency's interpretation of Title VII and recognize sexual orientation and gender identity discrimination as cognizable claims. Second, as the EEOC's analysis builds momentum in the federal judiciary, the Supreme Court will soon address the reach of "sex" in Title VII.

### III. The Limitations of Sex Discrimination under Title VII Going Forward

If recent trends in lower courts and the EEOC portend the future of Title VII doctrine, with *Price Waterhouse* leveraged on behalf of increasingly inclusive anti-discrimination doctrine, the question arises of how far Title VII's "because of sex" language will extend. How attenuated can a characteristic be from biological sex and still come within Title VII's protective reach? In the context of sexual orientation, for instance, is an asexual employee who openly identifies as having no sexual attraction to individuals of any sex or gender discriminated against "because of sex" if a supervisor believes asexuality is unnatural and terminates the employee? Under the recent application of *Price Waterhouse* in *Macy* and *Baldwin*, that employee's Title VII claim might prevail if the employee can show that the supervisor's animus was based on the sex stereotype that a "real woman" (or "real man")

---

113. *Id.* at 718. The prevarication in *Hively* is particularly interesting in light of the Seventh Circuit's decision in 2014 to refrain, at the request of the EEOC itself, from categorically rejecting the *Price Waterhouse*-based rationale for sexual orientation discrimination. In *Muhammad v. Caterpillar, Inc.*, 767 F.3d 694 (7th Cir. 2014), *as amended on denial of reh'g* (Oct. 16, 2014), the trial court rejected the plaintiff's Title VII sexual orientation discrimination claim on the ground that Title VII does not prohibit sexual orientation discrimination; the appellate panel affirmed. *Muhammad*, 767 F.3d at 697. When the plaintiff petitioned for rehearing, the EEOC wrote an amicus brief arguing that, regardless of its determination on rehearing, the panel should remove statements that Title VII's prohibition of discrimination on the basis of sex does not include discrimination on the basis of sexual orientation. Brief of U.S. Equal Emp't Opportunity Comm'n as Amicus Curiae in Support of Reh'g, *Muhammad v. Caterpillar, Inc.*, 767 F.3d 694, 697 (7th Cir. 2014), *as amended on denial of reh'g* (Oct. 16, 2014), <http://www.eeoc.gov/eeoc/litigation/briefs/caterpillar2.html>. The brief argued that the court's conclusion on this issue was based on precedents overruled by *Price Waterhouse*. According to the EEOC, *Price Waterhouse* rejected the narrow definition of sex that characterized decisions from earlier Title VII cases involving sexual orientation. Brief of U.S. Equal Emp't Opportunity Comm'n, *supra*. Although the panel chose not to rehear the case, it amended the original opinion to remove its original statements regarding the scope of Title VII coverage and affirmed summary judgment for the employer on other grounds. *Muhammad*, 767 F.3d at 700.

must be sexually attracted to others. The argument is cogent, but does not fit as neatly into *Price Waterhouse's* transgender or homosexuality analysis.

Even further attenuated might be the case of an employee who engages in sexual relationships that are nontraditional not by virtue of the sex or gender of the others involved, but because of the nature of the relationship itself—an openly polyamorous employee, for example, or perhaps even an employee who has non-consensually non-exclusive sexual partners, such as someone “cheating” on a spouse or partner. If a supervisor takes adverse action against the employee on the basis of such sexual practices, or if a co-worker engages in harassment because the co-worker believes the behavior is offensive, has the employee suffered discrimination “because of sex”? Does “because of sex” include not only gender and sexual orientation, but also sexual activity? Even with a broader interpretation of *Price Waterhouse* gaining traction, the answer is likely no. While “sex” in everyday speech can be shorthand for sexual activity, the distinction between sex-as-identity and sex-as-sexual activity has historical and conceptual significance that courts are not likely to abandon. Discrimination law has long distinguished between immutable characteristics and what might be deemed preferences or practices. The categories protected by Title VII—race, color, religion, sex, and national origin—are immutable, involuntary, or spiritual in character. And while gender identity and sexual orientation both fit at least one of these criteria, mere sexual activity, on its own, does not. Even under a broad reading of Title VII, a plaintiff who faced adverse action or harassment because of sexual activity would have no per se protections under the statute and could prevail on a sex discrimination claim only by showing that the treatment was different than that of other employees of another sex or was related to sex stereotypes about appropriate sexual behavior for people of a particular sex.

In sum, the most reasonable and realistic limits to the definition of “sex” under Title VII are characteristics relating to identity that are defined themselves in relation to a person’s physiological sex. Under current understandings in medicine, social science, and human rights advocacy, these characteristics include any and all gender identities and sexual orientations. This more robust and more logical interpretation of “sex” remains rooted in the text of the statute and the anti-discrimination principles of Title VII.

## Conclusion

In light the EEOC’s decisions in *Baldwin* and *Macy*, it has become clear that the most significant expansion of the legal definition of “sex” occurred not in the 21st century, but at the close of the 20th with the 1989 Supreme Court ruling in *Price Waterhouse*. The consequences of that expansion were perhaps unforeseen, but followed organically

from the Court's language and concepts. Today, scientific and activist communities clearly distinguish between sex and gender. When *Price Waterhouse* was decided, however, the understanding of these concepts was less sophisticated, and the Court accepted, with little analysis, the notion that sex stereotyping (encompassed today within the concept of gender) could comprise sex discrimination. Because the link between sex and gender was established with a minimum of rhetoric or ideological precision, there is little in the opinion to prevent contemporary legal actors from filling in these broad ideas. If sex discrimination includes any disparate treatment that relates to someone's perception of an employee's sex or gender—including what they are allowed to do, how they should behave and dress, and with whom they should engage in sexual or romantic relationships—there is no logical basis for leaving any sexual or gender identity outside the bounds of protection because these distinctions are, like the ones already accepted, undoubtedly sex- or gender-based.

Title VII's plain language allows for and arguably invites a broad reading of the word sex because it prohibits discrimination "because of sex." To the extent that one's sex provides the basis for a number of other identity labels—feminine, masculine, transgender, homosexual, heterosexual, asexual, etc.—these concepts are inextricably linked to sex in the most basic sense. Indeed, our very idea of gender or sexual orientation only has meaning "because of sex" in relation to the perception of, and attitudes about, biological or physiological sex.

While these connections might strike some observers as too philosophical, or too far removed from Congress's original intent, or from popular opinion, the relationship among these ideas is fundamentally reasonable. In the last few decades, the Supreme Court, the EEOC, and federal and state courts have steadily expanded protection for sexual minorities and developed a more holistic understanding of how sex is the crucial conceptual origin for gender and sexual orientation. In effect, jurisprudence is moving toward the principle that biases fundamentally related to a person's sex, whether directly or indirectly through gender or sexual orientation, violate the spirit of equal protection and the principles of anti-discrimination laws. A good faith reading of this fundamental concept naturally results in expanding the claims courts will recognize.

Whether the law has improperly "expanded" its definition of sex, or has just become more sophisticated about understanding how sex anchors other characteristics of identity, is debatable. In terms of equal rights, equal protection, and equal dignity in the workplace and under the law, the trend has undeniably expanded the number of Americans who receive important workplace protections. The doctrinal shift currently underway has not come from the abandonment of common sense or traditional statutory construction. Beginning

with *Price Waterhouse*, it has instead come from a desire to accurately understand how sex manifests in different aspects of identity and our social relationships with each other. With more careful consideration of the realities of sexual identities, judges and agencies continue to develop a more just and intellectually honest approach to fulfilling the promise of Title VII's anti-discrimination principles.

# The Equal Employment Opportunity Commission as a Change Agent: Tracing the EEOC's Relentless Pursuit of "Retaliatory" Waiver Provisions in Employer Severance Agreements

Leslie E. Silverman\*

## Introduction

The Equal Employment Opportunity Commission (EEOC or Commission) was established by Title VII of the Civil Rights Act of 1964 (Title VII or the Act) to help create equal opportunity in the nation's workplaces and serve as a change agent using all available legal remedies to end illegal acts of discrimination.<sup>1</sup> In addition to prohibiting employment discrimination on the basis of race, color, religion, national origin, and sex, Title VII also made it illegal to retaliate against anyone seeking relief or assisting others in exercising rights under the law.<sup>2</sup>

As the lead workplace discrimination enforcement agency, the EEOC is charged with using its regulatory powers and enforcement authority to create change for groups who historically faced workplace discrimination.<sup>3</sup> In 1972, Congress amended Title VII to permit the EEOC to bring lawsuits in its own name.<sup>4</sup> Since then, the Commission

---

\* Leslie E. Silverman is a shareholder at Fortney & Scott in Washington, D.C. where she represents employers before government agencies, conducts workplace investigations, and advises clients on a wide range of workplace issues including harassment, compensation and disability discrimination, employment screening, diversity, and recruitment and retention programs. Ms. Silverman served as a Member of the U.S. Equal Employment Opportunity Commission (EEOC) from 2002–2008, and as the EEOC's Vice Chair for the final two years of her term. She also served for five years as Labor Counsel to the Senate Health, Education, Labor and Pensions Committee. Ms. Silverman earned a J.D. from The Washington College of Law at American University and an LL.M. in labor and employment law with distinction from Georgetown University Law Center.

1. 42 U.S.C. § 2000e-4(a) (2012).

2. 42 U.S.C. §§ 2000e-2, 2000e-3(a) (2012).

3. 42 U.S.C. § 2000e-4 (2012).

4. See 42 U.S.C. §§ 2000e-6, 2000e-7. In 1972, Congress amended section 707 of Title VII, transferring the Department of Justice's pattern or practice authority to the

has used all of the unique tools at its disposal to challenge and change employment practices, often pushing the boundaries of its own authority.<sup>5</sup> A 2014 case challenging a standard waiver provision in a severance agreement demonstrates how the EEOC has remained steadfast to the charge of serving as an agent of change.<sup>6</sup>

In February 2014, the EEOC filed a complaint alleging that CVS Pharmacy, Inc. violated Title VII by conditioning employees' receipt of severance pay "on an overly broad, misleading, and unenforceable Separation Agreement" that interfered with employees' right to file charges, communicate voluntarily with, and participate in EEOC proceedings.<sup>7</sup> While these allegations sound strikingly similar to past EEOC actions, the agency intended its case against CVS to be different from nearly all of its prior challenges to severance agreements by seeking to significantly broaden its enforcement power and limit employers' use of waiver provisions.<sup>8</sup>

Indeed, the Commission did not allege the language of CVS's severance agreement was an unlawful employment practice because the language was discriminatory<sup>9</sup> in violation of section 703 of Title VII.<sup>10</sup> Nor did the agency allege that the severance agreement was retaliatory in violation of section 704 of Title VII.<sup>11</sup> Instead, the Commission pursued a novel theory that CVS's use of its severance agreement established a "pattern or practice of resistance to the full enjoyments of the rights secured by Title VII in violation of section 707 (a) of Title VII."<sup>12</sup>

By asserting this theory under section 707(a), the Commission is endeavoring to achieve two objectives that would greatly broaden its access to the legal system, which is a Strategic Enforcement Plan pri-

EEOC. At the same time, Congress authorized the EEOC to bring lawsuits in its own name under section 706 of Title VII subject to certain administrative prerequisites, such as charge, investigation, cause finding, and conciliation requirements.

5. *See, e.g.*, *EEOC v. CVS Pharmacy, Inc.*, 70 F. Supp. 3d 937, 938–39 (N.D. Ill. 2014).

6. *Id.*

7. Complaint at 1, *CVS Pharmacy*, 70 F. Supp. 3d 937 (N.D. Ill. 2014) (No. 1:14-CV-00863).

8. *See generally* Complaint at 2–4, *EEOC v. Baker & Taylor, Inc.*, No. 13-CV-03729 (N.D. Ill. May 20, 2013). In this complaint, the EEOC relied on the same theory in *CVS* to challenge waiver language in a severance agreement, but the case was never litigated. For further discussion of *EEOC v. Baker & Taylor, Inc.*, see *infra* notes 105–111.

9. *See* Complaint, *CVS Pharmacy*, *supra* note 7, at 1–5.

10. Section 703, entitled "unlawful employment practices," prohibits discrimination "against any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2012).

11. Complaint, *CVS Pharmacy*, *supra* note 7, at 1–5. Section 704, entitled "Other unlawful employment practices," forbids discrimination against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

12. *EEOC v. CVS Pharmacy, Inc.*, 70 F. Supp. 3d 937, 938–39 (N.D. Ill. 2014).

ority.<sup>13</sup> First, the Commission is seeking the ability to bring suits against employers without having to comply with the procedural requirements of section 706, including the requirement that the agency conciliate with the respondent before bringing suit.<sup>14</sup> Second, the EEOC is attempting to create a new substantive theory of liability that would allow the agency to sidestep existing legal precedent established under section 704's retaliation provisions as well as those of other anti-discrimination statutes.<sup>15</sup> This novel theory would allow the EEOC to allege "a pattern or practice of resistance" and immediately bring suit whenever it found language in an agreement that the agency determines has the potential to interfere with an employee's right to file a charge, communicate with, or participate in an EEOC proceeding without the employer ever acting on its agreement.<sup>16</sup>

This article discusses the potential ramifications of *CVS*. Part I describes the EEOC's historical use of the facial retaliation theory to discourage employers' inclusion of waiver clauses in separation agreements. Part II outlines the EEOC's migration from the facial retaliation theory to the resistance theory in waiver cases, and Part III examines *CVS*'s rulings, revealing the courts' disinclination to expand EEOC enforcement powers or to allow its use of "resistance theory" to challenge waivers.

## I. Early Development of the EEOC's Attack on Waiver Clauses

Title VII expressly protects the rights of individuals to file charges and cooperate with the EEOC.<sup>17</sup> The agency depends vitally upon this participation. The EEOC maintains that the ability for individuals to file charges and freely assist and participate in EEOC proceedings is

---

13. In 2012, the EEOC issued its Strategic Enforcement Plan FY 2013-2016 (SEP), which sets forth the agency's top six enforcement priorities. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN FY 2013-2016 (2012). The Fifth Priority, "Preserving Access to the Legal System," states:

The EEOC will also target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or which impede the EEOC's investigative or enforcement efforts. These policies or practices include retaliatory actions, overly broad waivers, settlement provisions that prohibit filing charges with the EEOC or providing information to assist in the investigation or prosecution of claims of unlawful discrimination, and failure to retain records required by EEOC regulations.

*Id.* On October 17, 2016, the EEOC released its Strategic Enforcement Plan FY 2017-2021. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN FY 2017-2021 (2016). The SEP for FY 2017-2021 largely restates the prior SEP's top six enforcement priorities and includes the EEOC's focus on overly broad waivers.

14. 42 U.S.C. §§ 2000e-5(b), 2000e-5(f) (2012).

15. 42 U.S.C. § 2000e-3(a).

16. 42 U.S.C. § 2000e-6(a).

17. 42 U.S.C. §§ 2000e-3, 2000e-5(b), 2000e-6(e).

critical to its enforcement efforts.<sup>18</sup> Public contact plays a crucial role in the EEOC's enforcement process by informing the Commission of employer practices that may violate the law.<sup>19</sup>

The EEOC's antipathy toward employers' use of certain waiver language dates back to the 1980s.<sup>20</sup> The EEOC has long believed that including broad waiver language in separation agreements constitutes an implied barrier to employees wishing to bring an unlawful discrimination claim or to assist others wishing to do so, impeding EEOC enforcement of civil rights laws.<sup>21</sup> Thus, according to the EEOC, broad waiver language violates the public policy interest to ensure employees access to the legal system.<sup>22</sup>

In early efforts to restrict separation and similar agreements, the EEOC was often successful in having waiver clauses declared unenforceable. Several courts at the time seemed inclined to support the agency's theory that mere inclusion of certain waiver language constituted unlawful retaliation.<sup>23</sup>

In *EEOC v. Cosmair Inc.*,<sup>24</sup> the Fifth Circuit held "a waiver of the right to file a charge is void as against public policy."<sup>25</sup> In *Cosmair*, the employer provided severance pay and benefits in exchange for the employee's promise to release the company from all federal, state, and local discrimination claims.<sup>26</sup> Shortly after signing the severance agreement, the employee filed a wrongful termination claim alleging age discrimination.<sup>27</sup> *Cosmair* halted payment of severance benefits upon learning of the charge.<sup>28</sup> The employee subsequently filed an additional charge, alleging that *Cosmair* retaliated against him for filing his initial EEOC charge when it ceased paying severance benefits.<sup>29</sup> The Fifth Circuit ruled in favor of the EEOC, finding that the waiver would drastically interfere with the EEOC's ability to conduct investi-

18. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (discussing the importance of "[m]aintaining unfettered access to statutory remedial mechanisms").

19. *EEOC v. Cosmair Inc.*, 821 F.2d 1085, 1090 (5th Cir. 1987) ("The EEOC depends on the filing of charges to notify it of possible discrimination. A charge not only informs the EEOC of discrimination against the employee who files the charge or on whose behalf it is filed, but also may identify unlawful company actions.") (internal citation omitted).

20. *See, e.g., id.*

21. *Id.* at 1090–92.

22. *Id.* at 1090.

23. *Id.*; *EEOC v. U.S. Steel Co.*, 671 F. Supp. 351, 358–59 (W.D. Pa. 1987), *rev'd on other grounds*, 921 F.2d 489 (3d Cir. 1990).

24. 821 F.2d 1085 (5th Cir. 1987).

25. *Id.* at 1090 ("an employer and an employee cannot agree to deny to the EEOC the information it needs to advance this public interest").

26. *Id.* at 1087.

27. *Id.*

28. *Id.*

29. *Id.*

gations.<sup>30</sup> In the court's opinion, "[a]llowing the filing of charges to be obstructed by enforcing a waiver of the right to file a charge could impede EEOC enforcement of the civil rights laws."<sup>31</sup> The court reasoned that a clause waiving an employee's right to file a charge was facially invalid and an employer's cessation of severance benefits upon the filing of a charge was unlawful retaliation.<sup>32</sup>

In *EEOC v. U.S. Steel Corp.*,<sup>33</sup> the U.S. District Court for the Western District of Pennsylvania went a step further, holding that the mere offer of an unenforceable severance agreement was retaliatory.<sup>34</sup> The EEOC successfully argued that the offer of a pension plan conditioned on the waiver of ADEA rights and reclassification of the pension plan if former employees involved themselves in an ADEA claim were unlawful.<sup>35</sup> The court permanently enjoined the employer from reclassifying or withholding the pension plan of employees who brought claims under the ADEA.<sup>36</sup>

In *EEOC v. Board of Governors*,<sup>37</sup> the Seventh Circuit examined a different type of agreement.<sup>38</sup> A provision of a collective bargaining agreement prevented employees from invoking "their contractual right to a grievance proceeding" if they filed a claim of discrimination.<sup>39</sup> Employees could choose between a grievance proceeding or litigation but could not pursue both.<sup>40</sup> The Board of Governors routinely implemented this provision and cancelled an employee's grievance proceeding after learning that the employee filed an EEOC charge.<sup>41</sup> The Sixth Circuit "concluded that a retaliatory policy constitutes a

30. *Id.* at 1089–90. The court also held that unlawful retaliation occurred if the employer halted severance benefits because of the filing of an EEOC charge. *Id.* at 1089. The court distinguished between a release of a private action and the waiver of the right to file a charge. *Id.* at 1091. Because the severance agreement contained no language regarding a charge and instead focused on actions—an employee's right to sue the employer—the employee did not breach the severance agreement. *Id.* at 1090.

31. *Id.* at 1090.

32. *Id.* at 1089–90.

33. 671 F. Supp. 351 (W.D. Pa. 1987), *rev'd on other grounds*, 921 F.2d 489 (3d Cir. 1990).

34. *Id.* at 352–58. The appeal focused on whether *res judicata* prevented employees who had sued from obtaining individual relief in later EEOC suits on the same claims. *Id.*

35. *Id.* at 356–59.

36. *Id.* at 352–53.

37. 957 F.2d 424 (7th Cir. 1992).

38. *Id.* at 424.

39. *Id.* at 426 ("Article 17.2 of the collective bargaining agreement between the Board and the Union . . . provides: [i]f prior to filing a grievance hereunder, or while a grievance proceeding is in progress, an employee seeks resolution of the matter in any other forum, whether administrative or judicial, the Board or any University shall have no obligation to entertain or proceed further with the matter pursuant to this grievance procedure.").

40. *Id.* at 430.

41. *Id.* at 426.

per se violation” of the ADEA and agreed with the Commission’s argument that the policy was retaliatory.<sup>42</sup>

The agency also successfully enjoined a non-cooperation clause in *EEOC v. Astra USA, Inc.*<sup>43</sup> There, the EEOC claimed that former employees were unwilling to talk to the agency because they had signed settlement agreements preventing signatories from filing charges of discrimination or assisting the Commission in investigation of charges.<sup>44</sup> The First Circuit emphasized that “it is crucial that the Commission’s ability to investigate charges of systemic discrimination not be impaired.”<sup>45</sup> It agreed with other courts that held such waivers offend public policy.<sup>46</sup> *Astra* affirmed the district court’s injunction prohibiting the employer from including or enforcing the non-assistance covenants in its settlement agreements.<sup>47</sup> However, because the EEOC was already investigating the matter, the court found that the district court’s injunction on the covenants banning charge filing was not warranted.<sup>48</sup>

In 1997, the Commission issued its Enforcement Guidance on non-waivable employee rights (Non-Waivable Rights Guidance or Guidance).<sup>49</sup> In its background section, the Guidance asserts that provi-

42. *Id.* at 429–31 (case remanded for issuance of injunction preventing Board of Governors from enforcing this clause against employees because it violated the ADEA).

43. 94 F.3d 738 (1st Cir. 1996).

44. *Id.* at 741–42.

45. *Id.* at 744 (quoting *EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 (1984) (focusing on importance of EEOC’s investigation and its need to communicate with victims and witnesses)). The Commission’s challenge to *Astra*’s severance agreement arose in the midst of an investigation into allegations of widespread sexual harassment. Balancing the importance of the EEOC and its investigations against private dispute settlement, the First Circuit noted “Congress entrusted the Commission with significant enforcement responsibilities in respect to Title VII . . . [t]o fulfill the core purpose of the statutory scheme . . . .” *Id.* at 744.

46. *Id.* at 744 n.5 (“[A] waiver of the right to assist the EEOC offends public policy under both the ADEA and Title VII.”); *id.* at 744 (“[I]f victims of or witnesses to sexual harassment are unable to approach the EEOC or even to answer its questions, the investigatory powers that Congress conferred would be sharply curtailed and the efficacy of investigations would be severely hampered.”).

47. *Id.* at 747.

48. *Id.* at 746. The court reasoned that because the EEOC may only investigate upon the filing of a charge, which had already occurred in this case, the EEOC would not suffer irreparable harm. *Id.* See also *EEOC v. Morgan Stanley & Co.*, No. 01CIV8421RMBRLE, 2002 WL 31108179, at \*1–2 (S.D.N.Y. Sept. 20, 2002) (EEOC successfully enjoined Morgan Stanley from enforcing non-assistance portions of release agreement). *Morgan Stanley* is similar to *Astra* in a number of respects. The release agreement, which was being signed by employees in settlement of gender discrimination claims, required employees to agree that they would “not offer assistance or testimony in any action against [Morgan Stanley] . . . unless ordered to do so by a court, agency, or regulatory authority, and then only after . . . [giving] . . . Morgan Stanley . . . written notice . . . .” *Id.* at \*2 (alteration in original). The court agreed with the EEOC that the agreement could have a chilling impact on claimants and held that the non-assistance clause directed at the EEOC violates public policy. *Id.* at \*2.

49. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, No. 915.002, ENFORCEMENT GUIDANCE ON NON-WAIVABLE EMPLOYEE RIGHTS UNDER EEOC ENFORCED STATUTES (1997), <http://www.eeoc.gov/policy/docs/waiver.html> [hereinafter ENFORCEMENT GUIDANCE].

sions preventing employees from filing a charge or participating in an EEOC proceeding are null and void as a matter of public policy.<sup>50</sup> The Guidance also cautions employers that an agreement containing promises not to file a charge or participate in an EEOC proceeding “may also amount to separate and discrete violations of the anti-retaliation provisions of the civil rights statutes.”<sup>51</sup>

The Guidance’s “Prohibitions Against Retaliation” section clarifies that any agreement attempting to bar individuals from filing a charge or assisting in an EEOC investigation violates anti-retaliation laws because it discourages participation in protected activity.<sup>52</sup> “By their very existence, such agreements have a chilling effect on the willingness and ability of individuals to come forward with information that may be of critical import to the Commission as it seeks to advance the public interest in the elimination of unlawful employment discrimination.”<sup>53</sup>

By citing *Board of Governors, Cosmair*, and *U.S. Steel Corp.* in the Guidance, the EEOC glossed over a crucial detail of these cases. None of them creates precedent that the language of an agreement, in and of itself, constitutes retaliation. Indeed, in *Cosmair* and *Board of Governors*, the employer actually took an adverse action against an employee after the employee filed a charge of discrimination, and *U.S. Steel Corp.* was reversed on other grounds.<sup>54</sup> Nevertheless, the Non-Waivable Rights Guidance provided additional support for the agency’s subsequent use of the “facial” or “per se” retaliation theory to challenge waivers, releases,

---

50. *Id.*

51. *Id.* The Background declares:

Some employers attempt to limit an individual’s right to file a charge or participate in an EEOC proceeding by requiring him or her to sign an agreement in which s/he relinquishes these statutory rights. Such language may appear in contracts requiring the use of alternative dispute resolution procedures (such as mediation or arbitration), waiver agreements, employee handbooks, employee benefit plans, and ‘non-compete’ agreements. Notwithstanding the format or context of the agreement in which such language might appear, promises not to file a charge or participate in an EEOC proceeding are null and void as a matter of public policy. Agreements extracting such promises from employees may also amount to separate and discrete violations of the anti-retaliation provisions of the civil rights statutes.

*Id.*

52. *Id.*

53. *Id.* See, e.g., *EEOC v. Board of Governors*, 957 F.2d 424, 425–26 (7th Cir. 1992) (collective bargaining agreement allowing termination of administrative grievance proceeding upon filing EEOC charge was per se violation); *EEOC v. Cosmair Inc.*, 821 F.2d 1085, 1089 (5th Cir. 1987) (impermissible retaliation arises when payments to which one is otherwise entitled are stopped merely because of filing an EEOC charge); *EEOC v. U.S. Steel Corp.*, 671 F. Supp. 351, 358–59 (W.D. Pa. 1987) (retaliation under section 4(d) of the ADEA results when an employer revokes enhanced pension benefits for persons who file charges or otherwise participate in EEOC proceedings), *rev’d on other grounds*, 921 F.2d 489 (3d Cir. 1990).

54. *Board of Governors*, 957 F.2d at 425–26; *Cosmair*, 821 F.2d at 1089; *U.S. Steel Corp.*, 921 F.2d 489.

or agreements containing language the agency viewed as barring or otherwise interfering with an employee's ability to bring a charge, cooperate with the Commission, or participate in an EEOC proceeding.<sup>55</sup>

Following the release of the Non-Waivable Rights Guidance, the EEOC successfully advanced its facial retaliation theory at the district court level in *EEOC v. SunDance Rehabilitation Corp.*<sup>56</sup> SunDance offered severance pay to employees terminated as a reduction in force in exchange for their signing a "Separation Agreement and General Release," including the following provisions:

*General Release:* Releasor . . . expressly agrees that she will not institute, commence, prosecute or otherwise pursue any proceeding, action, complaint, claim, charge or grievance against Company . . . in any administrative, judicial or other forum . . . .

*Return of Severance Pay:* In the event that the provisions of this Agreement are violated, Releasor agrees that the Company shall have the right to seek and obtain injunctive relief and damages in any court of competent jurisdiction from said violation, including the right to the return of the entire amount of the consideration paid by the Company under this Agreement, plus any other damages proven, including reasonable attorney's fees and costs.<sup>57</sup>

An employee who believed she had been the victim of sex discrimination did not sign the agreement and instead filed an EEOC charge.<sup>58</sup> Although the EEOC ultimately found no grounds for the employee's underlying discrimination claim, it determined that the waiver could chill employees' communications with the EEOC and "create disincentives for them to cooperate with EEOC in safeguarding the public interest."<sup>59</sup> The EEOC's case against SunDance relied on the agency's "facially retaliatory" theory.<sup>60</sup> It alleged that the separation agreement's requirement that an employee forego the right to file an EEOC charge was per se retaliatory.<sup>61</sup>

Relying on *Cosmair, Board of Governors*, and the Non-Waivable Rights Guidance, the district court found the separation agreement

55. ENFORCEMENT GUIDANCE, *supra* note 49.

56. 328 F. Supp. 2d 826 (N.D. Ohio 2004), *rev'd*, 466 F.3d 490 (6th Cir. 2006).

57. *Id.* at 829.

58. *Id.* at 829–30.

59. *Id.* at 830. The EEOC investigated and found there was no probable cause to believe that SunDance discriminated against the employee on the basis of sex. *Id.* The employee filed another charge claiming that because SunDance did not recall her to two positions after its reduction in force, the company had retaliated against her for filing her first EEOC charge. *Id.* The EEOC dismissed her first charge. *Id.* Subsequently, the employee signed the severance agreement, but by then SunDance had declared bankruptcy. *Id.* The EEOC then dismissed her second charge. *Id.*

60. *Id.* at 833.

61. *Id.* at 832 (alteration in original). The court distinguished the EEOC's facial retaliation claim from one of facial discrimination. *Id.* at 834.

facially invalid.<sup>62</sup> According to the court, “when an employer requires an employee as part of a separation agreement to give up her right to file a charge with the EEOC in exchange for severance benefits, the employer violates the anti-retaliation provisions of the laws enforced by the EEOC.”<sup>63</sup> *SunDance* was the high-water mark for the EEOC’s facial or per se retaliation theory until the district court’s decision was eventually overturned on appeal.<sup>64</sup>

Following its district court victory in *SunDance*, the Commission sued Lockheed Martin Corp. in 2005,<sup>65</sup> alleging that the company engaged in facial retaliation by conditioning severance on waiver of a right to file a charge.<sup>66</sup> Lockheed Martin offered severance in exchange for signing a release of any anti-discrimination claims to an employee whose job had been eliminated as the result of a merger.<sup>67</sup> The employee refused and filed an EEOC charge.<sup>68</sup> The district court granted the Commission’s motion for summary judgment, finding that the release was facially retaliatory because “conditioning benefits on the waiver of a right to file an EEOC charge . . . interferes with the public interest in EEOC enforcement.”<sup>69</sup> Although Lockheed Martin sought reconsideration following the court’s *SunDance* decision,<sup>70</sup> the parties resolved the matter in a consent decree.<sup>71</sup>

Over the next few years, the EEOC continued to challenge severance and other employment agreements containing waivers and covenants it believed impinged employees’ ability to file charges of discrimination or hampered their ability to communicate or cooperate with the

---

62. *Id.* at 838 (“This Court holds that the provision of the SunDance Separation Agreement conditioning severance payments on an employee agreeing not to file a charge with the EEOC is facially retaliatory in violation of the ADA, ADEA, EPA, and Title VII.”).

63. *Id.* at 838. Note, however, that the district court did not invalidate the entire separation agreement; rather, it removed the offending provision from the contract. *Id.* at 839.

64. EEOC v. SunDance Rehab. Corp., 466 F.3d 490 (6th Cir. 2006).

65. EEOC v. Lockheed Martin Corp., 444 F. Supp. 2d 414 (D. Md. 2006).

66. *Id.* at 418. *Lockheed Martin* is based almost entirely on the district court’s decision in *EEOC v. SunDance Rehab. Corp.* 328 F. Supp. 2d 826 (N.D. Ohio 2004), which was reversed on appeal. See EEOC v. Nucletron Corp., 563 F. Supp. 2d at 592, 598 n. 4 (D. Md. 2008) (district court in *Lockheed Martin*, “like the district court in *SunDance*, held that the mere offer of an unenforceable severance agreement can constitute retaliation. . . . In fact, the *Lockheed Martin* Court based its decision exclusively on the lower court’s decision in *SunDance*.”).

67. *Lockheed Martin*, 444 F. Supp. 2d at 415–16.

68. *Id.* at 416.

69. *Id.* at 421.

70. Defendant’s Motion for Reconsideration, EEOC v. Lockheed Martin Corp., No. 8:05-cv-00287-RWT (D. Md. Nov. 6, 2006).

71. Consent Decree, EEOC v. Lockheed Martin Corp., No. 8:05-cv-00287-RWT (D. Md. Apr. 4, 2008).

agency.<sup>72</sup> During this period, the EEOC sued several employers and negotiated several high-profile public settlements.<sup>73</sup>

One noteworthy settlement occurred in September 2006 when the EEOC filed a complaint against Eastman Kodak,<sup>74</sup> followed shortly by a consent decree that included waiver language prescribed by the Commission.<sup>75</sup> In *Kodak*, the EEOC alleged that provisions in the company's standard severance agreement conditioned severance packages on signatories' waiving the right to "assist the EEOC and other persons or entities in bringing lawsuits in state or federal court, including claims brought under Title VII and the ADEA"<sup>76</sup> and agreeing to "tender back" severance pay if employees breached the agreement.<sup>77</sup> The EEOC argued that these provisions interfered with agency processes and amounted to retaliation against employees who assisted or desired to assist it.<sup>78</sup>

Just prior to the EEOC's filing suit, Kodak agreed to resolve the matter through a consent decree enjoining the company from offering any release or waiver of claims disallowing involvement in EEOC actions and requiring new explicit language in all future agreements acknowledging employees' rights to bring EEOC claims.<sup>79</sup> The acceptable waiver language prescribed by the EEOC provided that:

Except as described below, you agree and covenant not to file any suit, charge or complaint against Releasees in any court or administrative agency, with regard to any claim, demand, liability or obligation arising out of your employment with Kodak or separation therefrom. . . .

Nothing in this Agreement shall be construed to prohibit you from filing a charge with or participating in any investigation or proceeding conducted by the EEOC or a comparable state or local agency.<sup>80</sup>

---

72. See, e.g., Complaint, EEOC v. Eli Lilly & Co., No. 1:07-cv-1168-LJM-JMS (S.D. Ind. Sept. 14, 2007); Complaint, EEOC v. Eastman Kodak, No. 6:06-cv-06489-CJS (W.D.N.Y. Sept. 29, 2006).

73. See, e.g., Order on Agreed Settlement, EEOC v. Eli Lilly & Co., No. 1:07-cv-1168-LJM-JMS (S.D. Ind. June 12, 2008). The Commission settled with Eli Lilly after filing a retaliatory discrimination claim for withholding severance pay to force a long-time employee to withdraw a discrimination charge. See Complaint, *Eli Lilly*, *supra* note 72, at 3. Eli Lilly agreed to change future agreements with all employees and pay damages. Order on Agreed Settlement, *Eli Lilly*, *supra* note 73, at 2–3.

74. Complaint, *Eastman Kodak*, *supra* note 72.

75. Consent Decree at 3–4, EEOC v. Eastman Kodak, No. 6:06-cv-06489-CJS (W.D.N.Y. Oct. 11, 2006).

76. Complaint, *Eastman Kodak*, *supra* note 72, ¶ 11.

77. *Id.* ¶ 15.

78. *Id.* ¶¶ 23–24. According to the EEOC, such clauses effectively "deprive employees of their protected rights to testify, assist, or participate in any investigation, proceeding, or hearing brought under Title VII [or the ADEA], and otherwise affect their status as employees because of their protected rights." *Id.* (alteration in original).

79. Consent Decree, *Eastman Kodak*, *supra* note 75, at 3–4.

80. *Id.*

Following the announcement of Kodak's consent decree, many employers began to include *Kodak* waiver language in severance agreements to clarify that employees could file a charge of discrimination and participate in an EEOC proceeding.<sup>81</sup>

## II. End of the EEOC's Facial Retaliation Theory

The Sixth Circuit considered the EEOC's facial retaliation theory in the *SunDance* appeal.<sup>82</sup> In support of its facial retaliation argument, the Commission again relied on the Seventh Circuit's opinion in *Board of Governors*, characterizing it as "the only circuit court opinion to address squarely the legality of . . . [the] 'preemptive retaliatory policy.'"<sup>83</sup> The agency also relied upon its own 1997 Non-Waivable Rights Guidance to support its argument that the mere offer of a separation agreement containing "promises not to file a charge or participate in EEOC proceedings" constituted retaliation.<sup>84</sup>

The Sixth Circuit rejected the EEOC's position.<sup>85</sup> It concluded that *Board of Governors* was distinguishable because the employer had in fact implemented a facially retaliatory collective bargaining agreement and actually engaged in a retaliatory act.<sup>86</sup> *SunDance*, in contrast, merely offered the separation agreement and engaged in no further action.<sup>87</sup> Furthermore, the court was not persuaded by the EEOC's reliance on its 1997 Non-Waivable Rights Guidance for the argument that "[a]greements extracting such promises from employees may also amount to separate and discrete violations of the anti-retaliation provisions of the civil rights statutes."<sup>88</sup> The court concluded that the 1997 Guidance was not entitled to deference.<sup>89</sup>

The Sixth Circuit acknowledged that "one of the primary purposes of anti-retaliation provisions is '[m]aintaining unfettered access to

---

81. See, e.g., The EEOC Takes Aim At Severance Package Agreements: Where We Were And Where We Are Now, HRUSA (Sept. 16, 2015), <http://blog.hrusa.com/blog/the-eec-takes-aim-at-severance-package-agreements/> (after *Kodak*, many employers included this exact language in severance agreements).

82. *EEOC v. SunDance Rehab. Corp.*, 466 F.3d 490 (6th Cir. 2006). The Commission maintained that by "condition[ing] severance pay on promises from the terminated employee not to file charges with the EEOC and . . . not to participate in EEOC proceedings," *SunDance* committed a "per se violation of the antiretaliation provisions" of Title VII, the EPA, the ADA, and the ADEA. *Id.* at 496–97 (alteration in original). This was the same argument that succeeded at the district court level. See *EEOC v. SunDance Rehab. Corp.*, 328 F. Supp. 2d 826, 838 (N.D. Ohio 2004), *rev'd*, 466 F.3d 490 (6th Cir. 2006).

83. *SunDance*, 466 F.3d at 497.

84. *Id.* at 500 (quoting ENFORCEMENT GUIDANCE, *supra* note 49).

85. *Id.* at 500–01.

86. *Id.* at 498.

87. *Id.* at 500–01.

88. *Id.* (quoting ENFORCEMENT GUIDANCE, *supra* note 49).

89. *Id.* at 500 (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

statutory remedial mechanisms,”<sup>90</sup> but it was “not persuaded by the EEOC’s argument that SunDance’s mere offer of the Separation Agreement to all employees terminated in the reduction in force, without more, amounts to facial retaliation . . . .”<sup>91</sup> Accordingly, the court wholly rejected the Commission’s facial retaliation theory.<sup>92</sup> Although the court agreed that a ban on EEOC charges may render the agreement unenforceable as a matter of contract law, the court was clear that the mere inclusion of a ban on charge filing in the separation agreement did not make the employer’s offering the agreement “in and of itself *retaliatory*.”<sup>93</sup>

After *SunDance*, the EEOC continued to pursue its facial retaliation theory to no avail. For example, in *EEOC v. Nucletron Corp.*,<sup>94</sup> it alleged that the employer’s “policy of conditioning the award of severance benefits upon the terminated employee’s agreement not to file a discrimination charge or to participate in proceedings before the EEOC constitute[d] ‘facial retaliation.’”<sup>95</sup> Nucletron’s severance agreement required employees to waive their rights to file a charge with the EEOC and to participate in an EEOC action.<sup>96</sup> The court considered “whether the mere offer of an unenforceable severance agreement constitutes retaliation under Title VII, the ADEA, and the EPA.”<sup>97</sup> The district court rejected the EEOC’s theory, finding that “[t]he mere offer of the severance agreement [was] insufficient to constitute discrimination in the retaliation context.”<sup>98</sup> The court reasoned that “the employer’s action only reaches the level of retaliation if it denies

90. *Id.* (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)).

91. *Id.* at 500–01.

92. *Id.* at 501.

93. *Id.* Cf. *EEOC v. Cosmair Inc.*, 821 F.2d 1085, 1090 (5th Cir. 1987) (“a waiver of the right to file a charge is void as against public policy”).

94. *EEOC v. Nucletron Corp.*, 563 F. Supp. 2d 592 (D. Md. 2008).

95. *Id.* at 594. The Commission also argued that “Nucletron retaliated against [the terminated employee] for engaging in a protected activity by denying him severance benefits.” *Id.* (alteration in original).

96. *Id.* at 595–96 n.2. The agreement stated: “Employee further covenants that she/he will neither file, participate in, nor cause nor permit to be filed on his/her behalf . . . any . . . claims, grievances, complaints, or any charges with any . . . federal, and/or local agency, concerning or relating to any dispute arising out of his/her employment relationship with [Nucletron], alleging . . . unlawful employment discrimination . . . .” *Id.* (alteration in original). Both Nucletron and the EEOC agreed that these provisions were unenforceable. *Id.* at 597.

97. *Id.* at 597.

98. *Id.* at 598 (alteration in original). While the court acknowledged that the EEOC’s policy argument had some merit, it concluded that the offering of a severance agreement “does not fit the definition of retaliation under Title VII, the ADEA, and the EPA,” thereby rejecting the EEOC’s facial retaliation theory. *Id.* at 599. The court concluded that “[t]o have committed actionable retaliation, the employer must have taken a sufficiently adverse employment action.” *Id.*

severance benefits that are otherwise promised or owed or if the employer sues to enforce the agreement.”<sup>99</sup>

Although the EEOC filed fewer cases alleging facial retaliation in subsequent years, it did not completely abandon the theory. For example, in *EEOC v. Cognis Corp.*,<sup>100</sup> it alleged that the employer violated anti-retaliation laws by presenting employees with a “Last Chance Agreement” (LCA) threatening termination if they undertook a statutorily protected activity.<sup>101</sup> The Commission once again relied upon *Board of Governors* to support its claim that presentation of the LCA itself constituted retaliation.<sup>102</sup> The court disagreed, reasoning that “the conclusion that the threat of retaliation contained in the LCA constitutes a retaliatory policy only allows this court to find retaliation as a matter of law if Cognis exercised the policy against any employee who took protected activity.”<sup>103</sup> Because the employer had not enforced the provision against any employees, there could be no finding of retaliation.<sup>104</sup> In sum, retaliation exists as an act, not an inchoate risk.

### III. The EEOC’s Current Resistance Theory and CVS

The courts’ rejection of facial retaliation claims led the agency to pivot in a different direction in its effort to discourage certain waiver clauses. Just a year prior to challenging the CVS severance agreement, the EEOC brought a nearly identical suit against Baker & Taylor, Inc., alleging that the book and entertainment distributor “conditioned employees’ receipt of severance pay on an overly broad, misleading and unenforceable Waiver and Release Agreement.”<sup>105</sup> In a significant change from previous court challenges, the EEOC alleged that such an agreement deterred employees from filing charges and interfered with their ability to “communicate voluntarily with the EEOC” and other fair employment practice agencies.<sup>106</sup> The EEOC

---

99. *Id.* at 598–99. The court noted:

Even if the employer offers a severance agreement with an invalid waiver, however, the employer only commits retaliation if it either (i) attempts to enforce the agreement against an employee who signed the agreement but nevertheless files or participates in an EEOC charge, or (ii) withholds benefits already promised or owed from an employee who refuses to sign the agreement.

*Id.* at 595. As a result, “if Nucletron were to enforce the invalid provisions against the employees who signed the agreement, such an action would constitute retaliation.” *Id.* (granting EEOC’s request for an injunction to prevent Nucletron “from enforcing the invalid portions of the severance agreement signed by its employees”).

100. *EEOC v. Cognis Corp.*, No. 10-CV-2182, 2012 WL 1893725 (C.D. Ill. May 23, 2012).

101. *Id.* at \*1, \*3, \*6.

102. *Id.* at \*6.

103. *Id.* at \*7.

104. *Id.*

105. Complaint at 1, *EEOC v. Baker & Taylor, Inc.*, No. 1:13-cv-03729 (N.D. Ill. May 20, 2013).

106. *Id.*

asserted that Baker & Taylor had “engaged in a pattern or practice of resistance to the full enjoyment of the rights secured by Title VII . . . .”<sup>107</sup> The EEOC sought an injunction preventing Baker & Taylor’s use of its severance agreement.<sup>108</sup>

Baker & Taylor’s severance agreement contained a waiver clause, which included a *Kodak* waiver provision:

This Waiver and Release does not apply to any Claim that I cannot waive as a matter of law. . . . Nothing in this Waiver and Release shall limit the rights of any governmental agency or my right of access to, cooperation or participation with any governmental agency, without limitation, the United States Equal Employment Opportunity Commission, or to file an administrative charge with such agency.<sup>109</sup>

Despite this language, part of which was bolded in the severance agreement, Baker & Taylor yielded to the EEOC’s demands. Less than two months after the EEOC brought suit, the parties settled with a far-reaching Consent Decree.<sup>110</sup> Under its terms, Baker & Taylor agreed to include the following language in any future release agreements:

Nothing in this Agreement is intended to limit in any way an Employee’s right or ability to file a charge or claim of discrimination with the U.S. Equal Employment Opportunity Commission . . . . Employees retain the right to communicate with the EEOC and comparable state or local agencies and such communication can be initiated by the employee or in response to the government and is not limited by any non-disparagement obligation under this agreement.<sup>111</sup>

Therefore, the EEOC succeeded in part using its new resistance theory. By alleging that Baker & Taylor engaged in a pattern or practice of resistance to employees’ rights under anti-discrimination statutes, the EEOC forced the employer to settle.<sup>112</sup> The EEOC obtained an injunction on the waiver and disparagement clauses and forced the employer to include an explicit acknowledgment of the EEOC’s ability to communicate with employees.<sup>113</sup> This had immediate ramifications.<sup>114</sup>

107. *Id.* at 2.

108. *Id.* at 4–5.

109. Answer to Complaint at 5, *EEOC v. Baker & Taylor, Inc.*, No. 1:13-cv-03729 (N.E.D. Ill. July 10, 2013) (emphasis omitted).

110. Consent Decree, *EEOC v. Baker & Taylor, Inc.*, No. 1:13-cv-03729 (N.E.D. Ill. July 10, 2013).

111. *Id.* at 3.

112. Complaint, *Baker & Taylor, Inc.*, *supra* note 105, at 2.

113. Consent Decree, *Baker & Taylor*, *supra* note 110, at 2–4.

114. For instance, in a subsequent case, the EEOC asserted that an employer “[had] engaged and continue[d] to engage in resistance to its employees’ full enjoyment of their rights secured by the ADEA.” Complaint at 10, *EEOC v. CollegeAmerica Denver, Inc.*, No. 1:14-cv-01232-LTB-MJW (D. Colo. Apr. 30, 2014). However, the court dismissed the two claims on jurisdictional grounds, and it was never substantively examined. Final Judgment at 1, *CollegeAmerica*, No. 1:14-cv-01232-LTB-MJW (D. Colo. June 24, 2014).

The EEOC next filed suit against CVS, purposefully to bring its new resistance theory to the forefront.<sup>115</sup> As in *Baker & Taylor*, the Commission alleged that the retail pharmacy giant “engaged in a pattern or practice of resistance to the full enjoyment of the rights secured by Title VII, in violation of Section 707.”<sup>116</sup> The EEOC challenged CVS’s standard severance agreement even though it contained the very language the EEOC prescribed in *Kodak*.<sup>117</sup>

In *CVS*, the EEOC faulted the employer for including the *Kodak* language only once in the contract instead of in each section.<sup>118</sup> In addition, the EEOC claimed that CVS’s five-page, single-spaced agreement and the following provisions were so broad and unclear to a reasonable employee that they deterred the filing of charges and interfered with employees’ ability to communicate directly with the agency and its partner agencies or to cooperate in an EEOC investigation. The agreement included the following provisions:

*General Release of Claims:* Requiring employees to release CVS from all claims and lawsuits, including “charges” and “any claim of unlawful discrimination of any kind;”

*No Pending Actions; Covenant Not to Sue:* Requiring employees to confirm that they have no pending complaints or lawsuits in any court or agency and agree not to file “any action, lawsuit, complaint or proceeding” asserting the claims released in the agreement;

*Cooperation:* Requiring employees to notify CVS of a legal proceeding, including an administrative investigation, by any investigator, attorney, or third party;

*Non-Disparagement:* Prohibiting employees from making disparaging statements about CVS and its officers, directors, or employees; and

---

The remaining count of the complaint involved actual retaliation by the employer against the employee for her filing of a charge with the EEOC. Complaint at 11, *College-America, supra*.

115. Complaint, *CVS Pharmacy, Inc., supra* note 7, at 2.

116. *Id.*

117. *Id.* at 2–4.

118. *Id.* at 4 (“The preceding paragraph entitled ‘No Pending Actions; Covenant Not to Sue’ contains a single qualifying sentence that is not repeated anywhere else in the Agreement (though the other limitations are contained in separate paragraphs), noting that ‘[n]othing in this paragraph is intended to or shall interfere with Employee’s right to participate in a proceeding with any appropriate federal, state or local government agency enforcing discrimination laws, nor shall this Agreement prohibit Employee from cooperating with any such agency in its investigation.’”).

*Non-Disclosure of Confidential Information: Prohibiting employees from disclosing confidential information without written authorization.*<sup>119</sup>

Neither CVS's use of a severance agreement nor the severance agreement itself were particularly unusual.<sup>120</sup> Employers routinely enter into such agreements when an employee leaves the company.<sup>121</sup> Severance agreements help eliminate potential employment disputes by obtaining a release of claims in exchange for extending departing employees benefits and additional unearned income.<sup>122</sup> Consequently, the EEOC's challenge of CVS's rather standard severance agreement raises a number of concerns for employers.<sup>123</sup>

First, if successful, the EEOC's challenge would establish that merely offering a severance agreement, even one including *Kodak*-like waiver language, and without an underlying claim of discrimination or retaliation, could violate Title VII.<sup>124</sup> Second, the EEOC's deliberate decision to avoid normal enforcement procedures and forego "informal methods of conference, conciliation, and persuasion" under section 706<sup>125</sup> prior to filing suit is a huge expansion of agency power.<sup>126</sup> Third, as potential Title VII defendants, employers fear that the EEOC, if successful, will use this newly developed statutory power to bring pattern or practice suits whenever it considers an employer policy or practice objectionable, even if the employer otherwise complies with anti-discrimination law.<sup>127</sup> As a result, employers may have to defend costly claims in lengthy litigation.<sup>128</sup>

Unlike *Baker & Taylor*, CVS was unwilling to accede to the EEOC's demands and instead challenged the Commission's novel "pattern or practice of resistance" theory, moving to dismiss it on both substantive and procedural grounds.<sup>129</sup> In October 2014, the district court granted CVS's motion for summary judgment<sup>130</sup> and summarily re-

119. *Id.* at 1–5.

120. Brief of the Retail Litigation Center, Inc. and the Chamber of Commerce of the United States of America as Amici Curiae in Support of CVS Pharmacy, Inc. and Affirmance at 5, *EEOC v. CVS Pharmacy, Inc.*, 70 F. Supp. 3d 937 (N.D. Ill. 2014) (No. 1:14-cv-00863).

121. *Id.*

122. *Id.* at 2.

123. *Id.* at 6.

124. *Id.* at 16.

125. 42 U.S.C. § 2000e-5(b) (2012).

126. Brief of the Retail Litigation Center, *supra* note 121, at 14–16.

127. *Id.* at 7.

128. *Id.* at 22.

129. Memorandum in Support of Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment at 8–20, *EEOC v. CVS Pharmacy, Inc.*, 70 F. Supp. 3d 937 (N.D. Ill. 2014) (No. 1:14-cv-00863).

130. *CVS Pharmacy*, 70 F. Supp. 3d at 938.

jected the substantive aspect of the Commission's new theory.<sup>131</sup> The court held that a section 707(a) violation requires an underlying discriminatory or retaliatory action.<sup>132</sup> The court noted: "EEOC attempts to expand the meaning of the term 'resistance' in § 707(a) beyond acts of discrimination and retaliation . . . . Simply put, the term 'resistance' is encompassed by the antiretaliation and discrimination provisions and requires some retaliatory or discriminatory act."<sup>133</sup> Additionally, the court recognized that "even if the Separation Agreement explicitly banned filing charges, those provisions would be unenforceable and could not constitute resistance to the Act."<sup>134</sup>

The court then discussed the procedural flaws of the EEOC's "pattern or practice of resistance" theory.<sup>135</sup> Specifically, the court found the EEOC lacked statutory authority to bypass section 706 and bring an action directly to court.<sup>136</sup> It concluded that the agency's authority under section 707(a) must "be exercised in accordance with the procedures set forth in section 706(b), which includes efforts to conciliate with the respondent prior to the institution of suit."<sup>137</sup>

The EEOC appealed the district court's decision to the Seventh Circuit.<sup>138</sup> On appeal, the EEOC argued that section 707(a) of Title VII authorizes it to bring actions challenging patterns or practices of resistance to statutory rights regardless of whether they independently violate Title VII.<sup>139</sup> The agency maintained that the pre-suit procedures of section 706 are not applicable to section 707(a) pattern or practice actions, and there is no statutory obligation for pre-suit conciliation.<sup>140</sup>

On December 17, 2015, a Seventh Circuit panel unanimously affirmed the district court's decision.<sup>141</sup> The court rejected the EEOC's section 707(a) claim, dismissing it as an overly broad statutory interpretation:

Section 707(a) does not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes—it simply allows the EEOC to pursue multiple violations

---

131. *Id.* at 939–40 nn.2 & 3.

132. *Id.* at 939 n.2.

133. *Id.*

134. EEOC v. CVS Pharmacy, Inc., 70 F. Supp. 3d 937, 940 n.3 (N.D. Ill. 2014).

135. *Id.* at 940–42.

136. *Id.* at 942.

137. *Id.* (quoting EEOC v. United Air Lines, Inc., No. 73 C 972, 1975 WL 194, at \*2 (N.D. Ill. June 26, 1975). The court also pointed to the EEOC's own regulations in support of its conclusion. *Id.*

138. EEOC v. CVS Pharmacy, Inc., 809 F.3d 335 (7th Cir. 2015).

139. Opening Brief of the Equal Employment Opportunity Commission as Appellant at 13, EEOC v. CVS Pharmacy, Inc., 809 F.3d 335 (7th Cir. 2015) (No. 14-3653).

140. *Id.* at 13–14, 37–38 (EEOC claimed it was challenging a "pattern or practice of resistance" under section 707(a), which is different from challenging a "pattern or practice of unlawful employment discrimination" under section 707(e)).

141. *CVS Pharmacy*, 809 F.3d at 336.

of Title VII (i.e., unlawful employment practices involving discrimination or retaliation defined in Sections 703 and 704) in one consolidated proceeding.<sup>142</sup>

The panel reasoned that because the EEOC did not allege that CVS had engaged in either illicit discrimination or retaliation by offering the severance agreement, the agency lacked an actionable claim.<sup>143</sup> It added that, even if it had agreed with the EEOC's arguments about the breadth of its powers under section 707(a), "the EEOC's claim would still fail because the Agreement makes clear that it does not obstruct the signatory's ability to file a charge with the EEOC."<sup>144</sup> The panel also rejected the EEOC's interpretation of section 707(a) as authorization to bypass conciliation under section 706.<sup>145</sup> Citing congressional intent and the EEOC's own regulations, the panel affirmed the district court's finding that the EEOC was required first to attempt informal methods to address the charge as prescribed by section 706.<sup>146</sup>

In January 2016, the EEOC petitioned the Seventh Circuit for a rehearing by the panel or en banc.<sup>147</sup> In its request for rehearing, the EEOC asserted that the panel erred in holding that the EEOC is bound in all cases by the procedural requirements of section 706<sup>148</sup> and that the panel misinterpreted section 707's "resistance" language.<sup>149</sup> The EEOC's final argument in support of its request for rehearing is most noteworthy:

In recent years, the EEOC and other commentators have taken note of the widespread practice of including unenforceable, yet chilling, anti-charge filing and anti-cooperation provisions in employment

---

142. *Id.* at 341 (citing Council 31, Am. Fed'n of State, Cty. & Mun. Emps. v. Ward, 978 F.2d 373, 378 (7th Cir. 1992), and Parisi v. Goldman Sachs & Co., 710 F.3d 483, 487 (2d Cir. 2013) (under Title VII, pattern or practice is a method of proving discrimination, not a freestanding cause of action)).

143. *Id.*

144. *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335, 341 n.4 (7th Cir. 2015).

145. *Id.* at 342.

146. *Id.* ("Nowhere in the EEOC's comprehensive regulations is there any statement suggesting that suits may [be] brought under Section 707(a) without conciliation or an allegation of discrimination." (alteration in original)). By rejecting the EEOC's assertion that it could forego other means of dispute resolution, such as conciliation, before pursuing civil action, the circuit court affirmed the statutory mandate, contemplating EEOC litigation as a last resort.

147. Petition of the Equal Employment Opportunity Commission for Rehearing or Rehearing En Banc, *CVS Pharmacy*, 809 F.3d 335 (No. 14-3653).

148. *Id.* at 4–10. The EEOC argued that the panel's holding that the EEOC must have a charge to proceed in a lawsuit directly conflicts with decisions of the Fifth, Sixth, Ninth, and Tenth Circuits. The EEOC also asserted that the panel exceeded its authority by going beyond clarification of the district court's ruling. *Id.*

149. *Id.* at 11–15. ("Section 707(a) allows the EEOC to challenge 'resistance to the full enjoyment of any of the rights secured by Title VII.' . . . This is *exactly* the nature of the present suit, which challenges a practice that threatens its (former) employees' rights to be free from retaliation for filing a charge or otherwise cooperating with the EEOC . . .").

contracts. . . . These provisions strike at the lifeblood of the EEOC by giving charging parties and witnesses a strong disincentive to come forward with allegations, or cooperate by providing even simple information about discrimination. The panel's opinion in this case leaves the EEOC with *no* mechanism under either § 706 or § 707 for challenging an unenforceable waiver of the right to file a charge or cooperate with the agency, no matter how explicit the waiver or how routine the employer's use of such provisions. It is both legally erroneous and profoundly contrary to the public interest the EEOC enforces.<sup>150</sup>

In response, CVS took direct aim at the Commission's claim that the panel's holding leaves it with no recourse against contract provisions banning agency cooperation. CVS pointed to *Cosmair*<sup>151</sup> and *Astra*,<sup>152</sup> which provide the EEOC with "ample tools that the agency may use to address this concern."<sup>153</sup> CVS also argued that the EEOC already had Title VII authority to enjoin anti-cooperation provisions that interfere with EEOC investigations.<sup>154</sup> CVS asserted that intentional attempts to prevent employees from cooperating with the EEOC could result in criminal obstruction-of-justice charges.<sup>155</sup> Lastly, CVS discussed the policy consequences of EEOC's expansive section 707 theory, observing that following the agency's logic, the agency could "challenge any employer policy it believes to be 'bad' . . . ."<sup>156</sup> As CVS pointed out, the agency could challenge any release of Title VII claims based on a concern that employees would be disinclined to file charges if they will not be entitled to personal relief.<sup>157</sup> On March 9, 2016, the Seventh Circuit denied without comment the EEOC's request for a rehearing en banc.<sup>158</sup>

## Conclusion

CVS is the latest example of the EEOC's failed attempts to outlaw waiver provisions the agency views as interfering with employees' rights under the employment discrimination statutes or as impeding the agency's investigative and enforcement efforts. It is a clear setback for the EEOC's new pattern or practice of resistance theory. Nonethe-

---

150. *Id.* at 15 (internal citations omitted).

151. *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1090 (5th Cir. 1987).

152. *EEOC v. Astra USA, Inc.*, 94 F.3d 738, 745–47 (1st Cir. 1996).

153. Response Brief of Defendant-Appellee CVS Pharmacy, Inc. at 34–35, *CVS Pharmacy*, 809 F.3d 335 (No. 14-3653).

154. *Id.* at 35 ("§ 706(f)(2) of Title VII authorizes the EEOC to seek 'temporary or preliminary relief' during an investigation").

155. *Id.* at 44. CVS also argued that if a former employee was "misled by an overbroad severance agreement and as a result did not file a timely EEOC charge," that may "warrant equitable tolling of Title VII's charge-filing period." *Id.* at 35 n.3.

156. *Id.* at 35–36.

157. *Id.* at 36.

158. Order, *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335 (7th Cir. Mar. 9, 2016) (No. 14-3653).

less, the Commission is unlikely to abandon its challenge to waiver provisions as long as preserving access to the legal system remains a top EEOC priority.<sup>159</sup> In fact, the agency used the same “pattern or practice of resistance theory” to challenge a Florida employer’s use of a mandatory arbitration agreement in its employment application, and the agency’s complaint survived a motion to dismiss.<sup>160</sup> The EEOC continues to act as an agent of change because, whether it wins or loses individual cases, its persistence and pursuit of high profile cases will ultimately persuade employers to include more specific and limited language, often abrogating employers’ rights, in severance agreements. The issue for those who believe in Title VII’s balance so clearly articulated in *CVS* is whether the EEOC’s pursuit of its expansionary goals serves all parties—employees, employers, and the public interest.

---

159. See U.S. EQUAL EMP’T OPPORTUNITY COMM’N STRATEGIC ENFORCEMENT PLAN FY 2017-2021, *supra* note 13 at 8. Note, however, that the Commission approved the SEP for FY 2017-2021 prior to the 2016 presidential Election. The Commission can vote to revise the SEP for FY 2017-2021 at any time.

160. See Opinion and Order, *EEOC v. Doherty Enters., Inc.*, No. 9:14-cv-81184-KAM (S.D. Fla. Sept. 1, 2015). The EEOC asserted that by conditioning employment on its applicants signing an arbitration agreement prohibiting EEOC charges, Doherty Enterprises, Inc. had engaged in a pattern or practice of resistance to the full enjoyment of rights secured by Title VII, in violation of section 707(a). *Id.* at 2. Doherty moved to dismiss asserting that the EEOC lacked standing to sue in the absence of an underlying discrimination charge, lacked authority to sue because the EEOC failed to engage in good faith conciliation, and failed to allege unlawful discrimination or retaliation under Title VII. *Id.* The court denied Doherty’s motion to dismiss. *Id.* at 13.

# Does Title VII Preempt State Fair Pay Laws?

Allan G. King\*

## Introduction

Several states amended their equal pay laws, effective in 2016, intending to eliminate, or at least reduce, the gender pay gap.<sup>1</sup> California<sup>2</sup> and New York<sup>3</sup> statutes go well beyond requirements of the federal Equal Pay Act (EPA)<sup>4</sup> and Civil Rights Act.<sup>5</sup> California's statute earned the distinction as "one of the toughest pay equity laws in the nation."<sup>6</sup> Not to be outdone, Massachusetts also will ease plaintiffs' burden in proving unequal pay and prohibit employers from asking applicants about their pay with prior employers.<sup>7</sup> This Article questions whether federal law preempts state legislation that requires employers to eliminate gender differences in pay that (1) do not violate Title VII or the EPA or (2) provide remedies in excess of those prescribed by federal law. In other words, do employers violate federal law by raising the pay of either men or women because of their gender, to comply with state law, when no federal law violation requires such remediation?<sup>8</sup> Indeed, under such circumstances, do state-mandated gender-conscious pay adjustments violate Title VII?

As explained below, state fair pay laws generally require equal pay for employees performing jobs requiring *comparable* skill, effort, and responsibility,<sup>9</sup> while the EPA requires equal pay in jobs requiring *equal* skill, effort, and responsibility.<sup>10</sup> Title VII plaintiffs must demon-

---

\* Mr. King is a shareholder in Littler Mendelson, P.C.'s Austin, Texas office. He co-chairs the firm's class action practice group.

1. See, e.g., S.B. 358, 2015–2016 Reg. Sess. (Cal. 2015); Act of Oct. 21, 2015, ch. 362, 2015 N.Y. Laws.

2. Cal. S.B. 358.

3. Ch. 362, 2015 N.Y. Laws.

4. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2012).

5. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012).

6. Patrick McGreevy & Chris Megerian, *Equal Pay for Women Gets a Boost: New State Law Offers Stronger Protections, But Some See a Reason for Businesses to Flee*, L.A. TIMES, Oct. 7, 2015, at 1, 2015 WLNR 29685734.

7. An Act to Establish Pay Equity, ch. 177, 2016 Mass. Laws (effective 2018).

8. Compare Cal. S.B. 358, § 2 (requiring equal pay for "substantially similar work"), with 42 U.S.C. § 2000e-2(a)(1) (2012) (prohibiting discrimination in compensation on the basis of sex), and 29 U.S.C. § 206(d)(1) (2012) (requiring equal pay for "equal work").

9. See, e.g., ch. 177, § 2, 2016 Mass. Laws (emphasis added).

10. 29 U.S.C. § 206(d)(1) (2012) (emphasis added).

strate intentional discrimination to prove that pay differences are motivated by a protected characteristic.<sup>11</sup> Employees alleging disparate impact must identify the policy or practice causing the alleged disparity and prove that it affects men or women disproportionately. Proof of a disparate impact triggers the employer's obligation to demonstrate the practice is job-related and consistent with business necessity.<sup>12</sup> State fair pay laws do not require an employee to identify any discriminatory policy. Proving a gender pay difference among employees in similar jobs is sufficient to shift the burden of persuasion to the employer.<sup>13</sup> As a consequence, tensions arise between state laws insisting on equal pay and federal laws, such as Title VII, that require only equal treatment.<sup>14</sup>

The Supreme Court has had to reconcile the tension between laws mandating equal treatment and those requiring equal outcomes at least twice. In *County of Washington v. Gunther*,<sup>15</sup> the Court attempted to reconcile the EPA's prohibition of gender pay differences in jobs requiring equal skill, effort, and responsibility with Title VII's general prohibition against disparate treatment.<sup>16</sup> Recognizing its duty to harmonize these federal statutes, the Court held that Title VII did not incorporate the EPA's limitations on equal pay requirements. Rather, it merely incorporated the EPA's four affirmative defenses<sup>17</sup> to sex-based wage discrimination claims.<sup>18</sup> Thus, the Court rejected limitations the EPA might otherwise have placed on the scope of Title VII liability.<sup>19</sup>

Next, the Supreme Court considered the tension between Title VII's prohibitions of disparate treatment and disparate impact.<sup>20</sup> Disparate impact addresses facially fair practices that disproportionately affect protected employees.<sup>21</sup> For example, a test may be administered fairly and

11. 42 U.S.C. § 2000e-2(a)(1) (2012).

12. 42 U.S.C. § 2000e-2(k) (2012).

13. See, e.g., Cal. S.B. 358, § 2.

14. See, e.g., 42 U.S.C. § 2000e-2(a)(1).

15. 452 U.S. 161 (1981).

16. *Id.* at 166 n.8 (“The sole issue we decide is whether respondents’ failure to satisfy the equal work standard of the Equal Pay Act in itself precludes their proceeding under Title VII.”).

17. The EPA allows gender pay disparities if they result from (1) a seniority system, (2) a merit system, (3) a system that measures earnings by quantity or quality of production, or (4) a differential based on any other factor other than sex. *Id.* at 161.

18. *Id.* at 170–71; see also *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1260 n.5 (7th Cir. 1985) (citations omitted) (“Title VII and the Equal Pay Act are to be construed ‘in harmony,’ . . . even though Title VII requires a showing of discriminatory intent while the Equal Pay Act creates a type of strict liability in that no intent to discriminate need be shown . . . . [T]he four statutory defenses available under the Equal Pay Act also serve as valid defenses to a claim based on Title VII . . . .”).

19. *Gunther*, 452 U.S. at 170–71.

20. *Ricci v. DeStefano*, 557 U.S. 557, 563 (2009).

21. *Id.* at 577–78.

scored the same for all test-takers, but that test may violate Title VII if it adversely impacts a protected group and the employer cannot prove job relatedness and business necessity.<sup>22</sup>

In *Ricci v. DeStefano*,<sup>23</sup> a municipality administered a test, which African American candidates failed disproportionately, to firefighter candidates.<sup>24</sup> The city believed that if it promoted the successful candidates, it would face a lawsuit alleging disparate impact.<sup>25</sup> On the other hand, denying promotion to white candidates who passed the test risked liability for disparate treatment.<sup>26</sup> The Court recognized the need to reconcile these competing concerns and announced that race-conscious decisions were lawful under Title VII only if there was a “strong basis in evidence” that, by failing to act, the employer would be exposed to Title VII disparate-impact liability.<sup>27</sup>

These cases illustrate how the Supreme Court has strained to reconcile the potentially conflicting requirements of federal statutes. State statutes do not require the Court to engage in the same legal gymnastics because they are preempted if they conflict with federal law.<sup>28</sup> Indeed, Title VII preempts state laws that require or permit an employer to act in ways that violate its terms.<sup>29</sup> For example, an employer cannot justify a disparate impact by contending it was complying with state law.<sup>30</sup> Accordingly, whether Title VII preempts a state’s statute depends on how its terms square with Title VII and whether any differences require or permit an employer to violate the federal law.<sup>31</sup>

To begin, consider the differences between Title VII and the California Fair Pay Act (CFPA)<sup>32</sup>:

The CFPA prohibits gender pay differences even in the absence of intent or disparate impact.<sup>33</sup> Title VII prohibits wage differences re-

22. See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012); *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

23. 557 U.S. 557 (2009).

24. *Id.* at 562.

25. *Id.*

26. *Id.*

27. *Id.* at 583.

28. *Compare Townsend v. Quasim*, 328 F.3d 511, 523 (9th Cir. 2003) (“Whenever two federal statutes may be in tension or conflict, we are required to reconcile the two statutes.”), with *Murphy v. Dulay*, 768 F.3d 1360, 1367 (11th Cir. 2014) (“If Congress’s intent is clear, courts should not strain to find ways to reconcile federal law with seemingly conflicting state law. [A] court need look no further than the ordinary meaning of federal law, and should not distort federal law to accommodate conflicting state law.”) (quotation marks and citations omitted).

29. 42 U.S.C. § 2000e-7 (2012); cf. *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 282–84 (1987) (Title VII preempts only inconsistent state law).

30. See *Guardians Ass’n of the N.Y.C. Police Dep’t, Inc. v. Civil Serv. Comm’n of N.Y.*, 630 F.2d 79, 104–05 (2d Cir. 1980) (job testing resulted in unlawful disparate impact).

31. See *Guerra*, 479 U.S. at 292.

32. S.B. 358, 2015–2016 Reg. Sess. (Cal. 2015).

33. *Id.* § 2.

sulting either from intentional discrimination or a facially neutral policy causing a disparate impact.<sup>34</sup>

The CFPA prohibits paying employees less than employees of the opposite sex performing work that is “substantially similar . . . when viewed as a composite of skill, effort, and responsibility . . . .”<sup>35</sup> Title VII does not require equalizing pay based on such a composite, and the doctrine of “comparable worth” is inconsistent with Title VII.<sup>36</sup> The CFPA imposes a heightened “business necessity” defense on employers and does not require plaintiffs to identify a facially neutral policy or prove causation.<sup>37</sup> Title VII imposes those burdens only after a plaintiff makes a prima facie demonstration of disparate impact.<sup>38</sup>

The CFPA defines a business necessity as “an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve.”<sup>39</sup> Title VII defines a business necessity as “job related for the position in question.”<sup>40</sup>

The CFPA permits an employer to prevail if the gender-related pay difference reflects a bona fide factor, but unless bona fide factors “account for the entire wage differential,” the employer is liable for the entire wage differential.<sup>41</sup> Under Title VII, an employer is liable only for the unexplained residual pay difference.<sup>42</sup>

The New York Fair Pay Act (NYFPA)<sup>43</sup> limits comparisons to jobs requiring “equal skill, effort and responsibility.”<sup>44</sup> This is the same as the federal EPA,<sup>45</sup> but New York requires employers to prove that gender pay differences within such jobs are based on job-related factors and consistent with business necessity.<sup>46</sup> The Massachusetts Equal

34. 42 U.S.C. § 2000e-2.

35. Cal. S.B. 358, § 2.

36. *See* *Loyd v. Phillips Bros., Inc.*, 25 F.3d 518, 525 n.6 (7th Cir. 1994).

[T]he *McDonnell Douglas* burden-shifting scheme does not import well into an area where wage discrimination claims are based on pay differences between dissimilar jobs. The approach would inject into the liability analysis notions of comparable worth which, under prevailing statutory conditions, have been banished from our jurisprudence. A Title VII wage-discrimination plaintiff comparing wage rates in dissimilar jobs retains at all times the burden of convincing the fact finder, without resort to shifting burdens or similar procedural devices, that her employer intended to suppress her wages on account of her sex (or other protected characteristic).

*Id.*

37. Cal. S.B. 358, § 2.

38. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

39. Cal. S.B. 358, § 2.

40. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

41. Cal. S.B. 358, § 2.

42. 42 U.S.C. § 2000e-2(k)(1)(B)(ii).

43. Act of Oct. 21, 2015, ch. 362, 2015 N.Y. Laws.

44. *Id.* § 1.

45. 29 U.S.C. § 206(d)(1) (2012).

46. Ch. 362, § 1, 2015 N.Y. Laws.

Pay Act (MEPA)<sup>47</sup> prohibits gender differences in pay between employees performing “comparable work,” defined as “work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions . . . .”<sup>48</sup> However, Massachusetts explicitly recognizes only education, training, or experience as legitimate distinctions among employees performing such work.<sup>49</sup> This excludes consideration of job performance and other qualitative differences among employees deemed legitimate under Title VII.<sup>50</sup> Are these and similar provisions of other state equal pay laws “inconsistent” with Title VII and therefore preempted?<sup>51</sup>

Part I of this Article provides background on preemption of state law by federal statutes such as Title VII. Part II highlights the provisions of equal pay statutes in California, New York, and Massachusetts. Part III explains how, with only limited exceptions, Title VII prohibits preferences for protected groups. Finally, Parts IV, V, and VI argue that in light of this prohibition, Title VII preempts the equal pay statutes in California, New York, and Massachusetts, respectively.

## I. Title VII Preemption

The Supreme Court recognizes three ways in which federal legislation may preempt a state statute.<sup>52</sup> In each instance, the challenge is to determine the scope of Congress’s intent to preempt.<sup>53</sup> First, Congress may expressly preempt state law.<sup>54</sup> Second, preemption may be inferred when Congress enacts a comprehensive regulatory scheme that leaves no room for state action regarding the same subject matter.<sup>55</sup> Third, federal preemption occurs if a state statute imposes requirements “inconsistent” with federal law or stands as an obstacle to accomplishing Congress’s purposes.<sup>56</sup> Only the third principle applies to Title VII.<sup>57</sup>

Title VII preempts state law if the state statute imposes conflicting obligations on employers.<sup>58</sup> Section 708 of Title VII, as codified, provides:

---

47. An Act to Establish Pay Equity, ch. 177, 2016 Mass. Laws.

48. *Id.* § 2.

49. *Id.*

50. 42 U.S.C. § 2000e-2(h) (2012).

51. *See* Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 282–84 (1987) (Title VII preempts inconsistent state law).

52. *Id.* at 280–81.

53. *Id.* at 280.

54. *Id.*

55. *Id.* at 280–81.

56. Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 281 (1987).

57. *Id.*

58. *Id.*

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.<sup>59</sup>

Accordingly, an employer may not raise a state statute as a defense to conduct that violates Title VII.<sup>60</sup> Nor may an employer defend on the basis that its conduct, while not mandatory, was permitted by state law.<sup>61</sup> The question is not whether an employer's action was imposed by the state or adopted voluntarily, but whether it violates Title VII.<sup>62</sup> Therefore, determining whether Title VII preempts state law requires understanding what those laws require and whether an employer violates Title VII by complying with state laws.<sup>63</sup>

## II. Fair Pay Laws of California, New York, and Massachusetts<sup>64</sup>

### A. California Fair Pay Act

The CFPA is the most sweeping of the recent state fair pay statutes.<sup>65</sup> Section 1 of the Act recites its underlying factual findings.<sup>66</sup> It notes that in 2014, “[a] woman working full time year round earned an average of 84 cents to every dollar a man earned.”<sup>67</sup> The legislature estimated that, in the aggregate, “women working full time in California lose approximately \$33,650,294,544 each year due to the gender wage gap.”<sup>68</sup> The legislature concluded that “[t]o eliminate the gender wage gap in California, the state’s equal pay provisions and laws regarding wage disclosures must be improved.”<sup>69</sup>

59. 42 U.S.C. § 2000e-7 (2012).

60. *See, e.g.*, *Gulino v. N.Y. State Educ. Dep’t*, 460 F.3d 361, 380 (2d Cir. 2006) (“[T]he mandates of state law are no defense to Title VII liability.”).

61. *See* *Guardians Ass’n of the N.Y.C. Police Dep’t, Inc. v. Civil Serv. Comm’n of N.Y.*, 630 F.2d 79, 105 (2d Cir. 1980).

62. *See* 42 U.S.C. § 2000e-7.

63. As an example, a state statute that required employers to pay African Americans 10% less than whites obviously would violate Title VII and therefore would be unenforceable. Similarly, a law that required increasing the pay of female employees, but not male employees, by 10% would violate Title VII. *Cf. Smith v. Va. Commonwealth Univ.*, 84 F.3d 672, 675–76 (4th Cir. 1996) (en banc).

64. On May 19, 2016, Maryland passed the Equal Pay for Equal Work Act, effective October 1, 2016. The Act prohibits gender or “gender identity” pay differences among employees performing “work of comparable character or work on the same operation, in the same business, or of the same type.” MD. CODE ANN., LAB. & EMPL. § 3-304 (West 2016).

65. *See* S.B. 358, 2015–2016 Reg. Sess. (Cal. 2015). McGreevy & Megerian, *supra* note 6.

66. Cal. S.B. 358, § 1.

67. *Id.* § 1(a).

68. *Id.* § 1(b).

69. *Id.* § 1(e).

The CFPA prohibits an employer from paying “any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions . . . .”<sup>70</sup> This prohibition is subject to enumerated affirmative defenses.<sup>71</sup> Pertinent to this discussion is the defense requiring proof of “[a] bona fide factor other than sex, such as education, training or experience.”<sup>72</sup> The employer must “demonstrate[] that the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity.”<sup>73</sup> This business necessity must be “an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve.”<sup>74</sup>

### *B. New York Fair Pay Act*

The NYFPA prohibits paying an employee “at a rate less than the rate at which an employee of the opposite sex in the same establishment is paid for equal work . . . which requires equal skill, effort and responsibility, and which is performed under similar working conditions . . . .”<sup>75</sup> This law too provides a defense based upon

a bona fide factor other than sex, such as education, training, or experience. Such factor: (i) shall not be based upon or derived from a sex-based differential in compensation and (ii) shall be job-related with respect to the position in question and shall be consistent with business necessity. Such exception under this paragraph shall not apply when the employee demonstrates (A) that an employer uses a particular employment practice that causes a disparate impact on the basis of sex, (B) that an alternative employment practice exists that would serve the same business purpose and not produce such differential, and (C) that the employer has refused to adopt such alternative practice.<sup>76</sup>

### *C. Massachusetts Equal Pay Act*

The MEPA also requires employers to pay male and female employees equally for comparable work:

No employer shall discriminate in any way on the basis of gender in the payment of wages, or pay any person in its employ a salary or wage rate less than the rates paid to its employees of a different gender for comparable work; provided, however, that variations in wages shall not be prohibited if based upon: (i) a system that rewards seniority with the employer; provided, however, that time spent on

---

70. *Id.* § 2.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. Act of Oct. 21, 2015, ch. 362, § 1, 2015 N.Y. Laws.

76. *Id.*

leave due to a pregnancy-related condition and protected parental, family and medical leave, shall not reduce seniority; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production, sales, or revenue; (iv) the geographic location in which a job is performed; (v) education, training or experience to the extent such factors are reasonably related to the particular job in question; or (vi) travel, if the travel is a regular and necessary condition of the particular job.<sup>77</sup>

Seemingly, under MEPA, only these enumerated exceptions are sufficiently job related to justify gender pay differences between men and women performing comparable work.<sup>78</sup> Thus, it would appear that even if the market values comparable jobs differently, a Massachusetts employer would have to pay men and women in those jobs equally.<sup>79</sup> Similarly, paying men and women differently based upon scores on a valid employment test seemingly would violate the statute.<sup>80</sup>

Thus, in the absence of proof of disparate impact, both California and New York require employers to prove a business necessity defense.<sup>81</sup> Massachusetts limits the neutral considerations that are subject to that proof.<sup>82</sup> Yet, under Title VII, the burden of proof remains at all times with the employee to prove disparate treatment,<sup>83</sup> and only upon proof of disparate impact does the burden of proving business necessity shift to the employer.<sup>84</sup>

### III. Title VII's Broad Prohibition of Preferences for Protected Groups

#### A. *An Employer May Favor Protected Groups to Correct a "Manifest Imbalance" in Its Workforce*

Section 703(a) of Title VII, as codified, provides:

It shall be an unlawful employment practice for an employer—

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

---

77. An Act to Establish Pay Equity, ch. 177, § 2, 2016 Mass. Laws.

78. *Id.*

79. *But see* Am. Fed'n of State, Cty., & Mun. Emps., 770 F.2d 1401, 1407 (9th Cir. 1985) ("Neither law nor logic deems the free market system a suspect enterprise.").

80. *But see* Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (discussing validity of job-related criteria).

81. S.B. 358, 2015–2016 Reg. Sess. § 2 (Cal. 2015); Act of Oct. 21, 2015, ch. 362, § 1, 2015 N.Y. Laws.

82. An Act to Establish Pay Equity, ch. 177, § 2, 2016 Mass. Laws.

83. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) ("[T]he Title VII plaintiff at all times bears the 'ultimate burden of persuasion.'").

84. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>85</sup>

In *United Steelworkers v. Weber*,<sup>86</sup> the Supreme Court ruled that private, voluntary affirmative action plans are excepted from these prohibitions.<sup>87</sup> The Court held that an employer may adopt an affirmative action policy favoring a protected group, provided its purpose is to correct a manifest imbalance in its workforce and remains in effect no longer than necessary to achieve that goal.<sup>88</sup>

In *Johnson v. Transportation Agency*,<sup>89</sup> the Supreme Court applied this reasoning to gender imbalances in public sector jobs.<sup>90</sup> The Court first clarified the parties' respective burdens of proof:

Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid.<sup>91</sup>

The Court then assessed the particular affirmative action plan.<sup>92</sup> "The first issue is therefore whether consideration of the sex of applicants for [defendant's] jobs was justified by the existence of a 'manifest imbalance' that reflected underrepresentation of women in 'traditionally segregated job categories.'"<sup>93</sup> The Court further stated:

The requirement that the "manifest imbalance" relate to a "traditionally segregated job category" provides assurance both that sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination, and that the interests of those employees not benefiting from the plan will not be unduly infringed."<sup>94</sup>

The Court found the plan met this requirement: "The promotion [of a female] thus satisfies the first requirement enunciated in

---

85. 42 U.S.C. § 2000e-2(a).

86. 443 U.S. 193 (1979).

87. *Id.* at 208.

88. *Id.*

89. 480 U.S. 616 (1987).

90. *Id.* at 619.

91. *Id.* at 626.

92. *Id.* at 631-40.

93. *Id.* at 631 (alteration in original) (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 197 (1979)).

94. *Johnson v. Transp. Agency*, 480 U.S. 616, 632 (1987).

Weber, since it was undertaken to further an affirmative action plan designed to eliminate Agency work force imbalances in traditionally segregated job categories.”<sup>95</sup>

The Court next addressed “whether the [affirmative action plan] unnecessarily trammelled the rights of male employees or created an absolute bar to their advancement.”<sup>96</sup> Of particular importance was whether the plan was designed to attain, rather than maintain, specified goals:

This is necessary both to minimize the effect of the program on other employees, and to ensure that the plan’s goals “[are] not being used simply to achieve and maintain . . . balance, but rather as a benchmark against which” the employer may measure its progress in eliminating the underrepresentation of minorities and women. In this case, however, substantial evidence shows that the Agency has sought to take a moderate, gradual approach to eliminating the imbalance in its work force, one which establishes realistic guidance for employment decisions, and which visits minimal intrusion on the legitimate expectations of other employees.<sup>97</sup>

The Court concluded that the plan was designed to correct a manifest imbalance and unlikely to trammel the rights of other employees. According to the Court, “[s]uch a plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace.”<sup>98</sup>

### B. *Title VII Generally Prohibits Preferences Toward Protected Groups*

However, there are limits to an employer’s ability to favor protected groups. Appellate courts in the Third, Fourth, Eighth, and Ninth Circuits have explored those limits. In *Taxman v. Board of Education*,<sup>99</sup> the Third Circuit held, en banc, that, “[g]iven the clear anti-discrimination mandate of Title VII, a non-remedial affirmative action plan, even one with a laudable purpose, cannot pass muster.”<sup>100</sup> The court questioned “whether Title VII permits an employer with a racially balanced work force to grant a non-remedial racial preference in order to promote ‘racial diversity.’”<sup>101</sup>

In *Taxman*, a school board decided to lay off teachers for budgetary reasons.<sup>102</sup> It had to choose between two teachers it acknowledged were

95. *Id.* at 637 (alteration in original).

96. *Id.* at 637–38 (alteration in original).

97. *Id.* at 640 (quoting *Local 28, Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421, 477–78 (1986)).

98. *Id.* at 642.

99. 91 F.3d 1547 (3d Cir. 1996) (en banc).

100. *Id.* at 1550.

101. *Id.* at 1549–50.

102. *Id.* at 1551.

equally qualified in all material respects.<sup>103</sup> However, one was black and one was white.<sup>104</sup> The school board, relying on its affirmative action plan, retained the black teacher to increase its faculty's racial diversity.<sup>105</sup>

The court ruled against the school board, finding its goal of racial diversity did not correspond to the approved objective of remedying historic racial imbalance:

[I]t is beyond cavil that the Board, by invoking its affirmative action policy to lay off Sharon Taxman, violated the terms of Title VII. While the Court in *Weber* and *Johnson* permitted some deviation from the antidiscrimination mandate of the statute in order to erase the effects of past discrimination, these rulings do not open the door to additional non-remedial deviations. Here, as in *Weber* and *Johnson*, the Board must justify its deviation from the statutory mandate based on positive legislative history, not on its idea of what is appropriate.<sup>106</sup>

In addition, the court found the Board's diversity goals were, rather than a temporary benchmark, "an established fixture of unlimited duration, to be resurrected from time to time whenever the Board believes that the ratio between Blacks and Whites in any Piscataway School is skewed. On this basis alone, the policy contravenes *Weber's* teaching."<sup>107</sup>

### C. Title VII Limits Employers' Ability to Use Affirmative Action Plans

The question addressed by the Fourth Circuit was the viability of a defense predicated on pursuing gender pay equity. In *Smith v. Virginia Commonwealth University*,<sup>108</sup> the university awarded pay increases to female faculty based on a pay equity study performed to determine whether female faculty were fairly compensated.<sup>109</sup> It appointed a Salary Equity Study Committee to conduct the study.<sup>110</sup> Key to the committee's findings was a multiple regression analysis—a statistical technique common in Title VII litigation—which enables researchers to control for a number of nondiscriminatory considerations to determine whether **any remaining** pay differences are related to gender.<sup>111</sup> "The VCU study controlled for such differences as doctoral degree, academic rank, tenure status, number of years of VCU experience, and number of years of prior academic experience.

---

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 1558.

107. *Id.* at 1564.

108. *Smith v. Va. Commonwealth Univ.*, 84 F.3d 672 (4th Cir. 1996) (en banc).

109. *Id.* at 674.

110. *Id.*

111. *Id.*

Any difference in salary after controlling for these factors was attributed to sex.”<sup>112</sup> The committee analyzed two years of salary data. In the first year, it found a gender difference of \$1,354; in the second year, the difference was \$1,982.<sup>113</sup>

Based on those estimates, the university set aside more than \$440,000 for female faculty members, who could apply for a portion of this fund.<sup>114</sup> Of the 201 eligible women, 172 applied, and each received payment. Additionally, all women who requested a review received an increase in salary.<sup>115</sup> A group of male professors sued the university, alleging that the pay increases constituted gender discrimination.<sup>116</sup>

The district court recognized that expressly advantaging female professors was lawful only if the university acted in accordance with an affirmative action plan that satisfied *Weber* and *Johnson*.<sup>117</sup> However, those cases addressed manifest disparities in employment in particular jobs.<sup>118</sup> In contrast, the university’s plan focused on pay differences.<sup>119</sup> The district court first determined that the appropriate parallel to the manifest imbalances in employment evaluated in *Weber* and *Johnson* was a statistically significant gender pay disparity, such as the one found by the regression analysis of the Study Committee.<sup>120</sup> Accordingly, the district court granted summary judgment in favor of the university, finding its affirmative action plan consistent with *Weber* and *Johnson*.<sup>121</sup>

The Fourth Circuit, hearing the case en banc, issued four separate opinions.<sup>122</sup> The majority and dissent disagreed primarily on the probative value of the university’s statistical proof.<sup>123</sup> Because plaintiffs have the burden of proving the invalidity of the affirmative action plan, the issue was whether the plaintiffs raised a genuine issue of material fact regarding whether the university’s plan failed the *Weber* test.<sup>124</sup> The answer turned on the soundness of the foundation for gender-conscious remedial payments.<sup>125</sup> If regressions lack validity,

112. *Id.*

113. *Id.*

114. *Id.* at 675.

115. *Id.*

116. *Id.* at 674.

117. *Id.* at 676.

118. *See Johnson v. Transp. Agency*, 480 U.S. 616, 634 (1987); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 198 (1979).

119. *Smith*, 84 F.3d at 674.

120. *Smith v. Va. Commonwealth Univ.*, 856 F. Supp. 1088, 1093 (E.D. Va. 1994), *rev’d*, 84 F.3d 672 (4th Cir. 1996) (en banc).

121. *Smith*, 856 F. Supp. at 1093–95.

122. *Smith*, 84 F.3d at 674, 677–91.

123. *See id.* at 674, 684.

124. *Id.* at 676.

125. *Smith v. Va. Commonwealth Univ.*, 856 F. Supp. 1088, 1093 (E.D. Va. 1994), *rev’d*, 84 F.3d 672, 676 (4th Cir. 1996).

raising the pay of female faculty in conformity with the study must be of questionable legality.<sup>126</sup>

The plaintiffs' experts asserted that, because the regression analysis omitted any measure of a faculty member's performance or previous status as a university administrator, the regression estimates were unreliable.<sup>127</sup> If included, these omissions potentially reconciled the pay differences between men and women.<sup>128</sup> A plurality of the court agreed:

Most importantly is the study's failure to account for the performance factors. [*Bazemore v. Friday*, 478 U.S. 385 (1986)] and common sense require that any multiple regression analysis used to determine pay disparity must include all the major factors on which pay is determined. The very factors (performance, productivity, and merit) that VCU admittedly considered in determining prior pay increases were left out of the study.<sup>129</sup>

In addition, the plurality observed the "study also failed to measure the amount of time actually spent in teaching as opposed to the lapse of time since the professor began teaching. Once again, the effect of these issues on the validity of the study is a question of material fact."<sup>130</sup>

Thus, the Fourth Circuit reversed the district court, finding the plaintiffs created an issue of material fact regarding the validity of the regression analysis on which the university's affirmative action was premised.<sup>131</sup>

Judge Wilkins' concurrence questioned whether the amounts paid to female professors exceeded the remedy required to redress a manifest imbalance.<sup>132</sup>

Because the salary equity fund was calculated by multiplying the average difference in pay attributed to gender in the VCU study by the number of women faculty members included in the study pool, plus fringe benefits . . . evidence permitting a jury to conclude that the average pay difference attributable to gender was smaller than that shown by the VCU study is sufficient to raise a genuine issue of material fact concerning whether the salary equity pool was larger than necessary to remedy the differential properly attributed to gender.<sup>133</sup>

---

126. *Smith*, 84 F.3d at 675–76.

127. *Id.* at 675.

128. *Id.*

129. *Id.* at 676 (alteration in original).

130. *Id.* at 677.

131. *Id.* ("Given the number of important variables omitted from the multiple regression analysis, and the evidence presented by the appellants that these variables are crucial, a dispute of material fact remains as to the validity of the study to establish manifest imbalance.")

132. *Smith*, 84 F.3d at 678–81 (Wilkins, J., concurring).

133. *Id.* at 680.

If the difference in pay attributable to gender was overstated, VCU's affirmative action plan may have unnecessarily trammled the interests of male faculty members by awarding unjustifiable salary increases to women.<sup>134</sup>

Male faculty also challenged an affirmative action plan of the University of Minnesota that made payments exclusively to female employees.<sup>135</sup> The plan was mandated by a consent decree that resolved previous litigation, creating a fund of \$3 million to be distributed to female class members and requiring female faculty to receive an across-the-board raise of three percent.<sup>136</sup> Male faculty members sued, contending these payments violated their Title VII rights because no pay difference required remediation.<sup>137</sup>

As in the previously discussed cases, the university relied on a multiple regression analysis.<sup>138</sup> As in the other university cases, the regression results depended on which variables were included in the analysis.<sup>139</sup> The district court observed:

The two [statistical] reports raise significant questions about the proper variables, the appropriate groups to include in an analysis, the theory of statistical analysis, appropriate sample size and many other matters. It is uncertain whether plaintiffs' statistical analysis and other evidence would, in fact, establish an illegal disparity between men's and women's salaries. It is also uncertain whether the University's statistical analysis and other evidence would, in fact, establish that there is no illegal salary discrepancy between men and women at the University of Minnesota.<sup>140</sup>

As a result, the Eighth Circuit found a fact issue regarding the existence of a manifest imbalance and reversed summary judgment for the university.<sup>141</sup>

The Ninth Circuit considered an affirmative action plan adopted by Northern Arizona University.<sup>142</sup> The parties stipulated the existence of a "manifest imbalance" in pay between male and female faculty, leaving the court to consider whether the amounts paid to female faculty exceeded what was required to remedy the pay disparity.<sup>143</sup> The university's pay adjustments, like those at VCU, were based on statistical comparisons.<sup>144</sup>

134. *Id.*

135. *Maitland v. Univ. of Minn.*, 155 F.3d 1013, 1015 (8th Cir. 1998).

136. *Id.*

137. *Id.* at 1016.

138. *Id.*

139. *Id.* at 1016–17.

140. *Id.* at 1018.

141. *Id.*

142. *Rudebusch v. Hughes*, 313 F.3d 506, 510 (9th Cir. 2002).

143. *Id.*

144. *Id.* at 511.

Based on this [regression] analysis, the Chambers' report concluded that there were "statistical differences in gender and ethnic equity" which could be removed with \$278,966 in adjustments. The report ultimately recommended various adjustments for 72% of the female faculty. A majority of the adjustments were in the \$1,001 to \$3,000 per year range. The amount of each adjustment depended on how far an individual's salary fell below the predicted salary of a similarly situated white male professor. Those women who were at or above this predicted salary received no adjustment.<sup>145</sup>

The university's president requested additional regressions and ultimately created a fund of \$207,617 to increase the pay of female and minority faculty.<sup>146</sup>

Male professors contended that pay adjustments to female faculty violated Title VII.<sup>147</sup> Because a jury found a manifest imbalance in pay according to gender and the plaintiffs waived the issue on appeal, the Ninth Circuit only considered the same question that troubled Judge Wilkins: whether the amounts awarded to female faculty "may have impermissibly gone beyond 'attaining a balance' in making its adjustments."<sup>148</sup> "Thus, the real question is not whether [the plaintiffs] should have been brought up to the mean, but whether using the predicted salary of similarly situated . . . male faculty for the minority and female adjustments somehow overcompensated these minority and women faculty members, i.e., whether the adjustments were more than remedial."<sup>149</sup> The appellate court remanded to the district court to make that determination.<sup>150</sup>

The Supreme Court recognized an additional exception to Title VII's general rule against expressly favoring one racial group over another in *Ricci v. DeStefano*.<sup>151</sup> In *Ricci*, the City of New Haven perceived a dilemma: if it certified the results of a test of firefighters applying for promotion to lieutenant or captain, the city could be challenged under disparate impact theory because of racial disparities in pass rates.<sup>152</sup> On the other hand, disregarding test scores, because they adversely affected African Americans, could be characterized as disparate treatment of white firefighters who passed the exam, potentially subjecting the city to liability on those grounds.<sup>153</sup> The city opted to disregard the test, and white firefighters with scores qualifying them for promotion sued under Title VII.<sup>154</sup>

---

145. *Id.* at 512 (alteration in original).

146. *Id.*

147. *Rudebusch v. Hughes*, 313 F.3d 506, 510, 513 (9th Cir. 2002).

148. *Id.* at 523.

149. *Id.* (alteration in original).

150. *Id.* at 524.

151. 557 U.S. 557, 581–83 (2009).

152. *Id.* at 563–74.

153. *Id.*

154. *Id.* at 562–63.

The Supreme Court acknowledged the conflict,<sup>155</sup> but recognized that

[a]llowing employers to violate the disparate-treatment prohibition based on a mere good-faith fear of disparate-impact liability would encourage race-based action at the slightest hint of disparate impact . . . . Even worse, an employer could discard test results (or other employment practices) with the intent of obtaining the employer's preferred racial balance. That operational principle could not be justified, for Title VII is express in disclaiming any interpretation of its requirements as calling for outright racial balancing.<sup>156</sup>

Accordingly, the Court announced a rule requiring a defendant to establish a "strong basis in evidence" that it would suffer disparate impact liability unless it engaged in race-conscious decisionmaking.<sup>157</sup> "Applying the strong-basis-in-evidence standard to Title VII gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other only in certain narrow circumstances."<sup>158</sup>

The City of New Haven contended that the racial disparity in test scores constituted a strong basis in evidence permitting race-conscious decisionmaking.<sup>159</sup> The Supreme Court disagreed. The Court considered not only the *prima facie* evidence of disparate impact, but the evidence available to defend affirmatively against that claim.<sup>160</sup>

[T]he City could be liable for disparate-impact discrimination only if the examinations were not job related and consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt. We conclude there is no strong basis in evidence to establish that the test was deficient in either of these respects.<sup>161</sup>

The Court reversed the Second Circuit and ruled in favor of the white firefighters.<sup>162</sup>

These cases demonstrate that employers may engage in race or gender-conscious decisionmaking only in the narrowest of circumstances.<sup>163</sup> An affirmative action plan provides a defense only if adopted

---

155. *Id.* at 580 ("We consider, therefore, whether the purpose to avoid disparate-impact liability excuses what otherwise would be prohibited disparate-treatment discrimination.").

156. *Id.* at 581–82.

157. *Id.* at 563.

158. *Id.* at 583.

159. *Id.* at 585.

160. *Id.* at 586–87.

161. *Id.* at 587.

162. *Id.* at 593.

163. *See id.*; *Rudebusch v. Hughes*, 313 F.3d 506, 510 (9th Cir. 2002); *Smith v. Va. Commonwealth Univ.*, 84 F.3d 672 (4th Cir. 1996) (en banc); *Taxman v. Bd. of Educ.*, 91 F.3d 1547 (3d Cir. 1996); *Maitland v. Univ. of Minn.*, 155 F.3d 1013, 1015 (8th Cir. 1998).

to remedy a manifest imbalance in its workforce.<sup>164</sup> When the focus is pay disparity, courts of appeals require proof that pay differences are statistically significant, according to analyses that incorporate all salient aspects of employee qualifications and performance.<sup>165</sup> Furthermore, the affirmative action plan must not needlessly trammel the rights of others.<sup>166</sup> The plan must focus on attaining, rather than maintaining, parity and, where pay is concerned, may compensate victims of long-standing discrimination no more than necessary to remedy that disadvantage.<sup>167</sup> We next consider whether the “equal pay” statutes of California and New York satisfy these standards.

#### IV. Is the California Fair Pay Act Inconsistent with Title VII?

##### A. *Hypothetical: Suppose an Employer Acts to Avoid CFPA Liability*

Consider a California employer that finds employees in Job A, all of whom are female, are paid less than employees in Job B, all of whom are male. Although the employer regards these jobs as distinct, they may be “substantially similar” under the CFPA, if the composite of skill, effort, and responsibility Jobs A and B require seem reasonably alike. Jobs A and B have similar working conditions. Fearing liability under the CFPA, the employer increases Job A’s pay by five percent, which benefits female employees only. The employer’s Job B employees, all male, sue under Title VII, contending this gender-conscious practice denied them the same pay increase received by female employees. Can the employer prevail if it defends on the ground that its actions were mandated by the CFPA?<sup>168</sup>

It is fundamental that an employer cannot successfully defend a Title VII claim by showing that state law mandated its actions.<sup>169</sup> Unlike the City of New Haven, which found itself between conflicting requirements of federal law, this defense places the California law in opposition to Title VII. Because federal law is supreme,<sup>170</sup> the employer’s

---

164. See, e.g., *Smith*, 84 F.3d at 672.

165. See, e.g., *Maitland*, 155 F.3d at 1013.

166. See, e.g., *Rudebusch*, 313 F.3d at 506.

167. See, e.g., *Smith*, 84 F.3d at 672.

168. Consider a similar hypothetical: Assume the same facts but an employer does nothing to eliminate this pay differential. Female employees sue, and the employer defends, contending that the court may not require raising the pay of females in Job A, but not males in Job B, because to do so would violate Title VII. Can the employer avoid liability under the CFPA?

169. See *Guardians Ass’n of the N.Y. City Police Dep’t, Inc. v. Civil Serv. Comm’n*, 630 F.2d 79, 104–05 (2d Cir. 1980).

170. Indeed, one of the goals of Title VII was to eliminate state-mandated Jim Crow laws. “Epstein writes that in 1964 ‘Title VII was heaven sent,’ and that ‘the Civil Rights Act of 1964 played an enormous role in the advancement of black economic interests by knocking out Jim Crow restrictions.’” John J. Donahue, *REVIEW ESSAYS*:

defense must show that payments to women required by the state statute are consistent with Title VII.<sup>171</sup>

Title VII provides two exceptions to the general requirement of non-discrimination.<sup>172</sup> First, an employer may prove that, unless it increased the pay of female employees, it would have been liable under Title VII as well as under the CFPA.<sup>173</sup> Essentially, the employer must concede that the previous pay disparity was unlawful under Title VII and it was merely complying with federal law by raising the pay of female employees.<sup>174</sup> Second, the employer could acknowledge that increasing only women's pay was discriminatory, but prove the increase necessary to correct the manifest imbalance in pay identified by the California Legislature.<sup>175</sup> The employer then could claim its remedial action was permissible under *Weber*.<sup>176</sup>

The problem with the first defense is that the CFPA makes illegal pay disparities that do not violate Title VII.<sup>177</sup> Were the CFPA merely coextensive with Title VII, the California statute would be redundant and no "tougher" than laws already in place.<sup>178</sup> However, the legislative and decisional history of Title VII indicates the gender-pay comparisons permitted by Title VII are far narrower than the comparison among "composites" contemplated by the CFPA.<sup>179</sup>

In *County of Washington v. Gunther*,<sup>180</sup> the Supreme Court addressed the breadth of gender-pay comparisons properly within the scope of Title VII.<sup>181</sup> Although the Court held that Title VII permitted broader comparisons—protecting female employees in jobs with no male colleagues to whom to compare their pay—it limited the scope of those comparisons.<sup>182</sup>

We emphasize at the outset the narrowness of the question before us in this case. Respondents' claim is not based on the controversial concept of "comparable worth," under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community. Rather, respondents seek to prove, by direct evidence, that their wages were depressed because of intentional

---

*Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1593 (1992). RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992).

171. See generally *Ricci v. DeStefano*, 557 U.S. 557 (2009).

172. See 42 U.S.C. § 2000e-2(h) (2012).

173. See 42 U.S.C. § 2000e-2(h).

174. See 42 U.S.C. § 2000e-2(h).

175. See 42 U.S.C. § 2000e-2(h).

176. 443 U.S. 193, 197 (1979).

177. See S.B. 358, 2015–2016 Reg. Sess. (Cal. 2015).

178. McGreevy & Megerian, *supra* note 6, at 1.

179. Cal. S.B. 358, § 2.

180. 452 U.S. 161 (1981).

181. *Id.* at 170–71.

182. See *id.* at 161.

sex discrimination, consisting of setting the wage scale for female guards, but not for male guards, at a level lower than its own survey of outside markets and the worth of the jobs warranted.<sup>183</sup>

Seemingly in anticipation of the CFPA, the Court recognized the difficulty of comparing jobs' composite characteristics.<sup>184</sup> The Court addressed the fears of employers that allowing compensation suits outside of the Equal Pay Act limitations would place "the pay structure of virtually every employer and the entire economy . . . at risk and subject to scrutiny by the federal courts" because "Title VII plaintiffs could draw any type of comparison imaginable concerning job duties and pay between any job predominantly performed by women and any job predominantly performed by men."<sup>185</sup> The Court responded that claims that called for such comparisons are "manifestly different" from the claims in *Gunther*.<sup>186</sup> The plaintiffs' suit did "not require a court to make its own subjective assessment of the value of male and female guard jobs, or to attempt by statistical technique or other method to quantify the effect of sex discrimination on the wage rates."<sup>187</sup> Thus, the Court indicated that its analysis would not apply unless there was direct evidence of intentional discrimination or the violation was "blatant[.]"<sup>188</sup>

Accordingly, the employer that responds to the pay difference between Jobs A and B by raising women's pay may remedy a violation of the CFPA but violate the Title VII rights of its male employees. But that is not the only way the CPFA exposes an employer to Title VII liability.

*Ricci* explains that an employer that makes gender-conscious decisions must consider the strength of its arguments if it wishes to defend its actions as based on a reasonable fear of litigation.<sup>189</sup> For example, suppose the hypothetical employer articulates a legitimate, nondiscriminatory reason for paying employees in Job A less than Job B. Unless the female employees are able to prove this reason is pretextual, the employer may lawfully maintain the pay differential under Title VII.<sup>190</sup> In contrast, the CFPA prohibits the employer from maintaining that pay difference unless it proves a business necessity.<sup>191</sup>

There is no need to parse the distinction between a "legitimate, nondiscriminatory reason" under Title VII and a "business necessity"

---

183. *Id.* at 166.

184. *Id.* at 180–81.

185. *Cty. of Wash. v. Gunther*, 452 U.S. 161, 180 (1981).

186. *Id.*

187. *Id.* at 181.

188. *Id.* at 179.

189. *Ricci v. DeStefano*, 557 U.S. 557, 581–84 (2009).

190. *See Cty. of Wash. v. Gunther*, 452 U.S. 161, 179 (1981).

191. S.B. 358, 2015–2016 Reg. Sess. § 2 (Cal. 2015).

under the CFPA to recognize that if the former places the burden of proof on the plaintiff, and the latter on the employer, there will be pay differences for which the employer would escape liability under Title VII but not under the CFPA.<sup>192</sup> Yet *Ricci* dictates that gender-conscious decisionmaking violates federal law absent a strong basis in evidence of a Title VII offense.<sup>193</sup> Thus, to the extent the CFPA requires employers to close gender pay gaps lawful under Title VII, it is inconsistent with federal law.<sup>194</sup>

*B. Did the California Legislature Find a Manifest Imbalance in Pay?*

As characterized by its preamble, the CFPA is remedial legislation.<sup>195</sup> The Legislature noted the historic and persistent disadvantage of female employees in California and stated its goal to reduce or eliminate the gender-based wage gap.<sup>196</sup> The CFPA therefore could be viewed as a state-wide affirmative action plan, intended to remedy pay disparity disfavoring a traditionally disadvantaged minority—the state’s female labor force.<sup>197</sup> The question is whether its affirmative action goal saves the gender-conscious decisions it requires from otherwise violating Title VII.

*Johnson*, *Weber*, and appellate decisions discussed previously that a prerequisite to a lawful affirmative action program is a manifest imbalance in an employer’s workforce.<sup>198</sup> When an affirmative action plan seeks to remediate differences in compensation, the employer must establish it is responding to significant differences in pay based upon statistical analyses that include all relevant, nondiscriminatory determinants.<sup>199</sup> In the line of university cases considered, the universities failed conclusively to establish their regression analyses met that threshold.<sup>200</sup>

The California Legislature, in the preamble to the CFPA, noted female employees in California earned an average of 84 percent of what male employees were paid. Latinas earned just 44 percent of what white males were paid.<sup>201</sup> Collectively, women working full-

192. *Id.*

193. *Ricci*, 557 U.S. at 581–84.

194. *See generally* Cal. S.B. 358, § 2; 42 U.S.C. § 2000e-2 (2012).

195. Cal. S.B. 358, § 2.

196. *Id.*

197. *See id.*

198. *Johnson v. Transp. Agency*, 480 U.S. 616, 631 (1987); *United Steelworkers v. Weber*, 443 U.S. 193, 197 (1979).

199. *Rudebusch v. Hughes*, 313 F.3d 506, 528 (9th Cir. 2002) (“A regression of salaries in a university setting that doesn’t include doctorate, merit, or performance as variables is like a regression study that predicts shoe size from weight without considering foot size.”).

200. *See Johnson*, 480 U.S. at 631; *Weber*, 443 U.S. at 197.

201. Cal. S.B. 358.

time lost \$33.6 billion annually because of the gender gap.<sup>202</sup> But the Legislature failed to indicate the source of these data or provide sufficient information from which to determine if these pay comparisons control for all meaningful variables, or any at all.<sup>203</sup>

One authoritative source on the earnings of California employees is the American Community Survey (ACS).<sup>204</sup> The ACS is a nationwide survey of three million addresses conducted by the Bureau of the Census.<sup>205</sup> It provides annual data regarding demographic, social, economic, and housing characteristics of the population.<sup>206</sup> The 2014 ACS estimates for California reported the median earnings (\$50,748) for male full-time, year-round civilian employees over age sixteen.<sup>207</sup> The comparable group of female employees had median earnings of \$42,704.<sup>208</sup> The ratio of female to male median earnings was 84.1 percent—the same figure cited in the CFPA’s preamble.<sup>209</sup> The median pay of white, non-Hispanic males in California over age sixteen working full-time, year-round in 2014 was \$70,765.<sup>210</sup> The median pay of Hispanic or Latina females with similar work experience in 2014 was \$29,173.<sup>211</sup> The ratio of the earnings of these females to this group of males is 41.2 percent.<sup>212</sup> The figure cited in the CFPA is 44 percent.<sup>213</sup>

Although the ACS may not have been the source relied upon by the California Legislature, results from that survey are close enough to make the following point: the gender wage gap reported in the CFPA fails to compare employees similarly situated on a host of meaningful characteristics, such as education, field of specialization, industry of employment, occupation, years of workforce experience, or inter-

202. *Id.* § 1(a).

203. *See id.*

204. U.S. CENSUS BUREAU, <http://www.census.gov/programs-surveys/acs/> (last visited Oct. 18, 2016).

205. *See id.*

206. *Id.*

207. American FactFinder, *Industry by Sex and Median Earnings in the Past 12 Months (in 2014 Inflation-Adjusted Dollars) for the Full-Time Year-Round Civilian Employed Population 16 Years and Over*, U.S. CENSUS BUREAU (Sept. 9, 2016), [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_14\\_1YR\\_S2404&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_1YR_S2404&prodType=table).

208. *Id.*

209. *Id.*; S.B. 358, 2015–2016 Reg. Sess. § 1(a) (Cal. 2015).

210. American FactFinder, *Median Earnings in the Past 12 Months (in 2014 Inflation-Adjusted Dollars) by Sex by Work Experience in the Past 12 Months for the Population 16 Years and Over with Earnings in the Past 12 Months (White Alone, Not Hispanic or Latino)*, U.S. CENSUS BUREAU (Sept. 22, 2016), [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_14\\_1YR\\_B20017H&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_1YR_B20017H&prodType=table).

211. American FactFinder, *Median Earnings in the Past 12 Months (in 2014 Inflation-Adjusted Dollars) by Sex by Work Experience in the Past 12 Months for the Population 16 Years and Over with Earnings in the Past 12 Months (Hispanic or Latino)*, U.S. CENSUS BUREAU (Feb. 12, 2017), [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_15\\_5YR\\_B20017I&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_5YR_B20017I&prodType=table).

212. *Compare id.*, with American FactFinder, *supra* note 211.

213. Cal. S.B. 358, § 1(a).

ruption of labor force experience.<sup>214</sup> Consequently, under Title VII's standards for whether a pay differential is sufficiently manifest to justify affirmative action, these comparisons are wholly inadequate.<sup>215</sup>

Recall that Virginia Commonwealth University was faulted for relying on gender pay comparisons that failed to account for differences in past administrative duties as well as performance.<sup>216</sup> The Fourth Circuit found these omissions material, although the pay comparisons pertained to college professors, a group already highly stratified, who constitute less than one percent of the workforce.<sup>217</sup> The CFPA, by contrast, pertains to the state's entire workforce, except for those under sixteen and those not working full-time, year-round.<sup>218</sup> No court has suggested that such broad comparisons raise a fact question regarding a manifest imbalance.<sup>219</sup> Of course, more granular comparisons, based on a more comprehensive set of variables, might find statistically significant differences in pay.<sup>220</sup> However, in the absence of such studies, there is no evidence the statute remedies a manifest pay imbalance.

Finally, the California statute imposes the same remedy on all employers, even those with no history of any imbalance.<sup>221</sup> Start-up companies, which by definition have no history of any imbalance, must comply with the statute from the day they open.<sup>222</sup> Employers with a history of paying women as much or more than men are also subject to the CFPA's requirements and could face suits by male employees paid less than their female counterparts.<sup>223</sup> The statute purportedly is justified as a remedy for disparities adverse to women, which would not support raising the pay of underpaid males.<sup>224</sup> Accordingly, the CFPA is not properly characterized as legislation designed to remedy a manifest imbalance in pay, as the term is defined by the Supreme Court.<sup>225</sup>

---

214. See generally *Gender Pay Gap: Recent Trends and Explanations*, COUNCIL OF ECON. ADVISERS ISSUE BRIEF (2015) (discussing importance of these considerations in understanding the gender wage gap).

215. See generally Cal. S.B. 358; American FactFinder, *supra* note 207.

216. *Smith v. Va. Commonwealth Univ.*, 84 F.3d 672, 677 (4th Cir. 1996).

217. *Id.* at 676–77.

218. See Cal. S.B. 358, § 1(a).

219. See, e.g., *Smith*, 84 F.3d at 677.

220. See generally *Gender Pay Gap: Recent Trends and Explanations*, *supra* note 214.

221. Cal. S.B. 358, § 1(a).

222. *Id.*

223. *Id.*

224. *Id.* § 1.

225. Compare Cal. S.B. 358, § 1(a), with *Johnson v. Transp. Agency*, 480 U.S. 616, 631 (1987).

C. *Do the Remedies Provided by the CFPA Unnecessarily Trammel the Rights of Other Employees?*

The Supreme Court evaluates affirmative action plans by asking whether the prescribed remedies are temporary and designed to attain, rather than maintain, equality.<sup>226</sup> In addition, the Court considers whether the plan's remedy is greater than necessary to achieve its stated goal.<sup>227</sup> The CFPA fails these criteria as well.<sup>228</sup> The Legislature has not limited the duration of the statute nor has it specified criteria that will trigger the statute's expiration.<sup>229</sup> Rather, the CFPA remains the law unless it is amended or repealed.<sup>230</sup>

In addition, it appears likely the CFPA will overcompensate those whose pay is less than employees of the opposite sex performing substantially similar work.<sup>231</sup> Although the CFPA permits an employer to demonstrate that "bona fide factors" account for the pay disparity, unless they "account for the entire wage differential," the employer appears liable for that entire differential, not just the fraction discriminatory under Title VII.<sup>232</sup>

For example, suppose female Employee A is paid 10 percent less than male Employee B, who performs substantially similar work. Employee B, however, has five years more experience than A, which the employer contends accounts for the entire 10 percent pay difference. Suppose the evidence at trial establishes "experience" indeed is a business necessity under the CFPA, but the employer actually rewards experience at the rate of 1 percent per year. In other words, employees who differ in experience by five years should differ in pay by only 5 percent, yet Employees A and B differ by 10 percent. Although the "discriminatory" component of the pay gender pay gap is 5 percent, the CFPA would award Employee A the entire 10 percent differential, only half of which is "remedial."<sup>233</sup> Accordingly, by Judge Wilkins' criterion, the damages provision of the CFPA would overcompensate plaintiffs for the portion of the pay gap attributable to gender.<sup>234</sup>

---

226. *Johnson*, 480 U.S. at 639.

227. *Id.* at 637–38 (affirmative action plan may not unnecessarily trammel the majority's rights).

228. Cal. S.B. 358, § 1(a).

229. *Id.*

230. *Id.*

231. See *Smith v. Va. Commonwealth Univ.*, 84 F.3d 672, 680 (1996) (Wilkins, J., concurring) ("If the difference in pay attributable to gender was overstated, the question is raised whether VCU's affirmative action plan unnecessarily trammelled the interests of male faculty members by awarding unjustifiable salary increases only to female faculty members.").

232. Cal. S.B. 358, § 1(a).

233. *Id.*

234. *Smith*, 84 F.3d at 680 (Wilkins, J., concurring); see also *Rudebusch v. Hughes*, 313 F.3d 506, 523 (9th Cir. 2002) ("Thus, the real question is not whether Rudebusch should have been brought up to the mean, but whether using the predicted salary of similarly situated white male faculty for the minority and female adjustments somehow

## V. Title VII and the New York Fair Pay Act

The New York Fair Pay Act draws comparisons between employees more narrowly than the California statute.<sup>235</sup> It limits comparisons to male and female employees whose work is equal, rather than “substantially similar,” in terms of skill, effort, and responsibility.<sup>236</sup> Equal skill, effort, and responsibility also are the touchstone of the federal Equal Pay Act.<sup>237</sup> Like the EPA and the CFPA, the NYFPA specifies four affirmative defenses to a claim of an unlawful gender pay disparity.<sup>238</sup> However, the NYFPA substitutes California’s “bona fide factor other than sex” for “a factor other than sex,”<sup>239</sup> which is one of the EPA’s affirmative defenses.<sup>240</sup> In New York, the burden of proof is on the employer to show a business necessity, which it defines as “a factor that bears a manifest relationship to the employment in question.”<sup>241</sup>

This is also Title VII’s definition of business necessity.<sup>242</sup> However, Title VII imposes that burden only if the plaintiff first identifies a facially neutral practice and demonstrates that practice caused an adverse impact.<sup>243</sup> Under federal law, if a plaintiff instead proves an employer engaged in intentional discrimination, the burden of proof never shifts to the employer and the employer merely needs to articulate a legitimate, non-discriminatory reason for the pay difference.<sup>244</sup> In other words, the NYFPA departs from both the EPA and Title VII by burdening the employer with proving a business necessity defense in response to a plaintiff’s proof of a mere pay difference.<sup>245</sup> As a consequence, an employer that could successfully defend a Title VII claim of pay discrimination may be required by the NYFPA to increase an employee’s pay because it is unable to prove business necessity.<sup>246</sup>

*Ricci* again provides a helpful analogy. Recall that New Haven contended it was required to engage in race-conscious decisionmaking because it would otherwise be subject to Title VII disparate impact liability.<sup>247</sup> Although acknowledging that disparate impact and disparate

---

overcompensated these minority and women faculty members, i.e., whether the adjustments were more than remedial.”).

235. Compare Act of Oct. 21, 2015, ch. 362, § 1, 2015 N.Y. Laws, with Cal. S.B. 358.

236. Ch. 362, § 1, 2015 N.Y. Laws.

237. 29 U.S.C. § 206(d) (2012).

238. 29 U.S.C. § 206(d); Cal. S.B. 358, § 2; Ch. 362, § 1, 2015 N.Y. Laws.

239. Ch. 362, § 1.1(d), 2015 N.Y. Laws.

240. 29 U.S.C. § 206(d)(1)(iv) (2012).

241. Ch. 362, § 1, 2015 N.Y. Laws.

242. See generally 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

243. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012).

244. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 806–07 (1973) (criticizing the Eighth Circuit for applying disparate impact framework of *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), to decide a disparate treatment case).

245. Compare Ch. 362, § 1(1)(d), 2015 N.Y. Laws, with 29 U.S.C. § 206(d) and *McDonnell Douglas*, 411 U.S. at 802.

246. 42 U.S.C. § 2000e-2(k)(1)(A)(i); Ch. 362, § 1(1)(d), 2015 N.Y. Laws.

247. *Ricci v. DeStefano*, 557 U.S. 557, 575 (2009).

treatment liability potentially impose conflicting obligations, the Court found the city misperceived the risk of a disparate impact suit by failing to recognize the strength of its affirmative defense based on the test's validity.<sup>248</sup> Accordingly, there was not a "strong basis in evidence" for the city's fear of disparate impact discrimination and its insubstantial concern did not mitigate its liability for intentional discrimination.<sup>249</sup>

The NYFPA places employers in a similar position.<sup>250</sup> It mandates equal pay between employees whose pay disparity would be legitimate under Title VII.<sup>251</sup> If a female paid less than a male comparator performing equal work sues her employer under Title VII, the employer can prevail by articulating a legitimate, non-discriminatory reason for the differential, assuming the employee cannot not prove pretext.<sup>252</sup> Because such an employer would not reasonably fear Title VII liability, *Ricci* suggests that increasing women's pay in these circumstances invites a reverse discrimination claim.<sup>253</sup> Yet the NYFPA requires a different result—employers that can defend against Title VII liability because they can articulate non-pretextual reasons for a gender pay difference are nevertheless required to raise women's pay unless they also can prove those reasons are a business necessity.<sup>254</sup> Because the NYFPA mandates pay increases to employees to whom the employer has no Title VII liability, complying with the NYFPA would cause employers to violate the Title VII rights of male employees who receive no pay increase due to their gender.<sup>255</sup> Therefore, the NYFPA and federal law are inconsistent in that respect.<sup>256</sup>

## VI. Title VII and the Massachusetts Equal Pay Act

The MEPA also prohibits pay differences that may be lawful under the EPA and Title VII.<sup>257</sup> The MEPA prohibits gender pay differences between employees performing "comparable work;" not work of equal skill, effort, or responsibility.<sup>258</sup> Further, neither Title VII nor the EPA limits the list of neutral policies or practices that provides a defense to liability if proved job-related and consistent with business necessity.<sup>259</sup> In contrast, the Massachusetts statute, on its face, would require employers to compensate employees adversely affected by neutral

---

248. *Id.* at 563.

249. *Id.* at 563, 587.

250. Ch. 362, § 1, 2015 N.Y. Laws.

251. *Id.*; 42 U.S.C. § 2000e-2(k) (2012).

252. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973).

253. *Ricci v. DeStefano*, 557 U.S. 557, 562–63 (2009).

254. Ch. 362, § 1, 2015 N.Y. Laws.

255. *Id.*

256. 42 U.S.C. § 2000e-7.

257. *See* 42 U.S.C. § 2000e-2(k); 29 U.S.C. § 206(d) (2012); An Act to Establish Pay Equity, ch. 177, § 2, 2016 Mass. Laws.

258. Ch. 177, § 2, 2016 Mass. Laws.

259. 42 U.S.C. § 2000e-2(k); 29 U.S.C. § 206(d).

practices other than those specifically enumerated in the state statute.<sup>260</sup> Accordingly, an employer that could defend against a Title VII challenge to a gender pay difference by invoking the affirmative defense of job-relatedness would be required to equalize pay between genders to avoid MEPA liability.<sup>261</sup> Because an employer in this situation acts on the basis of gender in setting pay, compliance with the MEPA would cause it to violate Title VII.<sup>262</sup> That is the test for preemption, which the MEPA fails.<sup>263</sup>

## VII. Does Gender Neutrality of State Statutes Provide a Defense to Title VII Preemption?

The California, New York, and Massachusetts statutes are written in gender-neutral terms, prohibiting pay differences between members of the “opposite sex” or “gender,” regardless of whether the higher paid employee is male or female.<sup>264</sup> Does this facial neutrality insulate these laws from challenge in specific cases because of their discriminatory effect?<sup>265</sup> In any particular case, the issue will be whether the employer paid employees of one sex less than employees of the opposite sex or else acted to benefit employees of one sex without providing equal benefits to employees of the other.<sup>266</sup> In either event, the issue is whether, under the circumstances presented, the plaintiffs are entitled to relief.<sup>267</sup> The symmetry of the statutes merely assures that, were circumstances reversed, these statutes would support the claims of employees of the opposite sex.<sup>268</sup> But two wrongs do not necessarily make a right.<sup>269</sup>

For example, every disparate impact claim involves, by definition, a facially neutral policy.<sup>270</sup> In disparate impact claims, a policy or practice

260. See Ch. 177, § 2, 2016 Mass. Laws.

261. 42 U.S.C. § 2000e-2(k); Ch. 177, § 2, 2016 Mass. Laws.

262. See 42 U.S.C. § 2000e-2(k); Ch. 177, § 2, 2016 Mass. Laws.

263. See 42 U.S.C. § 2000e-2(k); Ch. 177, § 2, 2016 Mass. Laws (the MEPA is also preempted to the extent the statute’s definition of “comparable work” is broader than the categories of jobs Title VII would find comparable).

264. See S.B. 358, 2015–2016 Reg. Sess. § 2 (Cal. 2015) (“An employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex . . . .”); Act of Oct. 21, 2015, ch. 362, § 1, 2015 N.Y. Laws (“No employee shall be paid a wage at a rate less than the rate at which an employee of the opposite sex in the same establishment is paid . . . .”); Ch. 177, § 2, 2016 Mass. Laws (“No employer shall discriminate in any way on the basis of gender . . . .”).

265. See Cal. S.B. 358, § 2; Ch. 362, § 1, 2015 N.Y. Laws; Ch. 177, § 2, 2016 Mass. Laws.

266. See Cal. S.B. 358, § 2; Ch. 362, § 1, 2015 N.Y. Laws; Ch. 177, § 2, 2016 Mass. Laws.

267. See Cal. S.B. 358, § 2; Ch. 362, § 1, 2015 N.Y. Laws; Ch. 177, § 2, 2016 Mass. Laws.

268. See Cal. S.B. 358, § 2; Ch. 362, § 1, 2015 N.Y. Laws; Ch. 177, § 2, 2016 Mass. Laws.

269. See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 563 (2009).

270. 42 U.S.C. § 2000e-2(k)(1)(A) (2012).

is applied even handedly.<sup>271</sup> For example, if the challenged practice is a test, the allegation must be that the answers would be scored the same whether the test taker was male or female.<sup>272</sup> Nevertheless, neutral tests may violate Title VII.<sup>273</sup>

In *Ricci*, the Supreme Court addressed whether the city’s motivation to help a racial minority meant its actions were “unintentionally” discriminatory toward whites, thereby precluding a disparate treatment claim.<sup>274</sup> The Court observed:

Whatever the City’s ultimate aim—however well-intentioned or benevolent it might have seemed—the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white. The question is not whether that conduct was discriminatory but whether the City had a lawful justification for its race-based action.<sup>275</sup>

Similarly, under fair pay laws in California, New York, and Massachusetts, the claim inevitably will be that members of one sex are entitled to more or less pay, but members of the opposite sex are not.<sup>276</sup> In each instance, the answer must turn on whether the basis of liability and the remedy are consistent with Title VII.<sup>277</sup> Whether an employer that raised the pay of women, pursuant to the statute, would have done the same if male employees had been paid less does not change the question of whether, in the particular instance, the employer’s action was gender-based and therefore prohibited by Title VII.<sup>278</sup>

## Conclusion

The recently enacted state fair pay laws are deemed “tough laws” because they require employers to eliminate gender pay differences in circumstances that do not violate Title VII. Yet, *Ricci* explains that predicating employment decisions, even those intended to help a protected group, violates Title VII except under narrowly defined circumstances.<sup>279</sup> Under *Ricci*, if an employer demonstrates a strong eviden-

---

271. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 645–46 (1989) (Under a disparate-impact theory of discrimination, “a facially neutral employment practice may be deemed violative of Title VII without evidence of the employer’s subjective intent to discriminate that is required in a ‘disparate-treatment’ case.”) (superseded by statute on other grounds).

272. *Ricci*, 557 U.S. at 563.

273. *Id.*

274. *Ricci v. DeStefano*, 557 U.S. 557, 565, 575 (2009).

275. *Id.* at 579–80.

276. See generally S.B. 358, 2015–2016 Reg. Sess. § 2 (Cal. 2015); Act of Oct. 21, 2015, ch. 362, § 1, 2015 N.Y. Laws; An Act to Establish Pay Equity, ch. 177, § 2, 2016 Mass. Laws.

277. 42 U.S.C. § 2000e-7 (2012) (state law cannot “purport[] to require or permit the doing of any act which would be an unlawful employment practice” under the federal law).

278. 42 U.S.C. § 2000e-2.

279. *Ricci v. DeStefano*, 557 U.S. 557, 563 (2009).

tiary basis to conclude it likely will be exposed to disparate impact liability under Title VII unless it takes race-conscious actions, it may prevail against a claim of intentional discrimination.<sup>280</sup> *Weber* and *Johnson* provide employers a defense to Title VII intentional discrimination if an affirmative action plan designed to remedy a manifest imbalance in employment does not unnecessarily trammel the rights of other employees.<sup>281</sup> However, the Supreme Court has never excused from Title VII liability an employer that engages in intentional discrimination under color of a state statute. This Article explains how the California Fair Pay Act, the New York Fair Pay Act, and the Massachusetts Equal Pay Act require precisely that.

---

280. *Id.*

281. *Johnson v. Transp. Agency*, 480 U.S. 616, 631 (1987); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 197 (1979).

# Deference to EEOC Rulemaking and Sub-Regulatory Guidance: A Flip of the Coin?

Eric Dreiband\* & Blake Pulliam\*\*

## Introduction

In 1964, Congress created the U.S. Equal Employment Opportunity Commission (EEOC or Commission) and assigned it to enforce Title VII of the Civil Rights Act.<sup>1</sup> In subsequent years, Congress passed the Age Discrimination in Employment Act (ADEA),<sup>2</sup> the Equal Pay Act (EPA),<sup>3</sup> the Americans with Disabilities Act (ADA),<sup>4</sup> and the Genetic Information Nondiscrimination Act (GINA).<sup>5</sup> Congress also designated the EEOC to enforce these laws.<sup>6</sup> In the decades since its creation, the EEOC has promulgated voluminous regulations, interpretive rules, a Compliance Manual,<sup>7</sup> enforcement guidelines,<sup>8</sup> policy statements,<sup>9</sup> discussion letters,<sup>10</sup> and other materials that interpret anti-discrimination statutes. Ideally, this wealth of administrative guidance would provide employers, employees, their counsel, and lower courts with clear rules to interpret these statutes. In practice, this ideal has not been achieved.

---

\* Eric Dreiband is a partner in the Labor and Employment practice at Jones Day's Washington D.C. office and previously served as general counsel of the U.S. Equal Employment Opportunity Commission (EEOC).

\*\* Blake Pulliam is an associate in the Labor and Employment practice at Jones Day's Washington, D.C. office. The views and opinions set forth herein are the personal views or opinions of the authors and do not necessarily reflect views or opinions of Jones Day.

1. 42 U.S.C. § 2000e-12 (2012).

2. 29 U.S.C. §§ 621–634 (2012).

3. 29 U.S.C. § 206(d) (2012).

4. 42 U.S.C. §§ 12101–12213 (2012).

5. 42 U.S.C. § 2000ff (2012).

6. See 29 U.S.C. § 628; 42 U.S.C. § 2000e-12; 42 U.S.C. §§ 12117; Reorg. Plan No. 1, 43 Fed. Reg. 19,807 (Feb. 23, 1978).

7. See *Compliance Manual*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <http://www.eeoc.gov/laws/guidance/compliance.cfm> (last visited Sept. 30, 2016) [hereinafter EEOC Compliance Manual].

8. See *generally Enforcement Guidances and Related Documents*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, [https://www.eeoc.gov/laws/guidance/enforcement\\_guidance.cfm](https://www.eeoc.gov/laws/guidance/enforcement_guidance.cfm) (last visited Sept. 30, 2016) [hereinafter EEOC Enforcement Guidances].

9. See *id.*

10. See *generally Informal Discussion Letters*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/foia/letters/> (last visited Sept. 30, 2016).

There are at least two reasons why administrative guidance has proved confusing for lawyers. First, Congress delegated different degrees of rulemaking authority to the EEOC under each of the anti-discrimination statutes. For example, Title VII limits the EEOC's rulemaking authority to procedural regulations,<sup>11</sup> while the ADEA grants the EEOC both procedural and substantive rulemaking authority.<sup>12</sup>

Second, the Supreme Court's deference to the EEOC's regulations and sub-regulatory guidance has varied. Despite articulating different tiers of deference for different forms of agency guidance, its actual deference ultimately turns on the Court's complex analysis of statutory text, regulatory authority, administrative procedure, and history. As a result, predicting whether the Court will defer to the EEOC in a particular case is like predicting the flip of a coin. Indeed, between 1964 and 1998, the Court deferred to the EEOC's position in 54 percent of cases in which the Court discussed judicial deference.<sup>13</sup>

This Article attempts to shed light on the Court's current approach to EEOC rulemaking and sub-regulatory guidance. Part I reviews the Administrative Procedure Act (APA) and the Court's general approach to administrative deference. Part II examines the EEOC's rulemaking authority under Title VII, the ADEA, ADA, EPA, and GINA and the extent to which the Court has recently deferred to the EEOC under each statute.<sup>14</sup> Part III identifies the practical considerations relevant to arguments for or against judicial deference to EEOC regulatory and sub-regulatory guidance.

## I. The Three Tiers of Deference: *Chevron*, *Auer*, and *Skidmore*

This Part begins with a brief overview of administrative rulemaking procedures and then explores the varying degrees of judicial deference that courts give to agency statutory interpretation.

The APA governs federal agency rulemaking.<sup>15</sup> The APA broadly defines a "rule" to include "statement[s] of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."<sup>16</sup> Most agency rulemaking must follow "notice and comment"

11. 42 U.S.C. § 2000e-12 (2012).

12. 29 U.S.C. § 628 (2012).

13. Theodore Wern, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 OHIO ST. L.J. 1533, 1584 (1999). Wern compared this 54% rate of deference to the EEOC against a 72% rate of deference to all other agencies. *See id.* While this comparison is interesting, it is not statistically valid because the 72% baseline came from a different set of researchers who looked at a different time period (1981–1990). Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 982 (1992).

14. Although a few additional cases have been included, this Article focuses on Supreme Court decisions involving EEOC regulations or sub-regulatory guidance.

15. 5 U.S.C. § 551 (2012).

16. 5 U.S.C. § 551(4) (2012).

procedures.<sup>17</sup> Notice and comment procedures require agencies to (1) give public notice of their proposed rulemaking in the Federal Register; (2) allow the public an opportunity to participate in rulemaking by submitting comments and arguments, with the agency responding to any significant comments; and (3) include a concise statement of the rule's basis and purpose when promulgating a final rule.<sup>18</sup> Regulations promulgated through notice and comment rulemaking are sometimes referred to as "legislative rules" because they carry the "force and effect of law."<sup>19</sup>

However, an agency need not use notice and comment procedures every time it publishes a statutory interpretation. In particular, the APA exempts "interpretative rules, general statements of policy, [and] rules of agency organization, procedure, or practice."<sup>20</sup> Thus, federal agencies sometimes publish interpretive rules as appendices to their legislative rules.<sup>21</sup> Additionally, agencies often publish manuals, policy statements, enforcement guides, and opinion letters providing their interpretations of statutes.<sup>22</sup> Sub-regulatory guidance avoids the administrative burden of notice and comment procedures, but comes at a price because this guidance does not carry the force of law.<sup>23</sup> Still, courts sometimes afford this interpretive guidance persuasive authority or even binding deference.<sup>24</sup>

With this background in administrative procedure established, this analysis turns to the tiers of deference courts afford agency statutory interpretation. Courts typically apply one of three standards, which originated from three cases: (1) *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>25</sup> (2) *Auer v. Robbins*,<sup>26</sup> and (3) *Skidmore v. Swift & Co.*<sup>27</sup>

Of these standards, *Chevron* deference is arguably the best known. *Chevron* uses a two-step process.<sup>28</sup> First, the court must determine, using traditional tools of statutory interpretation, whether the statutory language is ambiguous. If the court finds the language is unambiguous, that meaning controls and the analysis ends.<sup>29</sup> If the language is ambiguous, the court proceeds to step two to determine whether the agency's interpretation is a "permissible" or reasonable

17. See, e.g., *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015).

18. 5 U.S.C. § 553 (2012).

19. See *Perez*, 135 S. Ct. at 1203.

20. 5 U.S.C. § 553(b)(A) (2012).

21. See, e.g., 29 C.F.R. app. pt. 1630 (2015) (interpretive rules for the Americans with Disabilities Act (ADA)).

22. See, e.g., *supra* notes 7–10.

23. *Perez*, 135 S. Ct. at 1204.

24. See *infra* section II.

25. 467 U.S. 837 (1984).

26. 519 U.S. 452 (1997).

27. 323 U.S. 134 (1944).

28. *Chevron*, 467 U.S. at 842–43.

29. *Id.*

one.<sup>30</sup> The court also determines whether the regulation articulates a reasonable explanation for its interpretation since this is “[o]ne of the basic procedural requirements of administrative rulemaking.”<sup>31</sup> “That requirement is satisfied if the agency’s explanation is clear enough that its path may reasonably be discerned. But where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law.”<sup>32</sup> Arbitrary and capricious regulations are “unlawful” and do not receive *Chevron* deference.<sup>33</sup> However, the court must defer to regulations that are not “manifestly contrary” to the language of the statute, lacking in reasoned explanation, or otherwise procedurally defective.<sup>34</sup>

While *Chevron* is highly deferential to agency interpretations, it does not apply to all types of agency guidance. As *Chevron* stated, this standard is appropriate only if Congress has expressly or implicitly delegated authority to the agency to issue “legislative regulations” on the particular issue.<sup>35</sup> In subsequent cases, the Court explained that such delegation typically takes the form of a grant of authority to engage in notice and comment rulemaking.<sup>36</sup> While some agency positions may, in theory, be granted *Chevron* deference despite not being promulgated by notice and comment rulemaking, the “overwhelming” majority of *Chevron* cases involve such regulations.<sup>37</sup> Thus, while *Chevron* grants great deference to agency regulations promulgated by notice and comment under a grant of congressional authority, it is generally inapplicable to sub-regulatory guidance, such as agency manuals, opinion letters, and interpretive rules.<sup>38</sup>

When agency interpretations and sub-regulatory guidance are not eligible for *Chevron* deference, the Court may still defer to the agency’s position under either *Auer* or *Skidmore*. *Auer* is a closer corollary to *Chevron* because it requires binding deference to the agency’s position.<sup>39</sup> Specifically, while *Chevron* defers to an agency’s regulatory interpretation of an ambiguous statute, *Auer* calls for deference to an agency’s interpretation of its own ambiguous regulation. That is, if the regulation’s language is ambiguous, the agency’s interpretation controls if it reflects the agency’s “fair and considered judgment,” is

30. *Id.*

31. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

32. *Id.* (internal quotations and citations omitted).

33. *Id.* at 2126.

34. *Chevron*, 467 U.S. at 843–44.

35. *Id.*

36. *See United States v. Mead Corp.*, 533 U.S. 218, 229–31 (2001).

37. *Id.* at 230 (*Chevron* may apply to positions developed in formal adjudicatory proceedings or regulations adopted after other formal procedures sufficient to ensure fairness and deliberation.).

38. *See Christensen v. Harris Cty.*, 529 U.S. 576, 586–88 (2000).

39. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

not a “post-hoc rationalization” to justify past agency action, and is not “plainly erroneous or inconsistent with the regulation.”<sup>40</sup>

Notably, however, an agency is not entitled to *Auer* deference if the regulatory language it interprets simply parrots the language of the statute itself.<sup>41</sup> Nor is an agency entitled to *Auer* deference if the regulatory language is unambiguous.<sup>42</sup> As the Court noted in *Christensen v. Harris County*, granting deference in such situations would, in effect, permit an agency to issue new and binding regulations in the guise of mere interpretation.<sup>43</sup> Despite these limitations on its application, *Auer* deference is often subjected to criticism. At least three sitting justices and the late Justice Antonin Scalia criticized *Auer* and suggested a willingness to reconsider whether such deference is appropriate at all.<sup>44</sup>

Finally, under the third tier of judicial deference, the court may rely on an agency’s sub-regulatory guidance to the extent that the guidance has “power to persuade.”<sup>45</sup> *Skidmore* deference is potentially applicable to all agency guidance, even when the agency lacks rulemaking authority on the particular issue.<sup>46</sup> However, this wide breadth of applicability is balanced by the limited deference conferred. After all, agency guidance to which *Skidmore* might apply lacks congressional authority and reflects only a potentially persuasive “body of experience and informed judgment” to which courts may “resort for guidance.”<sup>47</sup> Under *Skidmore*, the court decides for itself what weight, if any, to give an agency’s position. The court assesses the agency’s guidance for “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade . . . .”<sup>48</sup>

These cases create three tiers of administrative deference. Under *Chevron*, an agency’s regulatory interpretation of a statute should generally control if the statute is ambiguous and the agency’s interpretation is reasonable. Under *Auer*, an agency’s interpretation of a regu-

40. *Id.* at 461–62.

41. *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006).

42. *Christensen*, 529 U.S. at 588.

43. *Id.*

44. See concurring opinions of Justices Samuel Alito, Antonin Scalia, and Clarence Thomas in *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1210–13 (2015), and concurring opinion of Chief Justice John Roberts in *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1338 (2013).

45. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

46. *Cf.* *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257–58 (1991) (EEOC guidelines may receive *Skidmore* deference). See also *Christensen*, 529 U.S. at 587–88 (agency interpretations of a statute found in opinion letters, policy statements, agency manuals, and enforcement guidelines receive *Skidmore* deference).

47. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (citations omitted).

48. *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1352 (2015) (quoting *Skidmore*, 323 U.S. at 140).

lation should generally control if the regulation is ambiguous and the agency's interpretation of its own regulation is reasonable. Under *Skidmore*, an agency's sub-regulatory guidance will be approved if it has the power to persuade. The following sections address how these standards of deference have been applied to EEOC regulations and sub-regulatory guidance.

## II. Deference to EEOC-Enforced Statutes

### A. Title VII

Congress grants the EEOC authority "to issue, amend, or rescind suitable procedural regulations to carry out [Title VII]."<sup>49</sup> Notably, Congress limited this grant of rulemaking authority to procedural regulations and did not grant the EEOC authority to issue substantive statutory interpretations with the force and effect of law.

While the EEOC has issued procedural regulations,<sup>50</sup> it has also issued substantive guidance about Title VII. This guidance includes interpretive rules about discrimination on the basis of sex, religion, national origin, employee selection procedures, and affirmative action plans.<sup>51</sup> In addition to these regulatory guidelines, the EEOC published a Compliance Manual with provisions applicable to Title VII<sup>52</sup> as well as numerous enforcement guidance documents and policy statements.<sup>53</sup>

In recent years, the Court's deference to this array of EEOC guidance has varied. As demonstrated in *Edelman v. Lynchburg College*,<sup>54</sup> the complexities of administrative procedure contribute to this variability. In *Edelman*, the Court determined whether a charge of discrimination was timely filed with the EEOC.<sup>55</sup> The issue arose from ambiguous language in Title VII about whether a charge needs to be verified by oath at the time of filing.<sup>56</sup> An EEOC regulation directly on point allowed charges to be verified after filing, with such verification relating back to the time of the original filing.<sup>57</sup> The Court found the regulation reasonable and a valid exercise of the EEOC's authority to issue procedural regulations.<sup>58</sup> However, the Court declined to address whether *Chevron* deference should apply, most likely due to concerns that the regulation had not been promulgated pursuant to notice

---

49. 42 U.S.C. § 2000e-12(a) (2012).

50. See 29 C.F.R. § 1601 *et seq.* (2016).

51. See 29 C.F.R. §§ 1604–1608 (2016).

52. EEOC Compliance Manual, *supra* note 7.

53. EEOC Enforcement Guidances, *supra* note 8.

54. 535 U.S. 106 (2002).

55. *Id.* at 109.

56. *Id.* (discussing provisions of 42 U.S.C. § 2000e-5 (1994)).

57. See 29 C.F.R. § 1601.12(b) (2002).

58. See *Edelman*, 535 U.S. at 114.

and comment procedures.<sup>59</sup> Instead, the justices stated that “[b]ecause we so clearly agree with the EEOC, there [is] no occasion to defer and no point in asking what kind of deference, or how much.”<sup>60</sup> Curiously, the majority also indicated that the EEOC’s position was not the “only one permissible,”<sup>61</sup> suggesting the EEOC could change its statutory interpretation.<sup>62</sup> Justice Sandra Day O’Connor’s concurrence said it was hard to see how the EEOC could adopt a different statutory interpretation unless the Court applied *Chevron* deference.<sup>63</sup> Thus, while the Court adopted the EEOC’s position, its decision gave little guidance about application of deference standards in cases in which there are procedural infirmities.

It is even more difficult to predict the Court’s outcomes in cases of sub-regulatory guidance because these cases turn on whether the Court finds the EEOC’s position persuasive. A representative example is *Burlington Northern & Santa Fe Railway Co. v. White*,<sup>64</sup> in which the Court held Title VII’s anti-retaliation protections are not limited to actions and harms related to employment or that occur at the workplace.<sup>65</sup> In reaching this conclusion, the Court gave considerable attention to the EEOC’s sub-regulatory guidance, including its 1972 Interpretive Manual and its 1991 and 1998 Compliance Manuals.<sup>66</sup> According to the Court, the EEOC had generally “expressed a broad interpretation of the anti-retaliation provision.”<sup>67</sup> In particular, the Court emphasized a provision in the EEOC’s 1998 Compliance Manual, stating that Title VII’s anti-retaliation provision “prohibit[s] any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.”<sup>68</sup> Although the Court made no mention of *Skidmore* and did not expressly defer to the EEOC, it clearly saw the agency as possessing a body of experience and considered the persuasive power of the EEOC’s position.<sup>69</sup> Hence, it is a noteworthy example of *Skidmore* deference.

---

59. *Id.* at 114. Justice Sandra Day O’Connor’s concurring opinion explained that the EEOC initially promulgated the regulation without following the Administrative Procedures Act’s (APA) notice and comment procedures and then reissued the regulation after following the notice and comment process. Justice O’Connor suggested this re-promulgation should not affect whether the agency is given *Chevron* deference. *Id.* at 123 (O’Connor, J., concurring).

60. *Id.* at 114 (alteration in original).

61. *Id.* at 114 n.8.

62. *Id.* at 123 (O’Connor, J., concurring).

63. *Id.*

64. 548 U.S. 53 (2006).

65. *Id.* at 69.

66. *Id.* at 65–66.

67. *Id.* at 65.

68. *Id.* at 65–66.

69. *Id.* at 65–72.

The Court offered an even stronger example of *Skidmore* deference in *Crawford v. Metropolitan Government of Nashville*,<sup>70</sup> in which the Court placed greater reliance on the EEOC's position.<sup>71</sup> At issue in *Crawford* was whether Title VII's anti-retaliation provision extended to employees who had reported discrimination while under questioning or during an internal company investigation, or if it protected only those who raised complaints on their own volition.<sup>72</sup> The EEOC Compliance Manual took the position that almost any reporting of discrimination was covered by Title VII's anti-retaliation provision, and the Court noted that the Manual "reflect[s] a body of experience and informed judgment to which [the Court] may properly resort for guidance."<sup>73</sup> Although the Court did not specifically cite to *Skidmore*, it echoed *Skidmore's* language. However, the limits of *Skidmore* deference still shine through since the Court offered no indication of the actual weight it afforded the EEOC's Manual compared to its own independent analysis.

The relative weight of EEOC guidance and the Court's independent analysis has been much clearer in other recent decisions, especially ones in which the Court expressed outright hostility toward EEOC sub-regulatory guidance. Notably, in *Vance v. Ball State University*,<sup>74</sup> the Court expressly rejected the EEOC's position regarding an employer's potential vicarious liability for supervisor harassment.<sup>75</sup> In an Enforcement Guidance document, the EEOC defined a supervisor as one who wields authority "of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment."<sup>76</sup> In finding that this guidance lacked any persuasive power under *Skidmore*, the Court derided the proposed definition of a supervisor as "vague," "nebulous," "ill-defined," and "a study in ambiguity."<sup>77</sup> The Court emphasized that, while both the petitioner and the United States urged the Court to adopt the EEOC's definition, the parties still disagreed as to the result under the facts at hand.<sup>78</sup> Thus, because the Court considered the proposed standard to be unworkable and difficult to apply, it gave little credence to the EEOC's supposed body of experience and informed judgment, instead emphasizing its own analysis of the issue.<sup>79</sup>

---

70. 555 U.S. 271 (2009).

71. *See generally id.* (Court clearly turned to EEOC's Title VII interpretation to determine outcome of case).

72. *Id.* at 273.

73. *Id.* at 276 (alteration in original).

74. 133 S. Ct. 2434 (2013).

75. *Id.* at 2443.

76. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, No. 915.002 (1999).

77. *Vance*, 133 S. Ct. at 2450, 2443, 2449.

78. *Id.* at 2449.

79. *Id.* at 2450.

The Court was similarly decisive in *University of Texas Southwestern Medical Center v. Nassar*.<sup>80</sup> There, the Court determined whether a Title VII retaliation claim could be based on a mixed-motive, or if the employee's protected activity had to be the but-for cause of the alleged adverse action.<sup>81</sup> As in *Vance*, the Court declined to adopt the EEOC's sub-regulatory guidance, this time focusing on the EEOC's justifications for its interpretation. Specifically, the Court found the Compliance Manual's stated rationales for allowing mixed-motive claims unpersuasive. The Compliance Manual's first justification was that courts have long applied the same evidentiary framework to status-based and retaliation claims.<sup>82</sup> The Court rejected this rationale as a "generic" discussion of causation that failed to address Title VII's complex statutory structure.<sup>83</sup> The Court then turned to the Manual's second rationale that mixed-motive claims are necessary to prevent "proven" claims from going unpunished.<sup>84</sup> The Court found this explanation circular because a claim cannot be "proven" unless causation is first established.<sup>85</sup> Thus, the Court rejected the EEOC's explanations for its position because the agency "lack[ed] the persuasive force that is a necessary precondition to deference under *Skidmore*."<sup>86</sup>

Other Supreme Court decisions relied on additional reasons for finding EEOC guidance unpersuasive. In *Young v. United Parcel Service*,<sup>87</sup> the Court refused to defer to the EEOC's interpretation of Title VII pregnancy-related provisions. The Court first noted that, under *Skidmore*, deference to the EEOC's Compliance Manual was contingent on "the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements."<sup>88</sup> Unfortunately for the EEOC, the Court found that considering those factors "severely limit[ed]" the Manual's power to persuade.<sup>89</sup> The Court seemed especially concerned that the interpretation in question had been issued only after certiorari had been granted and took a position on which guidance materials had previously been silent.<sup>90</sup> Moreover, the Manual's position was inconsistent

---

80. 133 S. Ct. 2517, 2521 (2013).

81. *Id.* at 2520.

82. *Id.* at 2533.

83. *Id.*

84. *Id.* at 2533–34.

85. *Id.*

86. *Id.* at 2533 (alteration in original).

87. 135 S. Ct. 1338, 1352 (2015).

88. *Id.* at 1352 (alteration in original).

89. *Id.*

90. *Id.* See generally *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (refusing to defer to EEOC and Age Discrimination in Employment Act (ADEA) interpretations articulated during litigation rather than in a deliberative exercise of interpretive authority). But see *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007), where the Court deferred to a Department of Labor (DOL) Advisory Opinion written in response to litigation in the same

with previous federal government positions and offered no justification for departing from these prior positions.<sup>91</sup> The Court therefore declined to rely on the EEOC's interpretation.<sup>92</sup>

Although the Court gave little weight to the EEOC's sub-regulatory guidance in *Vance*, *Nassar*, and *Young*, it at least considered the proposed guidance and provided specific rationales for finding the guidance unworthy of deference. By contrast, in *National Railroad Passenger Corp. v. Morgan*,<sup>93</sup> the Court rejected the EEOC's interpretation with little discussion of potential deference. The Court considered whether a Title VII plaintiff may file suit based on events falling outside the statute's limitations period.<sup>94</sup> The Court held the statute barred recovery for "discrete discriminatory acts" occurring outside the relevant period, although earlier events could be considered in conjunction with a hostile work environment claim.<sup>95</sup> In reaching this conclusion, the Court rejected the Compliance Manual's position that ongoing or serial violations constitute "continuing violations" that would permit recovery for otherwise untimely acts.<sup>96</sup> The Court noted that, under *Skidmore*, the Manual was entitled to deference only to the extent that it had persuasive power.<sup>97</sup> Without extended discussion, the Court said "[t]here is simply no indication" that the limitations provision was intended to allow suit on discrete acts committed outside its timeframes.<sup>98</sup> While *Skidmore* permits the Court to disagree with sub-regulatory guidance it finds unpersuasive, it arguably demands that it provide at least some detailed rationale for doing so. The Court's failure to do so in *Morgan* contributes to the difficulty lawyers face when applying the EEOC's interpretive materials.

Finally, the Court declines to offer deference because of a statute's lack of ambiguity. For example, the Court drew heavily on *Morgan* in *Ledbetter v. Goodyear Tire & Rubber Co.*,<sup>99</sup> another high-profile case regarding Title VII's limitations period.<sup>100</sup> The Court considered

---

case. Somewhat inexplicably, the Court treated that opinion as reflecting the considered judgment of the DOL and saw no reason to suspect that it was simply a post hoc rationalization of the agency's position. *Id.*

91. *Young*, 135 S. Ct. at 1352.

92. *Id.*

93. 536 U.S. 101 (2002).

94. *Id.* at 105. The statutory language required plaintiffs to file a charge with the EEOC either 180 or 300 days "after the alleged unlawful employment practice occurred." *Id.* at 108 (citing 42 U.S.C. § 2000e-5(e)(1) (2000)).

95. *Id.* at 123.

96. *Id.* at 110 n.6.

97. *Id.* at 111 n.6.

98. *Id.* at 111.

99. 550 U.S. 618, 628 (2007) ("[I]f an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed.")

100. Note that the substantive holding was abrogated by the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

whether each paycheck should be treated as an independent discriminatory act, even if it reflected the adverse effects of a long-past act of discrimination.<sup>101</sup> Although the Court briefly considered arguments that it should defer to the EEOC Compliance Manual, which treated each paycheck as independently actionable within the relevant limitations period, it held the statutory language was unambiguous and no agency deference was appropriate.<sup>102</sup> Thus, in a textbook application of *Chevron's* first step, the Court declined to give any deference to the EEOC's interpretation.

## B. ADEA

The EEOC's ADEA rulemaking authority is much broader than under Title VII. When Congress enacted the Civil Rights Act of 1964, it rejected proposals to include older workers as a protected class for purposes of employment discrimination.<sup>103</sup> It did, however, commission a report on age discrimination from Secretary of Labor Willard Wirtz.<sup>104</sup> In what became known as the "Wirtz Report," the Secretary recommended that Congress outlaw arbitrary age discrimination in employment.<sup>105</sup> The Secretary subsequently drafted the Age Discrimination in Employment Act of 1967 and included a broad grant of rulemaking authority.<sup>106</sup> However, Congress initially vested enforcement authority in the U.S. Department of Labor, not the EEOC. In 1978, Congress and President Carter transferred enforcement authority of the ADEA to the EEOC, with the EEOC inheriting the Secretary's rulemaking authority.<sup>107</sup> That transfer allowed the EEOC to issue "such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and [to] establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest."<sup>108</sup> The EEOC may therefore issue both substantive and procedural ADEA regulations, unlike Title VII.

Pursuant to this broad grant of rulemaking authority, the EEOC has issued an array of ADEA regulations.<sup>109</sup> Provisions of the Compli-

---

101. See *Ledbetter*, 550 U.S. at 631 (Ledbetter argued "her pay had not increased as much as it would have if she had been evaluated fairly . . . and that by the end of her employment, she was earning significantly less than her male colleagues.").

102. *Id.* at 642–43 n.11.

103. See *Smith v. City of Jackson*, 544 U.S. 228, 232–33 (2005) (discussing history of the ADEA).

104. *Id.* at 254.

105. See *id.* at 255 (citing WILLARD WRITZ, REPORT OF THE SECRETARY OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (1965)).

106. *Id.* at 232–33.

107. Reorg. Plan No. 1, 43 Fed. Reg. 19,807 (Feb. 23, 1978).

108. 29 U.S.C. § 628 (2012).

109. See generally 29 C.F.R. §§ 1625–27 (2016) (relating to general age-related discriminatory practices and keeping age-related employee records).

ance Manual provide sub-regulatory guidance, as do a bevy of Enforcement Guides and Policy Statements.<sup>110</sup> However, despite the grant of expanded ADEA rulemaking authority, the Court's deference to the EEOC's guidance has shown the same unpredictable treatment as under Title VII.

For example, in *Smith v. City of Jackson*,<sup>111</sup> the Court addressed whether the ADEA permitted disparate impact liability. As in *Edelman*, a plurality of the Court cited an EEOC regulation to support its position, but it did not apply *Chevron* deference.<sup>112</sup> Instead, the plurality conducted its own statutory analysis and referred to the EEOC's regulation only as a concluding factor in support of that analysis.<sup>113</sup> Thus, while the Court generally agreed with the EEOC that the statute authorized disparate-impact claims, it did not endorse the agency's regulatory standard as controlling. In a concurrence, Justice Scalia criticized the plurality for simply augmenting its own judgment with the EEOC regulations and convincingly explained why *Smith* provided "a classic case" for *Chevron* deference.<sup>114</sup> Justice O'Connor's concurrence thought *Chevron* should not apply.<sup>115</sup> The plurality ignored the deference issue entirely.

In *General Dynamics Land Systems v. Cline*,<sup>116</sup> the Court found no reason to even consider deferring to the EEOC's position after it determined that "social history" contradicted the EEOC's regulation and that the agency was "clearly wrong."<sup>117</sup> There, the question was whether the ADEA permitted an employer to favor older workers at the expense of younger employees.<sup>118</sup> Although the EEOC had issued a regulation directly on point,<sup>119</sup> the Court found the statutory language unambiguously permitted such preferences.<sup>120</sup> That allowed the Court to reject the EEOC's regulatory guidance without considering either *Chevron* or *Skidmore* deference.<sup>121</sup>

Other decisions by the Roberts Court show similar disinclination to defer to the EEOC's sub-regulatory ADEA guidance. In *Kentucky*

---

110. See, e.g., *Policy Guidance Documents Related to Age Discrimination*, U.S. EQUAL EMP'T COMM'N, [https://www.eeoc.gov/laws/types/age\\_guidance.cfm](https://www.eeoc.gov/laws/types/age_guidance.cfm) (last visited Oct. 29, 2016) (displaying various age-related discrimination documents available from the EEOC).

111. 544 U.S. 228, 229 (2005).

112. *Id.* at 239–40.

113. *Id.* at 239.

114. *Id.* at 243–44 (Scalia, J., concurring).

115. *Id.* at 263 (O'Connor, J., concurring).

116. 540 U.S. 581 (2004).

117. *Id.* at 596, 600.

118. See *id.* at 584.

119. See 29 C.F.R. § 1625.2(a) (2004) (prohibiting such preferences).

120. *Gen. Dynamics*, 540 U.S. at 600.

121. *Id.*

*Retirement System v. EEOC*,<sup>122</sup> for instance, the Court declined to extend *Auer* deference to the EEOC's proposed interpretation of its own regulation.<sup>123</sup> The Court noted that the regulation simply mirrored the statutory language and deserved no deference.<sup>124</sup> As the Court previously made clear in *Gonzales v. Oregon*, “[a]n agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.”<sup>125</sup> The Court also declined to extend *Skidmore* deference to the EEOC Compliance Manual, even though the Manual discussed the issue in more detail.<sup>126</sup> With little explanation, the Court stated the Manual's position was unpersuasive in light of the Court's own analysis of the issue and that the Manual did not justify or explain the EEOC's interpretation.<sup>127</sup>

Still, the Roberts Court has occasionally deferred to the EEOC's ADEA guidance. A prime example is *Federal Express v. Holowecki*,<sup>128</sup> in which the Court applied all three tiers of deference.<sup>129</sup> In *Holowecki*, the Court determined what exactly the ADEA required to be included in a document for it to be a “charge” filed with the EEOC.<sup>130</sup> EEOC regulations did not exhaustively discuss the required contents of a charge.<sup>131</sup> First, the Court held that the regulation's definition of a “charge” was entitled to *Chevron* deference.<sup>132</sup> Second, the Court extended *Auer* deference to the EEOC's position that these regulations should be read as only a partial definition and that a complete definition required more.<sup>133</sup> Third, to determine what more the definition should include, the Court granted *Skidmore* deference to the definition in the EEOC's Compliance Manual.<sup>134</sup> The Court placed particular emphasis on the consistency with which the EEOC had espoused this definition, noting that it had been in place for at least five years and had been repeated in several internal memos.<sup>135</sup> Thus, in *Holowecki*, the EEOC enjoyed full deference to both regulatory and sub-

---

122. 554 U.S. 135 (2008).

123. *Id.*

124. *Id.* at 149 (citing *Gonzales v. Oregon*, 546 U.S. 243 (2006)).

125. *Gonzales*, 546 U.S. at 257.

126. *Ky. Ret. Sys.*, 554 U.S. at 149.

127. *Id.* at 149–50.

128. 552 U.S. 389 (2008).

129. *Id.*

130. *Id.*

131. *Id.* at 395–96; see also 29 C.F.R. §§ 1626.3, 1626.6, 1626.8 (2007) (establishing the definition of charge under the ADEA).

132. *Id.*

133. *Fed. Express v. Holowecki*, 552 U.S. 389, 397 (2008).

134. *Id.* at 398–403.

135. *Id.*

regulatory guidance. The case stands as a model for the application of the three tiers of agency deference.<sup>136</sup>

### C. ADA

Under the ADA,<sup>137</sup> as under the ADEA, the EEOC has broad rule-making authority.<sup>138</sup> Specifically, it is authorized to “issue regulations in an accessible format to carry out this subchapter.”<sup>139</sup> Although several Supreme Court decisions questioned whether this encompassed authority to issue regulations defining the term “disability,”<sup>140</sup> Congress settled these questions in the ADA Amendments Act of 2008 (ADAAA).<sup>141</sup> Among other things, the ADAAA clarified that the EEOC’s rulemaking authority “includes the authority to issue regulations implementing the definitions of disability in section 3 (including rules of construction) and the definitions in section 4. . . .”<sup>142</sup> Congress further directed the EEOC to implement such regulations in a manner consistent with the ADA, which called for “broad coverage” of disabled persons and rejected several Supreme Court cases that had narrowed its coverage.<sup>143</sup>

Pursuant to its rulemaking authority under the ADA—and as clarified by the ADAAA—the EEOC has issued substantive ADA regulations.<sup>144</sup> Moreover, it used that authority to apply the procedural regulations first promulgated under Title VII to the ADA.<sup>145</sup> In addition to notice and comment rules, the EEOC has issued “Interpretive Guidance” to accompany the substantive regulations.<sup>146</sup> Finally, as under Title VII and the ADEA, the EEOC’s Compliance Manual, Enforcement Guides, and Policy Statements provide guidance regarding the application of the ADA.<sup>147</sup>

136. J. Lyn Entrikin Goering, *Tailoring Deference to Variety with a Wink and a Nod to Chevron: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations of Law*, 36 J. LEGIS. 18, 79 (2010) (discussing application of *Holowicki*’s three standards of deference).

137. 42 U.S.C. § 12116 (2012).

138. *Id.*; see also *Smith v. City of Jackson*, 544 U.S. 228, 232–33 (2005) (discussing the broad authority granted to the EEOC under the ADA).

139. 42 U.S.C. § 12116.

140. For example, see *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 523 (1999), *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 563–64 (1999), and *Bragdon v. Abbott*, 524 U.S. 624, 646–47 (1998), all of which avoided the question regarding the EEOC’s authority to interpret the ADA.

141. ADA Amendments Act of 2008, 110 Pub. L. No. 325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. § 12205 (2012)).

142. 42 U.S.C. § 12205a.

143. ADAAA, 110 Pub. L. 325, § 2(a).

144. See, e.g., 29 C.F.R. § 1630 *et. seq.* (2016); see also 29 C.F.R. §§ 1640–41 (2016).

145. 29 C.F.R. § 1601.1 (2016).

146. 29 C.F.R. app. pt. 1630 (2016).

147. See, e.g., *Selected Enforcement Guidance and Other Policy Documents on the ADA*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, [https://www.eeoc.gov/laws/types/disability\\_guidance.cfm](https://www.eeoc.gov/laws/types/disability_guidance.cfm) (last visited Sept. 26, 2016); see also EEOC Compliance Manual, *supra* note 7; EEOC, *Policy Guidance Documents Related to Age Discrimination*, *supra* note 110.

In recent years, the Court's deference to the EEOC's ADA guidance has been unpredictable, although it has tended toward skepticism of the EEOC. Perhaps most notably, the Court twice indicated its belief that the EEOC had exceeded its rulemaking authority by promulgating regulations defining the term "disability."<sup>148</sup> In both *Sutton v. United Air Lines, Inc.*<sup>149</sup> and *Toyota Motor Manufacturing, Inc. v. Williams*,<sup>150</sup> the Court stated that the EEOC's rulemaking authority was limited to regulations necessary to carry out "this subchapter" and that the definition of "disability" was found in a different subchapter.<sup>151</sup> However, because the parties in both cases declined to challenge the EEOC's definition, the Court had no occasion to address what, if any, deference was due to the relevant regulations.<sup>152</sup> While passage of the ADAAA clarified the EEOC's authority to issue regulations defining disability, these earlier decisions highlight the importance of the exact phrasing of each grant of rulemaking authority.

Despite its notable skepticism of the EEOC's ADA rulemaking, the Court has not been wholly unreceptive to the ADA regulations. For example, in *Chevron U.S.A. Inc. v. Echazabal*,<sup>153</sup> the Court granted *Chevron* deference to an EEOC regulation regarding affirmative defenses under the Act.<sup>154</sup> The ADA creates a defense for actions taken pursuant to certain "qualification standards" and states that such standards "may include" a requirement that an individual not pose a threat to the health and safety of others.<sup>155</sup> The EEOC had promulgated regulations further defining this provision to include defenses relating to the safety of the person with a disability.<sup>156</sup> After rejecting an argument that Congress intended the "threat to others" defense to preclude a "threat to self" defense, the Court held that the regulation was a reasonable interpretation of the statute and therefore entitled to *Chevron* deference.<sup>157</sup> In fact, the Court noted that the regulation "exemplifies the substantive choices that agencies are expected to make when Congress leaves the intersection of competing objectives both imprecisely marked but subject to the administrative leeway. . . ."<sup>158</sup> Thus, while cases like *Smith*, *Edelman*, *Williams*, and *Sutton* all highlight complexities of determining *Chevron's* application, *Echazabal*

---

148. 29 C.F.R. §§ 1630.2(h)-(j) (2016) (defining disability).

149. 527 U.S. 471 (1999).

150. 534 U.S. 184 (2002).

151. *Toyota*, 534 U.S. at 194; *Sutton*, 527 U.S. at 479.

152. *See Toyota*, 534 U.S. at 194; *Sutton*, 527 U.S. at 479.

153. 536 U.S. 73 (2002).

154. *Id.*

155. 42 U.S.C. § 12113(b) (2012).

156. *See, e.g.*, 29 C.F.R. § 1630.15(b)(2) (2016).

157. *Echazabal*, 536 U.S. at 84-87.

158. *Id.* at 85.

demonstrates the binding deference shown when *Chevron* standards are satisfied.<sup>159</sup>

Similarly, *Clackamas Gastroenterology Associates, P. C. v. Wells*<sup>160</sup> demonstrates that the Court sometimes finds the EEOC's sub-regulatory ADA guidance persuasive under *Skidmore*.<sup>161</sup> The question was how to define an "employee" for purposes of determining whether an employer had enough employees for ADA coverage.<sup>162</sup> Because the statutory definition was circular,<sup>163</sup> the Court first looked to its own precedent interpreting similar language and found a consistent focus on the common law test of control.<sup>164</sup> The Court then adopted the standard for employee status found in the EEOC's Compliance Manual section 605:0008, which it found persuasive by virtue of its similar emphasis on the element of control.<sup>165</sup> Thus, at least when the EEOC's Compliance Manual conforms closely to the Court's existing precedent, the Court affords *Skidmore* deference.

Finally, it is worth noting the considerable ambiguity regarding deference appropriate for ADA interpretive rules. In *Sutton*, the Court considered and rejected the EEOC's interpretive rules, which were issued at the same time as the regulations they purported to interpret.<sup>166</sup> Because the Court found the interpretive rules imposed an impermissible construction on the plain language of the statute, the Court did not need to discuss the level of deference those interpretations might otherwise have been due.<sup>167</sup> More recently, *Perez v. Mortgage Bankers Ass'n*<sup>168</sup> left the question of the deference due to such interpretive rules or guidance similarly unclear.<sup>169</sup> In *Perez*, the Court considered what procedures were required to issue interpretive rules or guidance.<sup>170</sup> The majority addressed deference only in passing, stating that such interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process."<sup>171</sup> But, as Justice Scalia pointed out in his concurring opinion, interpretive rules are arguably entitled to deference under *Auer*.<sup>172</sup> However,

159. *Id.* at 84–87.

160. 538 U.S. 440 (2003).

161. *Id.* at 449–50.

162. *Id.* at 442.

163. The ADA defines an employee as "an individual employed by an employer." 42 U.S.C. § 12111(4) (2012).

164. *Clackamas*, 538 U.S. at 444–48.

165. *Id.* at 448–49.

166. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 480 (1999) (discussing guidance relating to the definition of disability found at 29 C.F.R. pt. 1630, app. § 1630.2(j) (1998)).

167. *Id.*

168. 135 S. Ct. 1199, 1203 (2015).

169. *Id.*

170. *Id.*

171. *Id.* at 1204.

172. *Id.* at 1211–12.

along with Justices Alito and Thomas, Justice Scalia indicated his willingness to reconsider *Auer* deference entirely.<sup>173</sup> Thus, in the wake of *Perez*, it is unclear what, if any, deference the Court will give to the EEOC's Interpretive Guidance or any other interpretive rule in cases to come.

#### D. Equal Pay Act

In contrast to some other statutes it administers, the EEOC lacks any congressional rulemaking authority under the EPA.<sup>174</sup> Initially, the EPA did not assign the EEOC any administrative or enforcement role.<sup>175</sup> However, in 1978, Congress transferred enforcement authority from the Labor Department to the EEOC at the same time it transferred ADEA enforcement authority.<sup>176</sup> Thus, the EEOC currently administers and enforces the EPA without an express grant of rulemaking authority.<sup>177</sup> Notwithstanding this absence of rulemaking authority, the EEOC has issued both substantive and procedural regulations regarding the EPA.<sup>178</sup> The Compliance Manual provides further EPA sub-regulatory guidance, as do several Policy Statements.<sup>179</sup>

In recent years, the Court has had little occasion to consider the degree of deference due to the EEOC's EPA interpretations. In one of the few such cases, *Kasten v. Saint-Gobain Performance Plastics*,<sup>180</sup> the Court gave weight to the EEOC's EPA guidance.<sup>181</sup> At issue was whether the anti-retaliation provisions of the Fair Labor Standards

173. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210–13 (2015) (Scalia, J., concurring). Chief Justice Roberts has also suggested his willingness to reconsider *Auer*. See *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring) (writing separately to state that it “may be appropriate to reconsider [*Auer*],” but only if the issue is properly before the Court and fully briefed).

174. Gerald P. Norton, *EEOC's Right to a Jury Trial and Liquidated Damages in Actions Under the Age Discrimination In Employment Act: A Dissenting View*, 3 LAB. LAW. 819, 820 n.7 (1987) (discussing the lack of express EPA rule making authority granted to the EEOC).

175. *Id.*

176. See, e.g., Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (Feb. 23, 1978). This transfer provided that

All functions related to enforcing or administering Section 6(d) of the Fair Labor Standards Act . . . are hereby transferred to the Equal Employment Opportunity Commission. Such functions include, but shall not be limited to, the functions relating to equal pay administration and enforcement now vested in the Secretary of Labor, the Administrator of the Wage and Hour Division of the Department of Labor, and the Civil Service Commission pursuant to Sections 4(d)(1); 4(f); 9; 11(a), (b), and (c); 16(b) and (c) and 17 of the Fair Labor Standards Act . . . .

*Id.*

177. See Norton, *supra* note 174.

178. See, e.g., 29 C.F.R. §§ 1620 *et seq.* (2016) (substantive regulations), 29 C.F.R. §§ 1621 *et seq.* (2016) (procedural regulations).

179. See generally EEOC Compliance Manual, *supra* note 7.

180. 563 U.S. 1 (2011).

181. *Id.*

Act (FLSA) covered oral as well as written complaints.<sup>182</sup> Although the underlying claim was not an EPA violation, the Court still considered the position taken by the EEOC in its Compliance Manual and in several of its amicus briefs.<sup>183</sup> The Court noted that the EEOC and the Secretary of Labor both held the same position for some time.<sup>184</sup> It gave those positions “a degree of weight” because they “add[ed] force” to the Court’s independent analysis.<sup>185</sup> Thus, as seen in other cases of *Skidmore* deference, the Court’s independent analysis led the way, with EEOC guidance cited only as an additional buttressing argument.<sup>186</sup>

In contrast, in *Washington County v. Gunther*,<sup>187</sup> the Court found little reason to defer to EEOC guidance. In *Gunther*, the Court considered whether the Bennett Amendment to Title VII restricted sex-based wage discrimination suits to claims for equal pay for equal work.<sup>188</sup> The case turned on the wording of the amendment, which allows an employer to offer different pay on the basis of sex if such differential is “authorized” by the EPA.<sup>189</sup> The issue was whether this phrasing meant that Title VII claims had to satisfy the EPA’s “equal work” standard, or whether it was intended more narrowly to incorporate only EPA affirmative defenses.<sup>190</sup> In deciding that Title VII incorporated only the EPA’s affirmative defenses, the Court looked to the EEOC’s sub-regulatory guidance, but ultimately gave it little weight.<sup>191</sup> Noting that the EEOC’s position had changed several times and had been inconsistently enforced, the Court felt “no hesitation” adopting its own interpretation and disregarding the EEOC guidance documents.<sup>192</sup>

### E. GINA

As under the ADA and ADEA, Congress has granted the EEOC broad rulemaking authority under GINA.<sup>193</sup> Specifically, the EEOC is directed to “issue final regulations to carry out this title.”<sup>194</sup> That appears to give the EEOC authority to issue both procedural and substantive regulations, and the Commission has done so. For instance, the EEOC promulgated substantive GINA regulations under 29 C.F.R. section 1635,

182. *Id.*

183. *Id.* at 15–16. The Court noted that pursuant to the 1978 transfer of authority, the EEOC does enforce the Fair Labor Standards Act’s anti-retaliation provision when the Equal Pay Act is implicated. *Id.* at 15.

184. *Id.*

185. *Id.*

186. *See, e.g., Clackamas Gastroenterology Assocs., P. C. v. Wells*, 538 U.S. 440 (2003).

187. 452 U.S. 161 (1981).

188. *Id.* at 163–66.

189. *See* 42 U.S.C. § 2000e-2 (2012).

190. *Gunther*, 452 U.S. at 166.

191. *Id.* at 177–78.

192. *Id.*

193. 42 U.S.C. § 2000ff-6 (2012).

194. 42 U.S.C. § 2000ff-11 (2012).

and the Title VII and ADA procedures of 29 C.F.R. section 1601.1 apply to GINA as well.<sup>195</sup>

However, the Supreme Court has not yet considered any cases addressing GINA or the degree of deference due to these regulations, nor has any circuit court. Only one district court appears to have discussed deference to GINA regulations, and only in passing.<sup>196</sup> Thus, while similarities in rulemaking authority would suggest that GINA regulations will receive similar treatment to ADA regulations, there is not yet any case law to support this assumption.<sup>197</sup> Moreover, given the generally unpredictable outcomes in cases involving deference to EEOC guidance, it is difficult to predict whether the Court will defer to a particular regulatory or sub-regulatory GINA guidance.

### III. Practical Considerations

While the Supreme Court's three tiers of deference under *Chevron*, *Auer*, and *Skidmore* would suggest a degree of predictability as to when the Court would defer to an agency's regulations and sub-regulatory guidance, this has not been the case with the EEOC. Despite these articulated deference standards, each case's outcome turns on the Court's analysis of statutory text, the agency's rulemaking authority, and potential defects in administrative procedure. Although the three tiers of deference guide this analysis, the outcome often feels like a flip of a coin.

However, practitioners arguing for or against deference to EEOC regulations or sub-regulatory guidance can improve their chances of success by keeping certain questions in mind and framing their arguments in particular ways. For example, if *Chevron* deference to a regulation is in play, practitioners should ask whether the EEOC enjoys a statutory grant of authority to issue regulations in this arena. If so, does that authority extend to substantive regulations or just procedural regulations? And if the grant of regulatory authority is limited, can the regulation be cast as exceeding that authority? Also, was the regulation promulgated pursuant to notice and comment procedures? Were there any procedural irregularities in its issuance?

If *Auer* deference could potentially apply, practitioners should look to whether the regulation the EEOC purports to interpret only mirrors the statute itself. A true mirror image will not gain *Auer* deference.

---

195. See also *Selected Enforcement Guidance and Other Policy Documents on the ADA*, *supra* note 147.

196. See *Lowe v. Atlas Logistics Grp. Retail Servs.*, 102 F. Supp. 3d 1360, 1366 (N.D. Ga. 2015) (finding deference unnecessary because statutory definition of "genetic test" was unambiguous and noting that, even if it did look to the EEOC's regulations, it would reach the same conclusion).

197. Phillip K. Vacchio & Joshua L. Wolinsky, Note, *Genetic Information Nondiscrimination Act of 2008: It's in Title VII's Genes*, 29 HOFSTRA LAB. & EMP. L.J. 229, 254 (2012) (discussing the likely similarity of treatment of authority under the Genetic Information Nondiscrimination Act compared with ADA and Title VII).

However, if a regulation closely resembles, but does not exactly copy statutory language, practitioners seeking deference should explain why the language differences are significant, while those arguing against deference should explain why the differences are mere semantics.

Finally, if *Skidmore* deference is at issue, special attention should be given to the EEOC's rationales, if any, supporting its position. Are those rationales well-articulated or conclusory? Are there flaws in the rationale that can be highlighted? The EEOC's consistency, or inconsistency, in its interpretation can also be a powerful argument, but this may require research into decades of agency guidance materials. Has the EEOC ever changed positions outright, or has it maintained a long-held position? Has it taken or defended these positions in prior litigation? Or, has it previously been silent, so that its current position can be attacked as a post-hoc rationalization in response to litigation?

### **Conclusion**

This Article examines the U.S. Supreme Court's recent deference to EEOC regulations and sub-regulatory guidance. These cases indicate that the degree of deference has been highly variable, making it unpredictable which tier of deference, if any, the Court will apply.

However, while the Court had provided little certainty about the extent of deference it will apply to EEOC guidance in any particular case, informed practitioners seeking or opposing deference can prepare their arguments in a manner best reflecting these highly variable decisions. This requires, among other things, particular attention to the EEOC's rulemaking authority, consideration of any procedural irregularities in the issuance of guidance, review of the EEOC's prior guidance on the issue, and analysis of the agency's purported rationales for the current guidance.

# *E.I. Dupont and Manhattan Beer: How Far Do Weingarten Rights Extend? A Union Perspective*

Kate M. Swearngen\*

## Introduction

In 1975, the Supreme Court issued *NLRB v. J. Weingarten, Inc.*,<sup>1</sup> holding that a bargaining unit employee is entitled to union representation upon request during an investigatory interview the employee reasonably believes might result in discipline.<sup>2</sup> Under *Weingarten*, if an employee requests such representation, the employer may lawfully (1) grant the request, (2) deny the request and conduct its investigation without interviewing the employee, or (3) give the employee a clear choice between having the interview without representation or ending the interview.<sup>3</sup>

Since that time, the National Labor Relations Board has considered and reconsidered *Weingarten's* scope. In 1982, the Board found in *Materials Research Corp.*<sup>4</sup> that a non-union employee had the right to have a co-worker present during an investigatory interview.<sup>5</sup> Three years later, the Board reversed its position in *Sears, Roebuck & Co.*<sup>6</sup>

---

\* Kate M. Swearngen is an associate attorney at Cohen, Weiss and Simon LLP in New York. She has litigated on behalf of union clients in the nursing, security, and entertainment industries and in federal and municipal employment and has represented individual clients in litigation and administrative proceedings under the ADA, the Rehabilitation Act, the ADEA, and Title VII.

1. 420 U.S. 251 (1975).

2. *Id.* at 260. Disciplinary decisions do not necessarily have to originate with the employer. In *Menorah Medical Center*, the National Labor Relations Board (Chairman Mark Pearce and Members Kent Hirozawa and Harry Johnson) rejected the employer's argument that it did not violate the National Labor Relations Act by denying union representation to nurses at a peer review committee meeting. 362 N.L.R.B. No. 193, slip op. at 1 (Aug. 27, 2015). The employer had argued that because the state licensing agency, and not the employer, disciplined nurses based on the outcome of such meetings, nurses had no reasonable fear of discipline. *Id.*, slip op. at 4. The Board noted that if the state licensing agency revoked the nurses' licenses, the employer would have no choice but to suspend or discharge the nurses. *Id.*, slip op. at 6.

3. *Weingarten*, 420 U.S. at 256–59.

4. 262 N.L.R.B. 1010 (1982), *overruled in relevant part by Sears, Roebuck & Co.*, 274 N.L.R.B. 230 (1985).

5. *Id.* at 1016 (“[T]he right enunciated in *Weingarten* applies equally to represented and unrepresented employees.”).

6. 274 N.L.R.B. 230, 230 (1985) (“*Weingarten* rights are inapplicable where . . . there is no certified or recognized union.”).

In 2000, *Epilepsy Foundation of Northeast Ohio*<sup>7</sup> again extended *Weingarten* to non-union employees.<sup>8</sup> Four years later, the Board overturned *Epilepsy Foundation in IBM Corp.*<sup>9</sup>

*IBM Corp.* remains the law, despite signals and much speculation that the Board may change course again. In 2014 and 2016, the General Counsel directed the Regions to submit to the Division of Advice “[c]ases involving the applicability of *Weingarten* principles in non-union settings as enunciated in *IBM Corp.*”<sup>10</sup> While not changing its position regarding non-union settings,<sup>11</sup> the Board has focused on applying *Weingarten* in other contexts. This article analyzes two prominent recent *Weingarten* cases.

In *E.I. Dupont de Nemours & Co., Inc.*,<sup>12</sup> the Board considered the appropriate remedy for cases in which, after an employer unlawfully denies union representation, the employee is terminated for misconduct during the subsequent employee interview.<sup>13</sup> The Board held make-whole relief is appropriate if “(1) an employer, in discharging an employee, relies at least in part on the employee’s misconduct during an unlawful interview; and (2) the employer is unable to show it would have discharged the employee absent that purported misconduct.”<sup>14</sup>

Three months later, in *Manhattan Beer Distributors, LLC*,<sup>15</sup> the Board held that a beer distributor violated the National Labor Relations Act by denying an employee union representation during a drug test.<sup>16</sup> The Board also found that the employer unlawfully discharged the employee for refusing to take the test in the absence of his union steward.<sup>17</sup>

7. 331 N.L.R.B. 676 (2000), *enforced in relevant part by* *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095 (D.C. Cir. 2001).

8. *Id.* at 679.

9. 341 N.L.R.B. 1288, 1288 (2004) (*Weingarten* rights do not extend to non-union employees).

10. NLRB, Gen. Couns. Mem. 14-01, Mandatory Submissions to Advice (Feb. 25, 2014); NLRB, Gen. Couns. Mem. 16-01, Mandatory Submissions to the Division of Advice (Mar. 22, 2016).

11. In one recent *Weingarten* case, the Board dismissed a complaint in which an employer denied a represented employee’s request to have a co-worker witness (as opposed to a union representative) present at an investigatory interview. *Asset Prot. & Sec. Servs., L.P.*, 362 N.L.R.B. No. 72, slip op. at 1 (Apr. 22, 2015). In adopting the administrative law judge’s (ALJ) conclusions, the Board emphasized that it relied “solely” on the facts that the employee was “an experienced former union official”; that he represented, both to his co-worker and to management, that he intended to represent himself in the interview; that he wanted the co-worker present as a “witness”; and that the employer declined his request to have the co-worker present as a “witness.” *Id.*, slip op. at 1 n.1.

12. 362 N.L.R.B. No. 98 (May 29, 2015).

13. *Id.*, slip op. at 1.

14. *Id.*, slip op. at 4.

15. 362 N.L.R.B. No. 192 (Aug. 27, 2015).

16. *Id.*, slip op. at 1.

17. *Id.*, slip op. at 4. The U.S. Court of Appeals for the Second Circuit denied review in November 2016. *See Manhattan Beer Distribs., LLC v. NLRB*, 362 N.L.R.B. No. 192

Some have assailed these two decisions as dramatic and unwarranted extensions of *Weingarten*.<sup>18</sup> In reality, *E.I. Dupont* and *Manhattan Beer* are reasonable and logical applications of *Weingarten* and promote a robust and meaningful protection of rights guaranteed by section 7 of the Act.<sup>19</sup>

This article discusses *E.I. Dupont*, *Manhattan Beer*, and other recent *Weingarten* cases from a union perspective and examines the implications raised by their intersection. Part I describes *E.I. Dupont*'s facts. Part II discusses *E.I. Dupont*'s majority and dissenting opinions, and Part III provides a union perspective on the case. Part IV details *Manhattan Beer*'s facts. Part V examines *Manhattan Beer*'s majority and dissenting opinions, and Part VI presents a union perspective on the case.

## **I. Background of *E.I. Dupont***

### **A. Facts**

While working in May 2011, special projects operator Joel Smith was injured when he slipped on a wet floor.<sup>20</sup> Smith reported the injury and the employer investigated.<sup>21</sup> Thereafter, the employer issued Smith a corrective action document stating, among other things, that he had been dishonest in an interview; hindered the investigation by claiming he spilled only a small amount of solvent on the floor but later admitting that he spilled a gallon or two; and failed to report his injury immediately, as the employer required.<sup>22</sup> Smith did not file a workers' compensation claim and lost no time at work.<sup>23</sup>

Smith was involved in another reported accident about a year later at around midnight on May 24, 2012, while working as a wind-up operator.<sup>24</sup> When he fell while climbing stairs out of the pit in response to an alarm,<sup>25</sup> he broke his fall with his arms and hit his knee against the stairs.<sup>26</sup> He noticed that his arm was bleeding and applied a bandage.<sup>27</sup> Smith then told his supervisor, Mike Szymanski,

---

(Aug. 27, 2015), *review denied*, Nos. 15-2845, 15-3099, 2016 WL 6787873 (2d Cir. Nov. 16, 2016).

18. See, e.g., Patrick Sully, *The NLRB Reinstates Liar*, SHERMAN & HOWARD (June 2, 2015), <http://shermanhoward.com/the-nlrb-reinstates-liar/>.

19. National Labor Relations Act (NLRA) § 7, 29 U.S.C. § 157 (2012).

20. *E.I. Dupont de Nemours & Co., Inc.*, 362 N.L.R.B. No. 98, slip op. at 8 (May 29, 2015).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*, slip op. at 8–9. Smith regularly worked as a special projects operator and only worked as a wind-up operator sporadically.

25. *Id.*

26. *E.I. Dupont de Nemours & Co., Inc.*, 362 N.L.R.B. No. 98, slip op. at 9 (May 29, 2015).

27. *Id.*

that he had injured his knee and was bleeding.<sup>28</sup> Szymanski did not see any swelling, but gave Smith an icepack.<sup>29</sup> Smith told Szymanski that he felt severe shoulder pain.<sup>30</sup> Szymanski drove Smith to a hospital where a doctor took x-rays and advised Smith to see an orthopedist.<sup>31</sup> Szymanski then drove Smith back to the plant.<sup>32</sup>

After returning to the plant, Szymanski questioned Smith about the accident.<sup>33</sup> Smith told Szymanski that he had been working with a vacuum roll while standing on wet film when he slipped on a stair and fell.<sup>34</sup> Smith then went to the employer's medical department to answer its questions about the accident.<sup>35</sup>

At about 8:30 a.m. on May 24,<sup>36</sup> Smith was called into an interview with Szymanski, a superintendent, and the employer's safety specialist.<sup>37</sup> Smith later testified that he immediately requested a union representative; the employer claimed that Smith only asked whether a representative would be necessary.<sup>38</sup> The employer told Smith that no representation was necessary and denied him representation.<sup>39</sup>

During the interview, the employer asked Smith several questions, including how he fell, whether the floor was wet at the time, and whether he was wearing his personal protective equipment.<sup>40</sup> Smith said that the floor was wet at times during his shift, but that he could not recall whether it was wet at the time of the accident.<sup>41</sup> The meeting ended when Smith said his shoulder was causing him severe pain and he wanted to go home.<sup>42</sup> At the hearing, Szymanski testified that Smith's answers during the May 24 interview were consistent with Smith's initial report to him.<sup>43</sup>

The employer submitted a transcript of Smith's interview answers and a report of his injuries from its medical department to the employ-

28. *Id.*

29. *Id.*

30. *Id.*

31. E.I. Dupont de Nemours & Co., Inc., 362 N.L.R.B. No. 98, slip op. at 9 (May 29, 2015).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. The interview occurred approximately one hour after the end of Smith's twelve-hour shift at a time when he would normally take his diabetes medication. *Id.* at 1. The timing caused Smith to miss his medication. *Id.*

37. E.I. Dupont de Nemours & Co., Inc., 362 N.L.R.B. No. 98, slip op. at 9 (May 29, 2015).

38. *Id.* Smith testified that he requested a union representative because his employee interview after the 2011 accident "contributed" to his discipline. *Id.*

39. *Id.* at 9-10.

40. *Id.* at 10.

41. *Id.*

42. *Id.*

43. E.I. Dupont de Nemours & Co., Inc., 362 N.L.R.B. No. 98, slip op. at 10 (May 29, 2015).

er's safety manager for review.<sup>44</sup> The manager suggested follow-up questions, including why Smith had not reported the accident when he saw blood;<sup>45</sup> whether water was "everywhere" (as Smith had allegedly told the employer's medical department); whether Smith had bandages on his arm before the accident; and whether he had been wearing personal protective equipment.<sup>46</sup>

On June 1, the employer told Smith to attend another meeting.<sup>47</sup> Smith feared that the June 1 interview could result in discipline, but did not ask for union representation because the employer had denied representation at the May 24 meeting.<sup>48</sup>

During the June 1 interview, the employer's safety manager questioned Smith.<sup>49</sup> In her notes from the interview, the manager wrote that Smith did not offer that his arms were extended when he fell or that he otherwise caught himself.<sup>50</sup> She also wrote that Smith "confirmed" the floor was not wet from water and said that something cut through the protective rubber sleeve he was wearing when the accident occurred, but he did not know where the sleeve was.<sup>51</sup> The manager emailed this information to the superintendent. The superintendent identified what she considered as "oddities" in the notes, such as the fact that Smith had not mentioned before the meeting that he was wearing rubber sleeves or that one had been torn. The superintendent also observed that Smith had stated on May 24 that he was injured while removing a wrap from the vacuum roll, but now claimed he had been pulling bad film from a good roll.<sup>52</sup> The superintendent "questioned why Smith would have been wearing rubber sleeves for either task."<sup>53</sup>

On June 11, the employer called another meeting.<sup>54</sup> This time Smith was permitted to bring a union representative.<sup>55</sup> During the meeting, the employer challenged what it perceived as discrepancies in Smith's accounts.<sup>56</sup> The employer then prepared a personnel review setting forth these inconsistencies.<sup>57</sup> The report also mentioned Smith's

---

44. *Id.*

45. According to the timeline created at the May 24 meeting, Smith fell at 12:35 a.m., but did not report his injury until 12:45 a.m. *Id.*

46. *Id.* at 10.

47. *Id.*

48. E.I. Dupont de Nemours & Co., Inc., 362 N.L.R.B. No. 98, slip op. at 10–11 (May 29, 2015).

49. *Id.* at 11.

50. *Id.*

51. *Id.*

52. *Id.*

53. E.I. Dupont de Nemours & Co., Inc., 362 N.L.R.B. No. 98, slip op. at 11 (May 29, 2015).

54. *Id.*

55. *Id.*

56. *Id.*, slip op. at 11–12.

57. *Id.* at 12.

“history of dishonesty” (namely, his interview statements about the 2011 accident) and his failure to report the accident immediately.<sup>58</sup>

The employer terminated Smith for misconduct, specifically “[f]alsification of records, data, documents, or other information . . . in connection with management investigations.”<sup>59</sup>

### B. Procedural History

On August 26, 2013, administrative law judge (ALJ) Steven Davis issued a decision and recommended order, concluding the employer had violated Smith’s *Weingarten* rights by denying his request for union representation during the May 24 interview.<sup>60</sup> The ALJ found that the June 1 meeting was a continuation of the investigative process begun at the May 24 meeting and that Smith’s request for union representation on May 24 was sufficient to require the employer to allow representation at later meetings.<sup>61</sup>

On the issue of remedy, however, the ALJ concluded that the General Counsel’s requested make-whole remedy was inappropriate and contrary to Board law.<sup>62</sup> The ALJ relied on *Taracorp, Inc.*,<sup>63</sup> in which the Board held that an employee discharged for misconduct, or any other nondiscriminatory reason, is not entitled to make-whole relief simply because that employee’s section 7 rights were violated in a context unrelated to the discharge.<sup>64</sup> The ALJ also relied on *Anheuser-Busch, Inc.*<sup>65</sup> for the proposition that section 10(c) of the Act<sup>66</sup> precludes the Board “from granting a make-whole remedy where the employees were disciplined for cause, even if the employer learns of the misconduct through unlawful means.”<sup>67</sup>

---

58. E.I. Dupont de Nemours & Co., Inc., 362 N.L.R.B. No. 98, slip op. at 12–13 (May 29, 2015).

59. *Id.*, slip op. at 13.

60. *Id.*, slip op. at 1.

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

62. *Id.*, slip op. at 15.

63. 273 N.L.R.B. 221 (1984).

64. *Id.* at 221. In *Taracorp*, an employee responsible for feeding used batteries into a moving belt refused a supervisor’s directive to pull the belt after it jammed, stating that it was not his job. *Id.* The employee was subjected to an unlawful *Weingarten* interview in which he stated that he had told the supervisor that pulling the belt was unsafe, in addition to saying that it was not his job. *Id.* The employer next interviewed the supervisor, who denied the employee had said anything about safety. *Id.* The employer discharged the employee for insubordination, not for lying in the interview. *Id.* The ALJ ordered the employee’s reinstatement with back pay. *Id.* The Board reversed the ALJ on the issue of remedy, finding that the employee had been discharged for cause. *Id.*

65. 351 N.L.R.B. 644, 646 (2007).

66. Section 10(c) of the Act provides, “No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.” 29 U.S.C. § 160(c) (2012).

67. *Anheuser-Busch*, 351 N.L.R.B. at 650. In *Anheuser-Busch*, the employer unlawfully installed hidden surveillance cameras through which it determined that several employees had engaged in misconduct. *Id.* at 644. The employer discharged the employ-

The ALJ rejected the position taken in three General Counsel Advice Memoranda,<sup>68</sup> that if an employer discharges an employee for misconduct during an unlawful *Weingarten* interview, make-whole relief is warranted unless the employer shows that it would have discharged the employee regardless of the interview misconduct.<sup>69</sup> The ALJ noted that Advice Memoranda lack precedential weight.<sup>70</sup>

## II. The Majority Decision and Dissent in *E.I. Dupont*

### A. *The Majority Decision*

The majority of the Board agreed with the ALJ that the employer unlawfully denied Smith's request for a union representative at the May 24 and June 1 interviews.<sup>71</sup> The Board remanded to the ALJ for further findings and analysis<sup>72</sup> to determine the appropriateness of a make-whole remedy.<sup>73</sup>

The Board saw the case as one of first impression post-*Taracorp*: is make-whole relief appropriate for an employee discharged for misconduct precipitated by and occurring during an unlawful interview?<sup>74</sup> Applying the rationale from the General Counsel's three Advice Memoranda, the Board distinguished *Taracorp* because the "misconduct" giving rise to Smith's discharge (his alleged dishonesty) occurred after denial of *Weingarten* rights and during the unlawful interview, not before.<sup>75</sup> While acknowledging that make-whole relief is inappro-

---

ees. *Id.* In its initial decision, the Board declined to order reinstatement or back pay because the employees were disciplined for cause, even though the employer learned of the misconduct through unlawful means. *Id.* at 568. On petition for review, the U.S. Court of Appeals for the D.C. Circuit observed that section 10(c) did not "expressly address whether the Board shall or shall not deny make-whole relief where an employer would not have discovered its employees' misconduct but for its own unlawful action." *Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 46–47 (D.C. Cir. 2005). It acknowledged that the Board could therefore "fill [the statutory] interstices with a reasoned approach," but found the Board's decision to withhold a make-whole remedy was inconsistent with existing case law. *Brewers & Maltsters*, 414 F.3d at 46–47. On remand, the Board majority determined that section 10(c) precluded a make-whole remedy, even in the absence of a *Weingarten* violation. *Anheuser-Busch*, 351 N.L.R.B. at 647–48 (alteration in original). In dissent, Members Wilma Liebman and Dennis Walsh applied *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984), arguing that the majority's analysis relied on a construction of section 10(c) that the Court of Appeals had rejected. *Anheuser-Busch*, 351 N.L.R.B. at 652–53.

68. *E.I. Dupont de Nemours & Co.*, 362 N.L.R.B. No. 98, slip op. at 15 (May 29, 2015).

69. NLRB, Gen. Couns. Adv. Mem., Case 03-CA-026833, at 3 (Feb. 3, 2010); NLRB, Gen. Couns. Adv. Mem., Case 19-CA-026979, at 2 (Sept. 8, 2000); NLRB, Gen. Couns. Adv. Mem., Case 05-CA-024870, at 3–4 (Feb. 28, 1995).

70. *E.I. Dupont*, slip op. at 15. (Davis, ALJ, opinion).

71. *Id.*, slip op. at 5 (majority opinion) (Pearce, Chairman, and Hirozawa, Member).

72. The ALJ did not identify which of the interviews gave rise to the "misconduct" for which Smith was discharged. *Id.*

73. *Id.*

74. *Id.*, slip op. at 3–4.

75. *Id.*, slip op. at 4.

appropriate if an employer discharges an employee for cause, the Board, relying on *Anheuser-Busch*, noted that this rule does not apply if there is a nexus between an employee's misconduct and an employer's unlawful actions.<sup>76</sup> In *Anheuser-Busch*, the Board said:

The dissent cites several situations where the Board has granted a make-whole remedy to employees who have committed arguably wrongful actions. These cases are distinguishable because it is not clear whether the employees' actions would have been wrongful or would have merited the discipline imposed—that is, whether the employees' actions would have constituted “cause” for discipline—if the employer had not committed the unfair labor practices.<sup>77</sup>

The Board found that a make-whole remedy is appropriate when (1) an employer, in discharging an employee, relies at least in part on the employee's misconduct during an unlawful interview; and (2) the employer is unable to show that it would have discharged the employee absent the purported misconduct.<sup>78</sup> It noted that this rule does not prevent employers from taking action against employees based on preexisting misconduct brought to light only through an unlawful interview; nor does the rule apply to conduct objectively “so egregious as to take it outside the protection of the Act, or . . . render the employee unfit for further service.”<sup>79</sup>

### B. *The Dissent*

Dissenting Member Harry Johnson agreed with the majority that the employer had violated Smith's *Weingarten* rights at the May 24 and June 1 interviews, but disagreed that a make-whole remedy was appropriate.<sup>80</sup> He asserted that the Board's new rule and remand were irreconcilable with *Taracorp*, contending that whether conduct occurred before or after unlawful denial of *Weingarten* rights was “without legal significance.”<sup>81</sup> He also relied on *Taracorp* to contend that the ap-

76. *Id.*

77. *Anheuser-Busch, Inc.*, 351 N.L.R.B. 644, 649 (2007). See also *Kolkka*, 335 N.L.R.B. 844, 849–51 (2001) (discipline for employee actions provoked by employer's unfair labor practices); *Consec Sec.*, 328 N.L.R.B. 1201, 1203–04 (1999) (discipline for employee action would have been acceptable absent employer's unlawful unilateral change in conduct rules); *Bus. Prods.-Div. of Kidde, Inc.*, 294 N.L.R.B. 840, 840 n.3, 852 (1989) (discipline for employee action that employer did not find worthy of investigation until employees began union activities and employer responded with unlawfully motivated examinations).

78. *E.I. DuPont de Nemours & Co.*, 362 N.L.R.B. No. 98, slip op. at 4 (May 29, 2015).

79. *Id.*, slip op. at 5 (quoting *Richmond Dist. Neighborhood Ctr.*, 361 N.L.R.B. No. 74, slip op. at 2 (Oct. 28, 2014) (internal quotation marks and citations omitted)).

80. *Id.*, slip op. at 6 (Johnson, Member, dissenting).

81. *Id.* For this proposition, the dissent cited *Illinois Bell Telephone Co.*, in which an employee informed her employer, during an interview in which the employer unlawfully denied her *Weingarten* representation, that she had made personal phone calls. 275 N.L.R.B. 148, 148 (1985). The employer discharged the employee for this misconduct. *Id.* The ALJ initially provided a make-whole remedy under *Kraft Foods, Inc.*, 251 N.L.R.B. 598 (1980), but because the Board overruled *Kraft Foods* in *Taracorp*, it found that the

propriate remedy for *Weingarten* violations is a cease and desist order and a notice posting and that a make-whole remedy is appropriate only if the General Counsel can prove an additional violation.<sup>82</sup>

### III. A Union Perspective on *E.I. Dupont*

The Board's new rule applies only to limited factual circumstances in which the employee says or does something in an unlawful interview that the employer relies upon in disciplining or discharging the employee, and the employer cannot show that it would have made the same decision without the employee's admission.<sup>83</sup> The fact that *E.I. Dupont* was the first case to present this issue since 1984<sup>84</sup> demonstrates the rarity of this circumstance.

The first scenario in which the new rule would apply is when an employee makes inconsistent or inaccurate statements during an unlawful interview, as described in *E.I. Dupont*. This situation happened in *Birds Eye Foods*<sup>85</sup> when an employer discovered, through lawful video surveillance, that an employee had tossed a cup of coffee into a supervisor's office.<sup>86</sup> In an unlawful *Weingarten* interview, the employee lied to the employer about throwing the coffee.<sup>87</sup> The employer subsequently discharged the employee, citing both the coffee throwing and the employee's dishonesty during the interview.<sup>88</sup>

The second scenario in which the new rule would apply is when an employee speaks or behaves intemperately during an unlawful *Weingarten* interview. This happened in *The Lusty Lady*<sup>89</sup> and *National Rehabilitation Hospital*.<sup>90</sup> In *The Lusty Lady*, the employer cited the employee's unspecified "conduct" during the meeting as a reason for discharge.<sup>91</sup> In

---

employee was no longer entitled to make-whole relief due to an insufficient nexus between the employer's denial of the *Weingarten* request and the reason for discharge. *Illinois Bell*, 275 N.L.R.B. at 148–49.

82. *E.I. Dupont*, slip op. at 7 (Johnson, Member, dissenting). See also *Taracorp Indus.*, 272 N.L.R.B. 221, 223 n.12 (1984) ("A make-whole remedy can be appropriate in a *Weingarten* setting if, but only if, an employee is discharged or disciplined for asserting the right to representation.").

83. See *E.I. DuPont de Nemours & Co.*, 362 N.L.R.B. No. 98, slip op. at 5 (May 29, 2015).

84. *Id.*, slip op. at 3. The dissent did not believe the case presented an issue of first impression and asserted that *Taracorp* addressed the factual situation presented in *E.I. Dupont*. See *id.*, slip op. at 7 (Johnson, Member, dissenting). The dissent did not dispute, however, that the employee in *Taracorp* was discharged for conduct that occurred before the *Weingarten* violation. See *id.*, slip op. at 6. See also *Taracorp*, 272 N.L.R.B. 221.

85. NLRB, Gen. Couns. Adv. Mem., Case 03-CA-026833 (Feb. 3, 2010).

86. *Id.* at 2; *Taracorp*, slip op. at 3 (discussing *Birds Eye Foods*).

87. *Birds Eye Foods*, slip op. at 2; *Taracorp*, slip op. at 3.

88. *Birds Eye Foods*, slip op. at 2; *Taracorp*, slip op. at 3.

89. NLRB, Gen. Couns. Adv. Mem., Case 19-CA-026979 (Sept. 8, 2000).

90. NLRB, Gen. Couns. Adv. Mem., Case 5-CA-24870 (Feb. 28, 1995).

91. See *The Lusty Lady*, slip op. at 3; *E.I. Dupont de Nemours & Co., Inc.*, 362 N.L.R.B. No. 98, slip op. at 3 n.7 (May 29, 2015) (employee discharged for "misconduct occurring, at least in part, during an unlawful *Weingarten* interview").

*National Rehabilitation Hospital*, the employee lost his temper during the interview after being accused of improper conduct, and the employer cited the employee's behavior as the reason for discharge.<sup>92</sup> Although these examples show that the *E.I. Dupont* rule may protect an employee whose speech or behavior is intemperate, it is not to say, as the dissent suggests,<sup>93</sup> that an employee who punches a supervisor or engages in similar physical misconduct would receive make-whole relief under the Board's new rule.

Contrary to the dissent, it is highly relevant if the misconduct for which the employee is disciplined or discharged occurred prior to or during the unlawful interview. In this regard, it is useful to analyze the facts of *E.I. Dupont*. The employer there apparently believed that Smith was injured off the job but faked the accident to get workers' compensation. Because there were no witnesses to the accident, the employer could not prove this suspicion. The employer evidently believed that if it fired Smith, the union would have filed a grievance and the employer would not have prevailed in arbitration. Aware of this problem, the employer interviewed Smith and repeatedly asked the same questions, hoping to get inconsistent answers so that it could fire Smith for interfering with the investigation or giving false statements. Regardless of whether Smith faked an accident (although the facts suggest he did not), the employer apparently believed it did not have good cause to fire Smith before the interview. Instead, the employer created a situation it hoped would manufacture "good cause." It did so, not coincidentally, by denying Smith his *Weingarten* rights. As argued by the General Counsel, had Smith's request for a union representative been granted, the representative might have counseled Smith not to answer questions due to his physical condition or to provide only answers of which he was certain. As noted by the Supreme Court in *Weingarten*: "A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors."<sup>94</sup>

---

92. *Nat'l Rehab. Hosp.*, slip op. at 2; *E.I. Dupont*, slip op. at 3 (discussing *Nat'l Rehab. Hosp.*).

93. *E.I. Dupont*, slip op. at 7 n.11 (Johnson, Member, dissenting) (citing Pier Sixty, LLC, 362 N.L.R.B. No. 59, slip op. at 4 (Mar. 31, 2015) (Johnson, Member, dissenting) (profane Facebook post directed at supervisor did not lose the protection of the Act); Mik-Lin Enter., 361 N.L.R.B. No. 27, slip op. at 10, 13 (Aug. 21, 2014) (Johnson, Member, dissenting) (sick day campaign poster advising customers "WE HOPE YOUR IMMUNE SYSTEM IS READY BECAUSE YOU'RE ABOUT TO TAKE THE SANDWICH TEST" did not lose the protection of the Act); and Plaza Auto Center, Inc., 360 N.L.R.B. No. 117, slip op. at 15 (May 28, 2014) (Johnson, Member, dissenting) (employee's obscene and denigrating comments to manager did not lose the protection of the Act)).

94. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 262-63 (1975).

The Board's new rule protects employees like Smith who are coerced to attend interviews without representation.<sup>95</sup> It offers a robust remedy for violation of *Weingarten* rights that validates for employees the significance of these rights.

#### **IV. The Background of *Manhattan Beer***

##### **A. Facts**

While working on June 7, 2013, driver helper Joe Garcia Diaz was injured and filed an incident report.<sup>96</sup> When he reported to work the next day, he discovered he was not scheduled for any routes.<sup>97</sup> Diaz went to the office area and spoke to the delivery manager, Roy Small, about the schedule.<sup>98</sup> Small observed that Diaz “reeked of the smell of marijuana” and that his eyes were “glassy” and “bloodshot.”<sup>99</sup> Tony Wetherell, the facility manager, asked Diaz how he was feeling and whether he had “been doing anything stupid.”<sup>100</sup> When Diaz asked why he wanted to know, Wetherell told Diaz he smelled “a little funny.”<sup>101</sup>

According to his testimony, Diaz then waited over an hour for a route, during which Small repeatedly told him that he was trying to find him an assignment.<sup>102</sup> Diaz said he eventually asked Small if he should just go home.<sup>103</sup> Small told Diaz that he had a route for him, but that he would have to take a drug test first because he smelled like marijuana.<sup>104</sup> Wetherell also implied to Diaz that he smelled like marijuana.<sup>105</sup> Diaz told Small that he did not have a problem taking a drug test, but that he wanted his shop steward to be present.<sup>106</sup> Small said that it was a “company issue” and that “shop stewards have nothing to do with it.”<sup>107</sup> Diaz replied that he did not think

---

95. The Board's new rule could also apply to a case in which an employer denies an employee's request for union representation at drug or alcohol testing and compels the employee to submit to the testing unrepresented—a twist on *Manhattan Beer Distributors, LLC*, 362 N.L.R.B. No. 192 (Aug. 27, 2015), discussed below. If the test were positive and the employer elected to discipline or discharge the employee on the basis of the test result, presumably the employee would not be entitled to a make-whole remedy under the new rule, because the misconduct—the alcohol or drug use—would have occurred before denial of *Weingarten* rights.

96. *Manhattan Beer*, slip op. at 1.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Manhattan Beer Distribs., LLC*, 362 N.L.R.B. No. 192, slip op. at 1 (Aug. 27, 2015).

102. *Id.*, slip op. at 11 (Davis, ALJ, opinion).

103. *Id.*

104. *Id.*, slip op. at 1 (majority opinion).

105. *Id.*

106. *Manhattan Beer Distribs., LLC*, 362 N.L.R.B. No. 192, slip op. at 1 (Aug. 27, 2015).

107. *Id.*, slip op. at 11 (Davis, ALJ, opinion).

that was correct because when he had been a steward, he had to “be there for everything that was going on between workers and management.”<sup>108</sup> Small told him, “you just have to take the test.”<sup>109</sup>

Diaz left the office area to call the assistant shop steward but could not reach him.<sup>110</sup> Diaz then called the shop steward, who told Diaz it was his day off and that he could not accompany him to the drug test.<sup>111</sup> While Diaz was on the phone with the steward, Wetherell drove up in his car and told Diaz to get in.<sup>112</sup> Diaz told Wetherell he would not take the drug test without a shop steward present.<sup>113</sup> Wetherell then told Diaz to drive himself to the test and that they would “finish talking there.”<sup>114</sup> Diaz replied, “Not without a shop steward.”<sup>115</sup>

When Diaz returned to the office, Small asked him what the steward had said.<sup>116</sup> Diaz refused to tell Small.<sup>117</sup> Small then called the steward and told him that Diaz smelled of marijuana, that his eyes were glassy and bloodshot, and that he was going to take him for a drug test because he had a reasonable suspicion he was under the influence of marijuana.<sup>118</sup> The steward told Small to do what he had to do.<sup>119</sup>

Small again asked Diaz to take the drug test, telling him that, if he refused, it would be considered a positive test result and that he could be terminated.<sup>120</sup> Diaz again declined.<sup>121</sup> A short time later, Small and Wetherell again asked Diaz what he was going to do.<sup>122</sup> Diaz said that he felt as if his rights were being violated and that he did not have a problem taking the test, but that he wanted a steward present, and that, because a steward could not be present, he would not take the test.<sup>123</sup> Small told Diaz he should take the test and that, after he passed it, he could “come back, stick your nose up at us and tell us that we messed up.”<sup>124</sup> Diaz replied that he was “not

108. *Id.*

109. *Id.*

110. *Id.*, slip op. at 1 (majority opinion).

111. *Id.* According to Diaz’s hearing testimony, the steward told him that, if he felt “strongly enough” that his rights were being violated and that he needed a representative present, he should not take the test. *Id.*, slip op. at 11 (Davis, ALJ, opinion).

112. Manhattan Beer Distribs., LLC, 362 N.L.R.B. No. 192, slip op. at 1 (Aug. 27, 2015) (majority opinion).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*, slip op. at 11 (Davis, ALJ, opinion).

117. Manhattan Beer Distribs., LLC, 362 N.L.R.B. No. 192, slip op. at 11 (Aug. 27, 2015).

118. *Id.*

119. *Id.*

120. *Id.*, slip op. at 1 (majority opinion).

121. *Id.*, slip op. at 11 (Davis, ALJ, opinion).

122. *Id.*

123. *Id.*

124. Manhattan Beer Distribs., LLC, 362 N.L.R.B. No. 192, slip op. at 1 (Aug. 27, 2015).

that type of person.”<sup>125</sup> Small asked Diaz if he understood that, by refusing to take the drug test, he would be suspended.<sup>126</sup> Diaz said that he understood and repeated that he did not have a problem taking the test, but did not believe the employer had grounds “to do this.”<sup>127</sup>

### B. Procedural Background

On May 15, 2014, ALJ Steven Davis issued a decision and recommended order concluding that the employer had violated Diaz’s *Weingarten* rights by not giving Diaz a clear choice between having the interview (the drug test) without representation or ending the interview.<sup>128</sup> The ALJ, relying on *Safeway Stores*<sup>129</sup> and *System 99*,<sup>130</sup> found that *Weingarten* rights attached because Diaz reasonably believed the drug test would result in discipline and because the drug test was “an extension of, and a required part of its investigatory process to determine if [Diaz] was under the influence of drugs.”<sup>131</sup> The ALJ concluded that Diaz’s phone conversation with the steward did not satisfy his right to union representation.<sup>132</sup>

---

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*, slip op. at 15 (Davis, ALJ, opinion).

129. 303 N.L.R.B. 989, 989 (1991). In *Safeway Stores*, the employer investigated an employee’s absenteeism by directing the employee to take a drug test. The employer denied the employee’s request to consult with a union representative. When the employee refused to submit to the drug test on the spot, the employer discharged him. *Id.* at 990. As noted by the ALJ in *Safeway Stores*, the Board did “not pass on the administrative law judge’s apparent conclusion that a drug test, standing alone, would constitute an investigatory interview under *Weingarten*,” noting that the test was part of a wider inquiry into the dischargee’s absence record—a first step in determining whether his excessive absences were due to drug use.” *Manhattan Beer*, slip op. at 12 (referencing *Safeway Stores*).

130. 289 N.L.R.B. 723 (1988). In *System 99*, the employer interviewed an employee it believed had arrived at work intoxicated. *Id.* at 724. The employer asked the employee to take a sobriety test and advised him that, if he refused, he would be presumed intoxicated and fired. *Id.* The ALJ found that the employee had, in effect, been discharged as “punishment for his privileged silence after being denied *Weingarten* rights to consult” and ordered a make-whole remedy. *Id.* at 728.

131. *Manhattan Beer Distribs., LLC*, 362 N.L.R.B. No. 192, slip op. at 12 (Aug. 27, 2015) (alteration in original). The employer had a drug testing policy, which provided that “no employee shall report to work under the influence of such drugs. Employees who engage in such conduct will be subject to discipline up to and including discharge.” *Id.*, slip op. at 10. The collective-bargaining agreement (CBA) provided, in relevant part, that “any employee who . . . is impaired by . . . narcotics, illegal drugs, prescription drugs absent a prescription, controlled substances . . . when reporting for work . . . is subject to immediate disciplinary action, up to and including termination of employment.” *Id.* The CBA also stated that “employees other than drivers may be tested only when there is reasonable suspicion that the employee is working or has reported to work while impaired by drugs or alcohol.” *Id.* At the hearing, an employer witness testified that, notwithstanding the CBA’s provision that the employer has the right to fire an impaired employee immediately, the employer may not discipline employees without first affording them an opportunity to take a drug test. *Id.*

132. *Id.*, slip op. at 13.

The ALJ relied on *Weingarten*'s emphasis on "the importance of the physical presence of a union agent who 'is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them.'"<sup>133</sup> The ALJ also cited *Washoe Medical Center*,<sup>134</sup> in which the Board stated that "the union representative is entitled not only to attend the investigatory interview but to provide 'advice and assistance' to the employee."<sup>135</sup>

The ALJ declined to reinstate Diaz.<sup>136</sup> The ALJ found that the employer had discharged Diaz because of his refusal to submit to a drug test, not for his refusal to submit to a drug test without a union representative being present.<sup>137</sup> Applying *Wright Line*,<sup>138</sup> the ALJ found no evidence of animus towards Diaz's protected activity, citing company documents suggesting that Diaz was fired for refusing to take the test.<sup>139</sup> The employer also presented testimony showing that refusal to take a drug test was considered a positive result.<sup>140</sup> Finding no nexus between the denial of Diaz's *Weingarten* rights and the discharge, the ALJ concluded that Diaz's refusal to take the test and the managers' "reasonable suspicion" that Diaz was under the influence of drugs properly led to Diaz's termination.<sup>141</sup>

## V. The Majority Decision and Dissent in *Manhattan Beer*

### A. The Majority Decision

The Board majority adopted the ALJ's finding that the employer violated Diaz's *Weingarten* rights by not giving him a clear choice between having the interview without representation or ending the interview.<sup>142</sup> The Board also found that the employer violated Diaz's *Weingarten* rights by not affording him "a reasonable period of time to obtain union representation."<sup>143</sup> While conceding that "an employer cannot delay testing indefinitely while an employee seeks out an available union representative," the Board emphasized that it was required to "seek a reasonable accommodation of employers' legitimate management interests and employees' legitimate Section 7 interests, rather than serve one at the complete expense of the other."<sup>144</sup> The Board

---

133. *Id.*, slip op. at 14 (quoting *NLRB v. J. Weingarten*, 420 U.S. 251, 260 (1975)).

134. 348 N.L.R.B. 361 (2006).

135. *Id.* at 361 (citing *Barnard College*, 340 N.L.R.B. 934 (2003)).

136. *Manhattan Beer Distribs. LLC*, 362 N.L.R.B. No. 192, slip op. at 14 (Aug. 27, 2015).

137. *Id.*

138. 251 N.L.R.B. 1083, 1089 (1980).

139. *Manhattan Beer*, slip op. at 14.

140. *Id.*

141. *Id.*

142. *Manhattan Beer Distribs., LLC*, 362 N.L.R.B. No. 192, slip op. at 3 (Aug. 27, 2015) (*Hirozawa and McFerran, Members*).

143. *Id.*

144. *Id.*

did not clarify what it would consider “a reasonable period of time,” but noted that the employer had not allowed Diaz sufficient time to determine whether the assistant steward might become available, and that, according to one of the employer’s witnesses, marijuana stays in the body for three months.<sup>145</sup>

Relying on *Ralphs Grocery*,<sup>146</sup> the Board reversed the ALJ with regard to reinstatement.<sup>147</sup> In *Ralphs Grocery*, the employer interviewed an employee it believed had arrived at work under the influence and demanded that the employee submit to drug and alcohol testing.<sup>148</sup> The employee refused, and the employer warned him that such refusal would be grounds for immediate termination.<sup>149</sup> The employee asked to contact a union representative; despite telling him he had no right to union representation, the employer nevertheless permitted him to try to contact a union representative.<sup>150</sup> The employee was unable to reach a representative, and after ten to fifteen minutes, the employer again demanded the employee take the test.<sup>151</sup> Despite the employer’s warning that refusal would result in discharge, the employee refused to take the test and the employer terminated him.<sup>152</sup> The Board agreed with the ALJ that the employee had been unlawfully discharged, finding that his termination was “inextricably linked” to his assertion of *Weingarten* rights, and thus ordered make-whole relief.<sup>153</sup> The Board observed: “By relying on [the employee’s] refusal to take the test as a basis for discipline, the [employer] penalized [the employee] for refusing to waive his right to representation, irrespective of whether it considered his refusal to be insubordination or an automatic positive test result.”<sup>154</sup>

The Board noted in *Manhattan Beer* that the “facts of *Ralphs Grocery* are strikingly similar to those presented here.”<sup>155</sup> There, the employer told the employee that refusal to take a drug test would be considered a positive result that could possibly lead to suspension or termination.<sup>156</sup> In *Manhattan Beer*, after Diaz insisted upon exercising his *Weingarten* rights, the employer treated his refusal to take the drug test without the benefit of union representation as a positive test result

---

145. *Id.*

146. 361 N.L.R.B. No. 9 (July 31, 2014).

147. *Id.*, slip op. at 4.

148. *Id.*, slip op. at 5.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*, slip op. at 1.

154. *Manhattan Beer*, 362 N.L.R.B. No. 192, slip op. at 4 (Aug. 27, 2015) (quoting *Ralphs Grocery Co.*, 361 N.L.R.B. No. 9, slip op. at 1 (July 31, 2014)).

155. *Id.*, slip op. at 4.

156. *Id.*

and terminated him.<sup>157</sup> The Board held that here, as in *Ralphs Grocery*, the reason for the discharge was “inextricably linked” to the assertion of *Weingarten* rights, so make-whole relief was appropriate.<sup>158</sup>

### B. *The Dissent*

Dissenting Member Johnson disagreed with the majority’s conclusions that the employer had violated Diaz’s *Weingarten* rights and that the employer had discharged Diaz for exercising those rights.<sup>159</sup> While not disputing that an employee is entitled to “advice and active assistance” from a union representative “in a traditional investigatory interview,” Johnson concluded that “[a]s a matter of logic,” the role of a union representative in a drug or alcohol testing situation should be limited because of “increased risks of inaccuracy and adulteration” posed by the presence of another person during the physical test administration.<sup>160</sup> The dissent also believed that “the benefit of any kind of legitimate ‘advice and active assistance’ that would happen in that context is likely to be minimal.”<sup>161</sup> The dissent found that *Weingarten* requires only that the employee have an opportunity to confer with a union representative prior to deciding whether to submit to a drug or alcohol test and that the need for an accurate and unadulterated test outweighs whatever “minimal benefit” might be provided by a union representative’s presence.<sup>162</sup> The dissent also relied on the ALJ’s analysis in *System 99* (adopted without comment by the Board),<sup>163</sup> in saying that an employer should not be required to delay a drug or alcohol test if no union representative is available.<sup>164</sup>

Member Johnson distinguished *Ralphs Grocery*, in which he had agreed with the majority that the employer unlawfully interfered with the employee’s *Weingarten* rights, but disagreed that the employee had been discharged for his assertion of those rights. In *Manhattan Beer*, he noted that Diaz was able to speak on the telephone with, and obtain advice from, the steward before deciding not to take the drug test.<sup>165</sup>

The dissent opposed reinstatement, finding that, if an employee’s refusal to take a drug or alcohol test is treated by the employer’s pre-

157. *Id.*

158. *Id.*; see also *Ralphs Grocery*, slip op. at 6.

159. *Manhattan Beer*, slip op. at 6.

160. *Id.*

161. *Id.* (quoting Washoe Med. Ctr., 348 N.L.R.B. 361 (2006)).

162. *Id.*

163. *System 99*, 289 N.L.R.B. 723, 727 (1988). In *System 99*, involving an alcohol test, the ALJ doubted that the employee “had a *Weingarten* right to delay the interview until [the chief steward] returned, . . . considering that [he] was not expected back for perhaps an hour . . . and the passage of that much time has made the results of any sobriety test to which [the employee] might ultimately agree to submit largely useless.” *Id.* (alteration in original).

164. *Manhattan Beer Distribs. LLC*, 362 N.L.R.B. No. 192, slip op. at 6 (Aug. 27, 2015).

165. *Id.*

existing policy or practice as either a failure to overcome reasonable suspicion or an automatic positive test result, the employer is “really terminating the employee because of the preordained result under the policy.”<sup>166</sup> Thus, when the employee chooses to “forgo the interview,” the employer should be free to make its decision without information that could have been provided by the interview.<sup>167</sup>

## VI. A Union Perspective on *Manhattan Beer*

Why is a drug test like an investigative interview?<sup>168</sup> The dissent contended that it is not, claiming that the benefit of union representation during drug or alcohol testing is “minimal” and outweighed by increased risks of inaccuracy and adulteration posed by the presence of another person.<sup>169</sup>

However, a union representative’s advice on whether to take a drug or alcohol test, after having the opportunity to observe and speak with the employee face-to-face, is not a “minimal” benefit.<sup>170</sup> Nor is the representative’s presence at the test to ensure proper procedures are followed.<sup>171</sup> If there are irregularities, the representative can witness them, report them to the employer, and later raise them during the grievance and arbitration process.<sup>172</sup> If the employer asks the employee questions during the administration of the test (or if the employee feels the urge to volunteer information), the representative can counsel the employee on whether and how to respond.<sup>173</sup> Additionally, a union representative’s presence during a drug or alcohol test reassures not only the tested employee, but others in the bargaining unit “that they, too, can obtain [the representative’s] aid and protection if called upon to attend a like interview.”<sup>174</sup>

Reading between the lines of *Manhattan Beer*’s dissent, there seems to be an underlying presumption that if an employee were not using marijuana, he would submit to the test because the fear of losing the job would outweigh any injustice of denied union representation. Because applying this presumption means that the employee is necessarily “guilty,” it is perhaps not surprising that the dissent would be-

---

166. *Id.*, slip op. at 8.

167. *Id.*

168. See LEWIS CARROLL, *ALICE’S ADVENTURES IN WONDERLAND* 97 (VolumeOne Publishing 1998) (1865) (“Why is a raven like a writing desk?”).

169. *Manhattan Beer*, slip op. at 6.

170. See, e.g., *id.*, slip op. at 2–3 (“At the very least, the physical presence of a union representative to independently observe Diaz’s condition and potentially contest the grounds for the . . . suspicions.”).

171. *Id.*

172. *Id.*

173. *Id.*

174. *NLRB v. J. Weingarten*, 420 U.S. 251, 261 (1975) (alteration in original).

lieve that union representation in such circumstances would afford minimal benefit.<sup>175</sup>

To understand why an employee might be hesitant to take a drug test without a union representative present, consider what a positive drug test actually means. Some employer policies, as in *Manhattan Beer*, prohibit an employee from being under the influence of drugs or alcohol while on duty, but do not address an employee's off-duty conduct.<sup>176</sup> A marijuana test will show whether the employee has used the drug in the recent past, but will not indicate whether the employee is presently under the influence of the drug.<sup>177</sup> So, while an employee currently under the influence of marijuana would be understandably reluctant to take a drug test, so would an employee who used marijuana on a day off, but is not under the influence at the time of the test. In fact, in such circumstances, discharge could be the last thing on an employee's mind—the employee might fear that positive test results could result in criminal prosecution or impact such things as parental rights in a custodial hearing.

Consider also the application of a “reasonable suspicion” clause. What if a supervisor disliked a particular employee and used drug testing as harassment? What if the employer applied reasonable suspicion only to minority employees or to union activists? If an employee believed that the employer had improperly applied “reasonable suspicion,” it is especially understandable why the employee would want union representation.

Finally, a recent Board decision could bring into question the lawfulness of asking an employee to submit to drug or alcohol testing following an employer's denial of a request for *Weingarten* representation in a traditional investigatory interview. In *Bellagio, LLC*,<sup>178</sup> the Board majority concluded that the employer violated the Act by issuing an employee a suspension pending investigation (SPI) because he requested *Weingarten* representation.<sup>179</sup> The Board reached this conclusion although the employee suffered no loss of pay because of the SPI, noting that the SPI had a “chilling” effect on the exercise of *Weingarten* rights because it could result in suspension or discharge.<sup>180</sup> Similarly, a drug or alcohol test could have a chilling effect because a positive test could result in suspension or discharge.

---

175. Unless, as the dissent suggested, the union representative supplied the employee with clean urine or a detox kit that enabled the employee to pass the drug test. See *Manhattan Beer Distribs. LLC*, 362 N.L.R.B. No. 192, slip op. at 7 (Aug. 27, 2015).

176. *Id.*, slip op. at 3.

177. *Id.*

178. 362 N.L.R.B. No. 175 (Aug. 20, 2015).

179. *Id.*, slip op. at 3 (Pearce, Chairman, and McFerran, Member).

180. *Id.*

## **Conclusion**

*E.I. Dupont* and *Manhattan Beer* promote a robust protection of section 7 rights wholly consistent with the purposes of the Act. *E.I. Dupont* immunizes employees forced to attend interviews without union representation from the adverse consequences of that lack of representation. *Manhattan Beer* affirms, both to the employee under the microscope and to others in the bargaining unit, that the presence of a union representative at a *Weingarten* interview is meaningful, even when that interview is not an investigatory interview in the traditional sense. Together, these cases ensure that the protections guaranteed to workers for the past forty years continue to be relevant.

It remains to be seen if the Board will overturn *IBM Corp.* and extend *Weingarten* protections to employees not represented by a union. In the meantime, the application of *Weingarten* to other contexts and the intersection of *E.I. Dupont*, *Manhattan Beer*, and other recent *Weingarten* cases will continue to raise intriguing issues for employees, unions, employers, and attorneys.



# Factors in Police Misconduct Arbitration Outcomes: What Does It Take to Fire a Bad Cop?

Tyler Adams\*

## Introduction

“Anecdotal evidence can easily be generated from many . . . jurisdictions to illustrate the fact that disciplinary actions, grounded in conduct which chiefs of police and presumably the public at large would find simply unacceptable, are often overturned by arbitrators.”<sup>1</sup> Disciplinary procedures for police officers across the country have been a source of significant frustration for mayors, city officials, police chiefs, and others with an interest in the outcome of these proceedings.<sup>2</sup> At the core of this frustration is the perception that labor arbitrators frequently overturn decisions of police executives.<sup>3</sup>

Public concern over the effectiveness and adequacy of police discipline has spiked in recent years.<sup>4</sup> This has brought increased media attention to alleged police misconduct.<sup>5</sup> One obvious example is the shooting of Michael Brown, an unarmed black teenager, in Ferguson, Missouri, on August 9, 2014.<sup>6</sup> The shooting caused intense public outcry<sup>7</sup> about law enforcement’s treatment of racial minorities and led to

---

\* J.D. University of Minnesota Law School Class of 2017; Lead Managing Editor, *ABA Journal of Labor and Employment Law*; B.A., University of Minnesota College of Liberal Arts, Political Science and Philosophy with Concentration in Ethics and Civic Life, 2014. The author thanks all *JLEL* editors who helped with the production of this Note, particularly Professors Stephen F. Befort and Laura J. Cooper.

1. Mark Iris, *Unbinding Binding Arbitration of Police Discipline: The Public Policy Exception*, 1 VA. J. CRIM. L. 540, 544 (2013).

2. See Darrel W. Stephens, *Police Discipline: A Case for Change*, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE (June 2011), <https://www.ncjrs.gov/pdffiles1/nij/234052.pdf>.

3. *Id.*; see also Iris, *supra* note 1, at 544.

4. In 2015, one court went so far as to order an investigation into the adequacy of police discipline. *The Arbitration of Police Discipline: An Intensive Court Ordered Study in Oakland, California*, NATIONAL ACADEMY OF ARBITRATORS (Sept. 22, 2015), <http://law.missouri.edu/arbitrationinfo/2015/09/22/the-arbitration-of-police-discipline-an-intensive-court-ordered-study-in-oakland-california/>.

5. See *Last Week Tonight with John Oliver: Police Accountability* (HBO Oct. 2, 2016), <https://www.youtube.com/watch?v=zaD84DTGUL0>.

6. For an in-depth description of the Michael Brown shooting, see *What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), <http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html>.

7. Because of the politically divisive nature of the Ferguson incident, reactions to the shooting differed between those critical of law enforcement practices and those supportive of swift action to secure the safety of police officers and the public. For an exam-

heightened scrutiny of alleged police misconduct, particularly when officers used deadly force.<sup>8</sup> The Ferguson controversy led many to harbor strong sentiments of distrust toward police, an issue exacerbated by the death of Freddie Gray while in police custody in Baltimore, leading to widespread rioting across the city.<sup>9</sup> Some responded with deadly violence toward police officers after the shooting deaths of Philando Castile in St. Anthony, Minnesota,<sup>10</sup> and Alton Sterling in Baton Rouge<sup>11</sup> in 2016.

These events renewed longstanding perceptions that labor arbitrators who fail to uphold appropriate discipline for abusive police officers render useless measures intended to discipline police officers accused of misconduct. This perception manifests itself in media portrayals of police discipline arbitration proceedings.<sup>12</sup> There is a grow-

---

ple of a critical perspective of the aftermath of the Ferguson shooting, see, for example, Jim Salter & Eric Tucker, *Ferguson Aftermath: U.S. Finds Racist, Profit-driven Practices in St. Louis Suburb*, WASHINGTON TIMES (Mar. 5, 2015), [http://www.washingtontimes.com/news/2015/mar/5/ferguson-aftermath-us-finds-racist-profit-driven-p/?page=all](http://www.washingtontimes.com/news/2015/mar/5/ferguson-aftermath-us-finds-racist-profit-driven-p/). For an example of a more supportive perspective toward police accounts of the shooting, see, for example, Chris Nuelle, *8 Months Later: The True Aftermath of Ferguson*, COLL. CONSERVATIVE (Apr. 22, 2015), <http://thecollegeconservative.com/2015/04/22/8-months-later-the-true-aftermath-of-ferguson/>.

8. Some believe that the racial element of controversies concerning law enforcement and lethal force necessitate an entirely new approach to police training. See Jamaica Falconer, *Deadly Force: Post-Ferguson Policing*, SOC'Y OF COUNSELING PSYCH. (Oct. 9, 2015), <http://counspysyhracialjustice.org/deadly-force-post-ferguson-policing/>.

9. *Timeline: Freddie Gray's Arrest, Death and the Aftermath*, BALT. SUN (Apr. 12, 2015), <http://data.baltimoresun.com/news/freddie-gray/>. Further controversy ensued when none of the police officers involved in the incident were convicted of a crime. See Kim Bellware, *How the Fight to Convict Baltimore Cops in Freddie Gray's Death Fell Apart*, HUFFINGTON POST (July 31, 2016), [http://www.huffingtonpost.com/entry/freddie-gray-trial-problems\\_us\\_5798feb1e4b02d5d5ed3ed67](http://www.huffingtonpost.com/entry/freddie-gray-trial-problems_us_5798feb1e4b02d5d5ed3ed67); Kevin Rector & Michael Dresser, *Officers' Selection of Judge Trials Shaped Outcome in Freddie Gray Case—Spurring Debate*, BALT. SUN (Aug. 1, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-pivotal-nero-bench-decision-20160731-story.html>.

10. Elliot C. McLaughlin, *Woman Streams Aftermath of Fatal Officer-Involved Shooting*, CNN (July 8, 2016), <http://www.cnn.com/2016/07/07/us/falcon-heights-shooting-minnesotal>.

11. Steve Visser, *Baton Rouge Shooting: 3 Officers Dead, Shooter Was Missouri Man, Sources Say*, CNN (July 18, 2016), <http://www.cnn.com/2016/07/17/us/baton-route-police-shooting/> (“Louisiana State Police announced last week that they had received threats of plots against Baton Rouge police.”). Violence against police also erupted in Dallas soon after the Baton Rouge incident. See Manny Fernandez, Richard Pérez-Peña & Jonah Engel Bromwich, *Five Dallas Officers Were Killed as Payback, Police Chief Says*, N.Y. TIMES (July 8, 2016), [http://www.nytimes.com/2016/07/09/us/dallas-police-shooting.html?\\_r=0](http://www.nytimes.com/2016/07/09/us/dallas-police-shooting.html?_r=0).

12. See, e.g., Henry K. Lee, *Oakland Police Discipline Blasted Again*, SFGATE (May 4, 2015), <http://www.sfgate.com/crime/article/Oakland-police-discipline-blasted-again-6241820.php> (criticizing arbitration process that “failed to properly discipline” a police officer accused of alcohol-related misconduct); Conor Friedersdorf, *How Police Unions and Arbitrators Keep Abusive Cops on the Street*, ATLANTIC (Dec. 2, 2014), <http://www.theatlantic.com/politics/archive/2014/12/how-police-unions-keep-abusive-cops-on-the-street/383258/> (highlighting cases across the country in which arbitrators overturned police discipline).

ing sentiment that it is difficult or even impossible to fire a bad cop. Unfortunately, due to the media's propensity for circulating sensational headlines, they rarely provide complete and accurate accounts of the details of police misconduct arbitration decisions.<sup>13</sup> Most importantly, the media fail to capture what factors arbitrators actually consider when deciding whether to uphold police discipline. This Note explores those details and examines what factors are most important to arbitrators in adjudicating cases of alleged police misconduct.

Part I of this Note provides background on police unions and their collective bargaining agreements as well as prior research on arbitration outcomes in police discipline cases. Part II outlines this Note's methodology for reaching its own findings. Finally, Part III identifies the factors most significant in arbitrators' decisions overturning police discharges and notes the particular importance of officers' good character in decisions reversing discharges.

## I. Background

### A. Police Unions and Collective Bargaining Agreements

Most police officers are represented by unions<sup>14</sup> and are covered by collective bargaining agreements.<sup>15</sup> In 2013, the majority were covered by a collective bargaining agreement or were operating under a collective bargaining agreement that had technically expired.<sup>16</sup> The likelihood of police officers being covered by a collective bargaining agreement increases with the size of the city in which the department is located. In 2013, 92% of police officers serving a population of 1,000,000 people or more had collective bargaining agreements, compared to slightly less than 60% of officers serving populations of fewer than 2,500 people.<sup>17</sup>

The terms and structure of these collective bargaining agreements vary widely among states and even within municipalities.<sup>18</sup> However,

13. See Sean Gormley, *Counterpoint: Cop Disciplinary System Is Not Broken*, STAR-TRIBUNE (Jan. 7, 2016), <http://www.startribune.com/counterpoint-cop-disciplinary-system-is-not-broken/364582971/> (addressing a previous commentator's argument that police discipline through arbitration is inadequate to "weed out" bad cops).

14. See Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2206 (2014) (discussing the emergence and practice of police unionization). Many police unions do not use the word "union" to describe themselves as an entity, opting instead for terms like "association" or "order." *Id.*

15. *Id.* Because police officers are public employees, their right to bargain collectively depends on state law. Six states—Arizona, Georgia, North Carolina, Mississippi, South Carolina, and Virginia—prohibit police unions from collectively bargaining. *Id.* at 2207 (citing Richard B. Freeman & Eunice S. Han, *Public Sector Unionism Without Collective Bargaining*, 54 J. INDUS. REL. 386 (2012)).

16. Brian A. Reeves, *U.S. Dep't of Justice, Bureau of Justice Statistics, Local Police Departments, 2013: Personnel, Policies, and Practices*, at 15 (app. tbl.3) (May 2015), <https://www.bjs.gov/content/pub/pdf/lpd13ppp.pdf>.

17. *Id.*

18. Stoughton, *supra* note 14, at 2208–09. This variance is at least in part due to differences in how police unions negotiate with local law enforcement agencies. In larger

collective bargaining agreements between police officers and law enforcement agencies<sup>19</sup> almost always permit grievances to challenge disciplinary actions.<sup>20</sup> Often, these grievances are initially appealed to an officer's immediate superior in the chain of command, meaning, for example, that a sergeant would appeal a disciplinary decision to a lieutenant.<sup>21</sup> Once this process is finished, if the union still wishes to dispute the disciplinary decision, most collective bargaining agreements permit the matter to be heard by a neutral arbitrator.<sup>22</sup>

### *B. Prior Research on Arbitration Outcomes and Police Discipline*

Previous studies have analyzed arbitration decisions to determine what factors arbitrators most frequently take into account in sustaining or denying labor grievances.<sup>23</sup> A study analyzing 2,055 Minnesota arbitration awards between 1982 and 2005 found that public sector employers are significantly more likely than private sector employers to win cases that go to arbitration.<sup>24</sup> Management is more likely to be upheld if the employee was discharged rather than suspended or reprimanded.<sup>25</sup> The same study also found that when arbitrators reduce discipline, they most frequently cite an employee's good work record, a lack of progressive discipline by the employer, or the excessive severity of the punishment as mitigating factors.<sup>26</sup>

Some research has focused exclusively on police discipline arbitration. Studies of the frequency with which arbitrators overturn police discipline have been limited in scope, confined only to large cities, and cover only short timeframes.<sup>27</sup> Nevertheless, the available studies suggest that neutral arbitrators regularly overturn police dis-

---

cities, departments may have to negotiate with several different unions representing different portions of the police force. *Id.*

19. The Labor Relations Information System maintains a "contract database" of police collective bargaining agreements. *LRIS Public Safety Contract Database*, LABOR RELATIONS INFORMATION SYSTEM, <https://www.lris.com/contracts/>.

20. Stoughton, *supra* note 14, at 2209.

21. *Id.* at 2210.

22. *Id.* Grievance procedures may have more steps before reaching arbitration. *See generally id.*; Jerome Lefkowitz, *Arbitration of Disputes Involving Police and Firefighters*, in *LABOR AND EMPLOYMENT ARBITRATION* § 2-51 (2d ed. 2016).

23. *See, e.g.*, LAURA J. COOPER, MARIO F. BOGNANNO & STEPHEN F. BEFORT, *MORE THAN WE HAVE EVER KNOWN ABOUT DISCIPLINE AND DISCHARGE IN LABOR ARBITRATION: AN EMPIRICAL STUDY* (2015); George W. Bohlander & Donna Blanchero, *A Study of Reversal Determinants in Discipline and Discharge Arbitration Awards: The Impact of Just Cause Standards*, 21 *LAB. STUD. J.* 3 (1996).

24. COOPER ET AL., *supra* note 23, at 7, 305.

25. *Id.*

26. *Id.* at 308.

27. *See Iris, supra* note 1, at 543-44 (examining two studies of police misconduct arbitration: one in Chicago over a four-year period and another in Houston over a five-year period); EDWARD SWANSON, *REPORT OF THE COURT-APPOINTED INVESTIGATOR IN DELPHINE ALLEN V. CITY OF OAKLAND* (2015) (researching police discipline arbitration in Oakland over a five-year period).

cipline.<sup>28</sup> One study of Chicago police discipline arbitration decisions from 1990 and 1993 found that arbitrators overturned about half of the total days of disciplinary suspension imposed by police executives.<sup>29</sup> A similar study of Houston police discipline arbitration awards from 1994 to 1998 found that arbitrators upheld slightly more than half of all suspension days.<sup>30</sup>

While the suspension of police officers is certainly a significant aspect of police discipline, perhaps the more controversial issue is how often discharged police officers are reinstated through arbitration. Studies suggest that the frequency of overturned discharges varies by city. A 2001 study of police discharge grievances in Cincinnati, for example, observed how high standards for terminating police officers resulted in many officers being reinstated.<sup>31</sup> In recent years, Philadelphia and Oklahoma City have seen nearly every discharged police officer reinstated through arbitration.<sup>32</sup> A study of police discipline in Oakland between 2010 and 2014 characterized the arbitration system as “broken” because police officials were upheld only about a quarter of the time.<sup>33</sup>

Departments throughout Texas at about the same time as the Cincinnati study, however, saw closer to half of police discharges overturned, and about half of overturned discharges reduced to a lesser penalty, such as a suspension.<sup>34</sup> More recently, police departments in Portland, Oregon, have also seen about half of officer discharges overturned.<sup>35</sup>

These studies provide important statistical background and support the assertion that arbitrators regularly, but not always, overturn

28. Iris, *supra* note 1, at 543 (“Empirical findings confirm the reality that from a police chief’s perspective, the results of the arbitration process are not pretty.”).

29. Mark Iris, *Police Discipline in Chicago: Arbitration or Arbitrary?*, 89 J. CRIM. L. & CRIMINOLOGY 215, 235 tbl.1 (1998).

30. Mark Iris, *Police Discipline in Houston: The Arbitration Experience*, 5 POLICE Q. 132, 141 tbl.1 (2002).

31. See Robert Anglen & Dan Horn, *Police Discipline Inconsistent: Sanctions Most Likely to be Reduced*, CINCINNATI ENQUIRER (Oct. 21, 2001), [http://enquirer.com/editions/2001/10/21/loc\\_police\\_discipline.html](http://enquirer.com/editions/2001/10/21/loc_police_discipline.html). This trend may have been attributable to a de facto requirement that Cincinnati police officers be convicted of a felony in a separate criminal proceeding before discharge became a possibility. Iris, *supra* note 1, at 544.

32. Dan Stamm, *Police Commish Angry That 90 Percent of Fired Officers Get Jobs Back*, NBC PHILADELPHIA (Feb. 28, 2013), <http://www.nbcphiladelphia.com/news/local/Police-Officers-Get-Jobs-Back-194100131.html> (about ninety percent of fired officers were reinstated; three-fourths with full pay and benefits); Will Aitchison, *10 Years of OKC Police Discipline*, LABOR RELATIONS INFORMATION SYSTEM (Aug. 11, 2015), <https://www.lris.com/2015/08/11/10-years-of-okc-police-discipline/> (Oklahoma City Police Department rehired six officers fired between 2005 and March 2015; all six had a favorable arbitration award).

33. SWANSON, *supra* note 27, at 1 (“For years, Oakland’s police discipline process has failed to deliver fair, consistent, and effective discipline.”).

34. Iris, *supra* note 1, at 544.

35. Maxine Bernstein, *Disciplining Portland Police Proves Challenging Task*, OREGONIAN (July 14, 2012), [http://www.oregonlive.com/portland/index.ssf/2012/07/disciplining\\_portland\\_police\\_p.html](http://www.oregonlive.com/portland/index.ssf/2012/07/disciplining_portland_police_p.html).

police discipline. However, they do not offer insight into the reasoning or important factors arbitrators considered in police discharge cases.<sup>36</sup> This Note seeks to fill this gap by identifying the most important factors to arbitrators in deciding whether to overturn police discipline.

## II. Methodology

Finding and analyzing every arbitration decision involving police officers is beyond the capabilities of one researcher. Major metropolitan areas alone can produce hundreds of arbitration decisions in only a few years.<sup>37</sup> This makes a nationwide survey of the factors that influence arbitrators' decision-making impracticable. This Note, therefore, recognizes some reasonable limitations on the scope of the decisions analyzed.

First, this Note examines only cases challenging a police officer's discharge.<sup>38</sup> Limiting analysis to officer discharges narrows the number of decisions studied and allows focus on cases involving the most serious allegations of police misconduct, the area of greatest public and media concern.

Second, this Note examines only cases in which police departments discharged officers for misconduct. Police officers can be discharged for a variety of reasons.<sup>39</sup> Because the controversy about police arbitration centers on misconduct,<sup>40</sup> this Note looks at why police officers discharged for misconduct are reinstated by arbitrators.

Third, this Note is limited in the time period studied. Although police misconduct arbitration has been controversial for many years,<sup>41</sup> it is more useful to provide a contemporary, rather than historical, perspective on police misconduct arbitration. This Note, therefore, examines decisions published in the five years between 2011 and 2015.

Finally, this Note does not address all police department employees covered by a collective bargaining agreement. Many law enforcement arbitration decisions involve employees who are not police officers. These include, for example, administrative assistants, dispatchers, or

36. Cooper, Bognanno, and Befort did not control for occupation beyond distinguishing between public and private sector employees. *See* COOPER ET AL., *supra* note 23 *passim*.

37. *See, e.g.*, Iris, *supra* note 29, at 216 (328 arbitration decisions involving police grievances in Chicago in four years).

38. Some studies that compiled arbitration decisions for strictly statistical purposes, without going into the merits of each individual decision, have included cases involving officer suspensions. *See, e.g., id.*

39. *See, e.g.*, City of Rockford, 133 BNA LA 587 (2013) (Simon, Arb.) (officer discharged for psychological problems associated with lawful shooting of a suspect); City of Marengo, 131 BNA LA 1729 (2013) (Kravit, Arb.) (officer discharged for injuries she sustained while on duty).

40. *See supra* notes 1–13 and accompanying text.

41. *See supra* notes 1–13 and accompanying text.

city inspectors.<sup>42</sup> This Note limits analysis to police officers, who are directly responsible for law enforcement and are the subject of media scrutiny.

With these limiting factors in mind, this analysis includes ninety-two arbitration awards published between 2011 and 2015 regarding police officers discharged for misconduct.<sup>43</sup> Nearly all of these decisions came from Bloomberg Law's Labor and Employment Law Resource Center.<sup>44</sup>

Using the Bloomberg BNA Labor Arbitration Decisions search engine and the search terms "police & discharge OR terminate!" and "police officer & discharge OR terminate!" yielded thirty-eight decisions between 2011 and 2015.<sup>45</sup>

Using the Arbitration Award Navigator, applying "Law Enforcement" under the "Industry" tab, and "discharge of employee" under the "Topic" tab yielded 125 results between January 1, 2011, and December 31, 2015. This yielded an additional fifty-four decisions within the study's scope.

The decisions were organized in a spread sheet documenting information about each decision, including its citation and date. Codes were assigned to the arbitrators' decisions and rationales, including reliance on due process (procedural reasons) and mitigating circumstances for overturning discharge. The study also recorded other factual aspects of each case, such as whether the officer was formally charged with a crime or whether the alleged misconduct involved civilian mistreatment.

### **III. Findings**

As seen in Table 1, of the ninety-two awards examined, arbitrators upheld discharges in forty-nine cases (53.3%) and overturned discharges in the remaining forty-three (46.7%). The arbitrators' rationale for overturning discharges fell into two categories: procedural factors related to due process and mitigating factors concerning the discharge's factual context.

---

42. One example is a recent case involving a city inspector who allegedly misused the city's ticketing system by entering information about her own property. *City of St. Paul*, 135 BNA LA 456 (2015) (Jacobs, Arb.).

43. This Note examines only arbitration decisions. It is important to recognize that courts may overturn some arbitration decisions in rare circumstances. Because police cases depend on state law, this may occur, for example, under state-law public policy exceptions to the finality of arbitration awards. *See generally* Henry Drummonds, *The Public Policy Exception to Arbitration Award Enforcement: A Path Through the Bramble Bush*, 49 WILLAMETTE L. REV. 105 (2012).

44. Four decisions came from the AAA service on LexisAdvance.

45. Other searches included "police & discharge," "police & terminate," "police officer & discharge," "police officer & terminate," and "police & just cause to discharge OR terminate!" These searches did not produce any additional awards.

**Table 1: Outcomes of Police Discharge Arbitrations**

Category	Number	Percentage of Total Cases
Discharge Upheld	49	53.3%
Discharge Overturned	43	46.7%
Total Cases	92	–

### A. *Due Process Factors: The “Just Cause” Standard in Police Discharge Arbitration*

Due process in a discharge case relates to two issues: whether the department proved that it had just cause for discharge, and whether the pre-discharge procedure satisfied the collective bargaining agreement.

#### 1. Proof of Just Cause

“The central concept permeating discipline and discharge arbitration is ‘just cause.’”<sup>46</sup> A principal reason why arbitrators overturn police discharges is a department’s failure to prove just cause. The meaning of just cause is derived from principles of fundamental fairness that evolved over time through the decisions of arbitrators.<sup>47</sup> Hence, it is rarely defined in collective bargaining agreements or arbitral decisions. While prior decisions and arbitral literature offer a structure for just cause analysis and highlight its critical elements, the application of the standard necessarily retains some subjectivity.<sup>48</sup>

Most collective bargaining agreements contain a just cause provision.<sup>49</sup> Agreements between police departments and police unions place the burden of persuasion on the department to prove just cause.<sup>50</sup> Some contracts articulate elements of just cause analysis, but they vary in content.<sup>51</sup> Many do not specify a quantum of proof necessary to prove just cause.

Each decision in the database was coded for the quantum of proof used by the arbitrator. Table 2 shows that, of the ninety-two decisions, fourteen (15.2%) explicitly used a “preponderance of the evidence”

46. DISCIPLINE AND DISCHARGE IN ARBITRATION 2-2 (Norman Brand et al. eds., 3d ed. 2015).

47. *Id.* at 2-3 (“[A]rbitrators did not sit down together in the dim past and agree upon the principles of just cause. Rather, arbitrators build upon what other arbitrators said in their opinions, developing principles of just cause by accretion.”).

48. *Id.* at 2-2 (“[J]ust cause can be shorthand for what an arbitrator thinks is fair.”)

49. HOW ARBITRATION WORKS 15-4 (Kenneth May et al. eds., 7th ed. 2014). At least one arbitrator has held that even in the absence of a just cause provision, a just cause limitation is implied by the very existence of a collective bargaining agreement. Herlitz, Inc., 89 BNA LA 436 (1987) (Allen Jr., Arb.) (“[A] ‘just cause’ limitation on discharge is ‘implied’ in any labor agreement.”).

50. See, e.g., City of Mountlake Terrace, 134 BNA LA 1736 (2015) (Pederson, Arb.).

51. Compare *id.* (requiring a “heightened standard of civil proof” beyond preponderance of the evidence), with City of Youngstown, 134 BNA LA 1644 (2015) (Bell, Arb.) (requiring a showing that the officer committed a dischargeable offense).

**Table 2: Quantum of Proof Used by Arbitrators in Police Discharge Cases**

Quantum of Proof	Number of Cases	Percentage of Cases	Discharges Upheld	Percentage Upheld
Preponderance	14	15.2%	9	64.3%
Clear and Convincing	19	20.7%	11	57.9%
Reasonable Doubt	2	2.2%	0	0%
No Standard	57	62%	29	50.9%

standard, nineteen (20.7%) explicitly used a “clear and convincing evidence” standard, and two (2.2%) explicitly used a “beyond a reasonable doubt” standard. In the remaining fifty-seven decisions (62%), there was no clear standard articulated by the arbitrator.<sup>52</sup>

A. DAUGHERTY’S SEVEN TESTS

The “Seven Tests” of just cause theory articulated by Arbitrator Carroll Daugherty and used by some arbitrators to determine just cause have drawn significant academic attention.<sup>53</sup> Daugherty’s Seven Tests evaluate just cause through a series of seven yes-or-no questions;<sup>54</sup> an

52. Awards using a “preponderance of the evidence” quantum were slightly more likely to uphold a discharge decision. In nine of the fourteen cases (64.3%) in which the arbitrator used that standard, the arbitrator upheld the officer’s discharge. This is compared with eleven of nineteen cases (57.9%) under the “clear and convincing standard” and twenty-nine of fifty-seven cases (50.9%) with no clear standard in which the discharge was upheld. In both cases where the arbitrator used the “beyond a reasonable doubt” standard, the discharge was overturned. These results differ from a recent study of Minnesota arbitration awards in which arbitrators found just cause in 47% of decisions using a “preponderance of the evidence” standard and in 51.58% of decisions using no clear standard. See COOPER ET AL., *supra* note 23, at 162.

53. See HOW ARBITRATION WORKS, *supra* note 49, at 2-5; COOPER ET AL., *supra* note 23, at 175-78.

54. The seven tests are:

- 1) Did the Company give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?
- 2) Was the Company’s rule or managerial order reasonably related to the orderly, efficient, and safe operation of the Company’s business?
- 3) Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
- 4) Was the Company’s investigation conducted fairly and objectively?
- 5) At the investigation did the “judge” obtain substantial evidence or proof that the employee was guilty as charged?
- 6) Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
- 7) Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee’s proven offense and (b) the record of the employee in his service with the company?

answer of “no” to any one of which “normally signifies that just and proper cause did not exist.”<sup>55</sup>

In twelve of the ninety-two cases (13%) studied for this Note, one or both parties relied upon Daugherty’s Seven Tests. The arbitrator explicitly relied on the Seven Tests in only nine cases (9.8%). These findings suggest that lawyers use the Seven Tests analysis somewhat more frequently in police discharge disputes than in other contexts,<sup>56</sup> but arbitrators use it no more frequently in these cases than in other types of cases.<sup>57</sup> In police cases, as in other arbitrations, the Seven Tests appear to be “utilized by arbitrators much less frequently than most of the arbitration literature would suggest.”<sup>58</sup>

#### B. DEPARTMENTS’ FACTUAL INVESTIGATION

An insufficient investigation is a principal reason why discharges are overturned.<sup>59</sup> In sixteen of the forty-three decisions (37.2%) overturning a discharge, the arbitrator cited an inadequate departmental factual investigation.

Departmental discharge decisions overturned because of inadequate investigation can lead to a perception that police officers are impossible to fire. For example, a 2013 decision overturned an officer’s discharge for “alcohol abuse” and “drinking while on-duty.”<sup>60</sup> One can see how, without context, returning an alcoholic police officer to the force would cause public outrage. However, the arbitrator overturned the discharge because the officer accepted one free beer while at a bar and “it [did] not appear that City officials made any effort . . . to ascertain the extent, if any, of the Grievant’s alcohol problem.”<sup>61</sup> This case illustrates how the department’s failure to investigate the circumstances behind a discharge decision can change one’s impression of the arbitration result. In many instances, an inadequate investigation can lead to an unfair discharge.

---

55. *Id.*

56. A comprehensive study of arbitration decisions in Minnesota found “no mention of an advocate’s reliance on the Seven Tests in more than 95 percent of cases.” COOPER ET AL., *supra* note 23, at 189.

57. “More than 90 percent of the time arbitrators did not rely on the Seven Tests.” *Id.*

58. *Id.* Arbitrators may choose to use the Seven Tests regardless of whether it was argued by one or both parties. *See, e.g.*, *United City of Yorkville*, 134 BNA LA 1665 (2015) (Finkin, Arb.) (refusing to use the Seven Tests despite its invocation by both parties); *City of Mountlake Terrace*, 134 BNA LA 1736 (2015) (Pederson, Arb.) (same).

59. *See, e.g.*, *Labor Arbitration Decision*, No. 148286-AAA, 2013 BNA LA Supp. 148286 (Apr. 24, 2013) (De Treux, Arb.).

60. *Id.*

61. *Id.* (alteration in original).

C. GUILT OF THE DISCHARGED OFFICER

Even if a department conducts a thorough investigation, its discharge decision may be overturned if the arbitrator concludes the evidence did not prove guilt.<sup>62</sup> In many police discharge cases, guilt is not an issue; either the officer admitted wrongdoing or the evidence is too overwhelming to dispute.<sup>63</sup> However, arbitrators will not find just cause if the department cannot prove that the officer committed the alleged offense on which the discharge was based.<sup>64</sup> As seen in Table 3, in twenty-one of the forty-three cases (48.9%) overturning discharge, the arbitrator overturned the officer’s discharge because the department failed to prove that the officer was guilty of the alleged offense that led to discharge. This includes the sixteen cases mentioned in part III(A)(1)(b) in which the arbitrator found the department’s factual investigation insufficient. This means that there were only six instances (14%) in which the arbitrator overturned a discharge based on insufficiency of evidence that did not result from an inadequate factual investigation. These findings suggest that departments that conduct thorough investigations and gather strong evidence showing an officer committed the alleged offense are likely to be upheld in arbitration.

**Table 3: Guilt of Discharged Officers**

Category	Number of Cases	Percentage of Cases
Failed to Prove Guilt	21	48.9%
Investigation Insufficient	16	37.2%
Investigation Not Insufficient	6	14%
Overtured Discharges	43	–

The sufficiency of evidence presented by the department is necessarily a matter of arbitral judgment.<sup>65</sup> In a 2014 case, an officer was discharged for sexually harassing a female crime victim.<sup>66</sup> The officer had turned off his dash camera in violation of the department’s recording policy, leaving no video evidence to prove the officer’s misconduct.<sup>67</sup>

62. *See, e.g.*, City of Del Rio, 134 BNA LA 1285 (2014) (Jennings, Arb.).

63. *See, e.g.*, Labor Arbitration Decision, No. 148286-AAA, 2013 BNA LA Supp. 148286 (Apr. 24, 2013) (De Treux, Arb.) (officer admitted to drinking while on duty).

64. *See* Labor Arbitration Decision, No. 200551-AAA, 136 BNA LA 760 (Jennings, Arb.) (“The City failed to produce any credible evidence to sustain the allegation/accusation that the Grievant acted improperly when he delivered a compliance strike.”).

65. The quantum of proof may also be relevant. *See supra* Part III(A)(1); City of Del Rio, 134 BNA LA 1285 (2014) (Jennings, Arb.) (using the “clear and convincing” standard in ruling for the grievant).

66. City of Del Rio, 134 BNA LA 1285.

67. *Id.*

To support the discharge, the city offered results of a polygraph test suggesting the officer had inappropriately touched the victim while in his squad car.<sup>68</sup> The arbitrator overturned the discharge because he was “not convinced” that the evidence was sufficient to infer guilt.<sup>69</sup> The arbitrator thought the victim lacked credibility and that testimony supporting the discharge was “contradictory.”<sup>70</sup>

## 2. Discharge Procedure

Police discharges are often overturned on procedural grounds, such as the failure to observe a specified termination process outlined by state law or the collective bargaining agreement.<sup>71</sup>

### A. LEOBORs

Along with protections granted by collective bargaining agreements, police officers often enjoy due process rights granted by the Law Enforcement Officers’ Bill of Rights (LEOBOR).<sup>72</sup> LEOBORs are found in collective bargaining agreements or state statutes.<sup>73</sup> Generally, LEOBORs provide police officers accused of misconduct certain protections, such as the right against self-incrimination during an investigation.<sup>74</sup>

Two notable U.S. Supreme Court decisions, *Garrity v. New Jersey*<sup>75</sup> and *Gardner v. Broderick*,<sup>76</sup> granted due process protections to police officers under investigation for alleged misconduct. These decisions, as well as the rise of police unions in the late 1960s and early 1970s, influenced the development of LEOBORs.<sup>77</sup> Although there

68. *Id.*

69. *Id.*

70. *Id.*

71. *See, e.g.*, Labor Arbitration Decision, No. 148286-AAA, 2013 BNA LA Supp. 148286 (Apr. 24, 2013) (De Treux, Arb.) (overturning discharge because of the department’s failure to enroll the grievant in an alcohol treatment program per department policy and the collective bargaining agreement).

72. *See generally* Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers’ Bills of Rights*, 14 B.U. PUB. INT. L.J. 185 (2005) (analyzing the impact of LEOBORs on police accountability); *see also Due Process Rights for Law Enforcement Officers*, FRATERNAL ORDER OF POLICE, <https://www.fop.net/CmsPage.aspx?id=97>.

73. Keenan & Walker, *supra* note 72, at 188.

74. Common examples of these protections include, *inter alia*, limitations on investigatory questioning, the exemption of routine interactions between officers from discovery, the requirement that an officer be informed of the names and ranks of officers in charge of the investigation, the requirement that an officer be informed of the nature of the investigation prior to questioning, and the right to have counsel present during questioning. *See id.* at 203–41 (in-depth description of protections for police officers commonly found in LEOBORs).

75. 385 U.S. 493 (1967).

76. 392 U.S. 273 (1968).

77. Keenan & Walker, *supra* note 72, at 196–98. *See also Due Process Rights for Law Enforcement Officers*, FRATERNAL ORDER OF POLICE, <https://www.fop.net/CmsPage.aspx?id=97> (“We need legislation to create a uniform minimal level of procedural due

was an effort to enact a federal LEOBOR,<sup>78</sup> LEOBORs were incorporated in various forms in state and local law.<sup>79</sup>

State LEOBORs vary in the protections they afford. Typically, LEOBORs provide basic protections, such as the right to be informed of an adverse investigation<sup>80</sup> and mandatory “waiting periods” to allow the accused officer time to retain legal representation.<sup>81</sup> Many LEOBORs also guarantee the right to legal counsel throughout misconduct investigations.<sup>82</sup> Some place restrictions on how police officials conduct these investigations, such as time constraints or rules regarding conduct during interviews.<sup>83</sup>

#### B. PROCEDURAL DEFICIENCIES IN POLICE DISCHARGES

Of the forty-three cases overturning discharge, the arbitrator cited failure to comply with proper procedure in nine (20.9%). Types of procedural shortcomings include lack of notice that the alleged misconduct was prohibited,<sup>84</sup> failure to observe a statute of limitations imposed by state law,<sup>85</sup> and other procedural missteps unique to the specific provisions of a collective bargaining agreement.<sup>86</sup>

One example of how procedural issues can lead arbitrators to overturn a police discharge is a 2013 case in which a police officer was fired for excessive force after allegedly firing her weapon at a fleeing robbery suspect.<sup>87</sup> In deciding to discharge the officer, the department considered previous discipline against her more than one year prior to the incident.<sup>88</sup> The arbitrator overturned the discharge in part be-

process for police officers and codify the core holdings of the U.S. Supreme Court [dealing with police officers] confronted with the threat of termination.”) (alteration in original).

78. S. 1043, 102d Cong. (1991).

79. Keenan & Walker, *supra* note 72, at 197 (“[P]roponents of LEOBORs have achieved their greatest successes at the state level.”).

80. *See id.* at 211 (citing H.R. 1626, 107th Cong. § 3(e)(2) (2001)).

81. *Id.* at 212.

82. *Id.* at 215.

83. *Id.* at 217–22. For an example of a model Peace Officer’s Bill of Rights, which would apply to all public servants, see Wayne W. Schmidt, *Peace Officers Bill of Rights Guarantees: Responding to Union Demands with a Management Sanctioned Version*, ALEL LAW ENFORCEMENT LEGAL CENTER (2004), <http://www.aeel.org/pobr-iacp.pdf>.

84. *See, e.g.*, Labor Arbitration Decision, No. 148178-AAA, 2013 BNA LA Supp. 148178 (Sept. 23, 2013) (Visco, Arb.) (overturning a young officer’s discharge for “immature and vulgar” social media posts because of the department’s failure to “clearly inform [Grievant] of good as well as inappropriate forms of conduct”) (alteration in original).

85. City of San Jose, 129 BNA LA 1313 (2011) (Reeves, Arb.) (overturning discharge for officer’s investigative errors and misquoting of witnesses in sexual assault cases because “the disciplinary action against Grievant [was] time barred”) (alteration in original).

86. *See, e.g.*, City of Riviera Beach, 131 BNA LA 1057 (2013) (Abrams, Arb.) (overturning discharge after officer’s fourth tardy because collective bargaining agreement allowed five).

87. City of Flint, Grievance: #12.19/T\_F\_, 2013 BNA LA Supp. 20130725 (July 25, 2013) (McDonald, Arb.).

88. *Id.*

cause considering discipline more than one year prior to the alleged offense violated the collective bargaining agreement.<sup>89</sup>

This case demonstrates that a department's failure to follow established procedures can lead to an overturned discharge. The arbitrator stated: "I can understand the frustration of the Police Chief and the Administration in this particular matter. At the same time, the City has the burden of proof in this case and it appears clear that it did not strictly follow the language of the collective bargaining contract in imposing discipline."<sup>90</sup> However, cases in which a procedural error is the only factor in overturning an officer's discharge are rare. Of the ninety-two examined cases, the arbitrator cited procedural error as the only factor in overturning a discharge in only two (2.2%). While arbitrators consider procedural requirements, when discipline is overturned they are almost always accompanied by other mitigating factors.

### *B. Mitigating Factors: When Does an Officer Deserve to be Fired?*

In most cases overturning discharges, arbitrators cite mitigating factors favoring reinstatement.<sup>91</sup> In twenty-nine of the forty-three decisions (67.4%) in which an arbitrator overturned a discharge, the arbitrator cited mitigating factors unrelated to whether the officer was guilty of the alleged offense. This Section discusses some of the most significant of these mitigating factors.

#### 1. Good Work Record

One of the most important mitigating factors is an officer's prior disciplinary record. Disciplinary records were raised by one or both parties in nearly every analyzed decision.<sup>92</sup> A positive work history can be helpful to persuade an arbitrator to overturn an officer's discharge.

In a 2013 case, for example, an officer was discharged for excessive force when she rammed a fleeing suspect's car, causing the suspect's death.<sup>93</sup> The arbitrator reinstated the officer, stating "[the officer]

89. *Id.*

90. *Id.*

91. *See, e.g.*, Labor Arbitration Decision, No. 149300-AAA, 2011 BNA LA Supp. 149300 (Feb. 25, 2011) (Humphries, Arb.) (citing disparate treatment as a mitigating factor overturning discharge).

92. *See, e.g.*, 2015 AAA LEXIS 215 (May 26, 2015) (Lurie, Arb.) (upholding the discharge of an officer for taking an unauthorized personal break while on duty because of a disciplinary history, including eight written counselings, nine written reprimands, and two suspensions over five years); Labor Arbitration Decision, No. 149904-AAA, 2011 BNA LA Supp. 149904 (Dec. 26, 2011) (Ryan, Arb.) (finding that the grievant's prior suspension reduced the credibility of his testimony).

93. Lacrosse Cty., Case 225 No. 71108 MA-15092, 2013 WI ERC LEXIS 45 (June 21, 2013) (Emery, Arb.).

has no history of similar lapses and her overall record does not suggest to me that she is beyond redemption as a law enforcement officer.”<sup>94</sup>

In another 2013 case, an officer was fired for repeated on-duty sexual harassment of citizens.<sup>95</sup> The arbitrator reinstated the officer in light of his twelve years without prior discipline, saying: “[a] second chance is not given to many but in this instance it is warranted. The City failed to sufficiently take into account the mitigating factors of his commendable and lengthy record of service . . . .”<sup>96</sup>

Conversely, officers with poor disciplinary histories are less likely to be reinstated under similar circumstances. In a 2013 case involving the use of excessive force, a police officer was discharged for allegedly slamming an innocent citizen’s face against a wall.<sup>97</sup> The arbitrator upheld the officer’s discharge, accepting the department’s argument that his previous one-day suspension for being rude and discourteous to a citizen was indicative of his incompetence.<sup>98</sup>

Another 2013 case involved an officer fired for improper sexual contact with former inmates.<sup>99</sup> The arbitrator upheld the discharge, relying in part on the officer’s previous suspension for poor performance and patronizing a prostitute.<sup>100</sup>

These cases demonstrate how officers discharged for similar reasons may experience different arbitral outcomes because of their disciplinary history. Arbitrators are more likely to reinstate officers with clean records prior to the action that prompted their termination.<sup>101</sup>

## 2. Excessiveness of Discharge as a Punishment

In many cases, arbitrators reinstate police officers because they conclude discharge is too severe a punishment for the alleged offense.<sup>102</sup> In thirteen of the forty-three decisions (30.2%) overturning discharge, the arbitrator believed discharge too severe under the circumstances.

The determination that discharge was excessive is obvious in some cases. In a 2014 case, for example, two officers were discharged

---

94. *Id.* (alteration in original)

95. Labor Arbitration Decision, No. 149974-AAA, 2013 BNA LA Supp. 149974 (Nov. 7, 2013) (Spring, Arb.).

96. *Id.* Arbitrators have overturned police discharges based on similar allegations because of exemplary work records. *See* Labor Arbitration Decision, No. 148141-AAA, 2013 BNA LA Supp. 148141 (Sept. 9, 2013) (Cochran, Arb.) (“I hope that this decision serves as a wakeup call to [the officer]. It was evident that he has provided valuable service . . . for many years. He nearly fatally tarnished all those years of service . . . . He has just barely retained . . . his employment as an officer . . . . He should not squander this last chance.”) (alteration in original).

97. City of Galveston, 132 BNA LA 1101 (2013) (Jennings, Arb.).

98. *Id.*

99. United Gov’t of Wyandotte Cty., 131 BNA LA 1209 (2013) (Bonney, Arb.).

100. *Id.*

101. *See* Labor Arbitration Decision, No. 149974-AAA, 2013 BNA LA Supp. 149974 (Nov. 7, 2013) (Spring, Arb.).

102. City of Memphis, 133 BNA LA 612 (2014) (Skulina, Arb.).

for “inciting officers to strike” in violation of an anti-strike clause in the collective bargaining agreement.<sup>103</sup> However, on further investigation the arbitrator discovered that the officers’ misconduct had not gone beyond a few discussions in the department’s parking lot.<sup>104</sup> The arbitrator decided that, although some discipline was warranted, discharge was too severe.<sup>105</sup>

Sometimes the determination of excessiveness seems to rely only on the arbitrator’s subjective judgment. In one 2013 case, an officer was discharged for excessive force in subduing an intoxicated suspect by throwing the suspect face first onto the ground.<sup>106</sup> The arbitrator overturned the discharge, despite finding no procedural faults and concluding that the officer “patently exceeded the force reasonably necessary to subdue [the suspect].”<sup>107</sup> The only ground on which the arbitrator relied in reinstating the officer was that he should “be afforded a last chance to demonstrate that he is capable of sustaining a career in law enforcement.”<sup>108</sup>

These cases illustrate how police discharges can be overturned based on an arbitrator’s conclusion that such a penalty is excessive for the alleged offense. It is possible that arbitrators think discharge is a particularly severe consequence for police officers, since officers with a termination or suspicious resignation in their work history may never find another job in law enforcement.<sup>109</sup> Indeed, in the context of police discipline, arbitrators consider discharge to be the “death penalty.”<sup>110</sup> However, a determination that discharge was an excessive punishment is almost always made in light of other mitigating factors.<sup>111</sup> Of the forty-three overturned discharges analyzed for this

103. *Id.*

104. *Id.*

105. *Id.* (“[T]here was no effort to recruit officers to participate in a strike. Two officers would not shut down the police operation.”).

106. Labor Arbitration Decision, No. 148131-AAA, 2013 BNA LA Supp. 148131 (Aug. 2, 2013) (Wolf, Arb.).

107. *Id.* (alteration in original).

108. *Id.* (emphasis omitted). The arbitrator cited no basis in the collective bargaining agreement to support the decision.

109. See, e.g., *Forced to Resign or Get Fired*, INDEED.COM (Sept. 25, 2015), <http://www.indeed.com/forum/job/police-officer/Forced-Resign-get-fired/t514398> (police officer, who resigned while under investigation, struggling to find work in law enforcement). *Contra* Paula Parmeley Carter, *Fired Cops Have Little Trouble Finding New Jobs*, COPBLOCK.ORG (July 22, 2010), <http://www.copblock.org/583/fired-cops-have-little-trouble-finding-new-jobs/> (anecdotes from other cities have “not deterred other municipalities from hiring disgraced cops”).

110. Lucas Sullivan, *7 of 13 Fired Officers, Firefighters Got Job Back in Arbitration*, COLUMBUS DISPATCH (Dec. 9, 2012), <http://www.dispatch.com/content/stories/local/2012/12/09/7-of-13-fired-officers-firefighters-got-job-back-in-arbitration.html>.

111. See, e.g., Labor Arbitration Decision, No. 148297-AAA, 2013 BNA LA Supp. 148297 (Apr. 22, 2013) (Humphries, Arb.) (overturning discharge of an officer fired for congregating at a night club for over an hour while on duty because the conduct did

Note, only two (4.7%) cited the excessiveness of discharge as a penalty for the alleged misconduct as the only factor supporting reinstatement.

### 3. Disparate Treatment

One important mitigating factor consistently argued by police union advocates is that the discharged officer was treated differently than other officers who committed similar misconduct.<sup>112</sup> Arbitrators consider whether other officers received lesser discipline under similar circumstances.

In one 2015 case, a police officer was fired after being charged with DUI.<sup>113</sup> The union argued that his termination was unfair because other officers who had been charged with DUI were not terminated.<sup>114</sup> The arbitrator overturned the discharge, saying “other officers within [the] County had been charged with DUI over the years and . . . typically officers were not discharged for a first offense DUI.”<sup>115</sup>

Although disparate treatment is frequently argued and considered by arbitrators, it rarely succeeds in getting a discharge overturned. Discharges are likely to result from serious misconduct that has not previously occurred or that was previously disciplined by discharge.<sup>116</sup> It was cited as a factor in only five of the forty-three decisions (11.6%) analyzed for this Note that overturned discharge. It is possible that disparate impact is more significant in disciplinary settings that occur more frequently, but this question is beyond the scope of this Note.<sup>117</sup>

### 4. Acceptance of Responsibility

One factor that may be particularly salient in police discharge cases is the willingness of the officer to admit wrongdoing and accept

---

not reach “the level that mandate[s] a ‘zero tolerance’ . . . reaction” in light of the officer’s employment record and other mitigating factors).

112. See, e.g., *City of Youngstown*, 2011 BNA LA Supp. 119807 (Mar. 10, 2011) (Paolucci, Arb.) (citing disparate treatment in overturning officer discharge); *Labor Arbitration Decision*, No. 149300-AAA, 2011 BNA LA Supp. 149300 (Feb. 25, 2011) (Humphries, Arb.) (same).

113. 2015 AAA LEXIS 155 (Mar. 27, 2015) (Lowe, Arb.).

114. *Id.* at \*17.

115. *Id.* at \*32 (alteration in original).

116. See, e.g., *Labor Arbitration Decision*, No. 148019-AAA, Grievance No. 15-2012, 2013 BNA LA Supp. 148019 (Jan. 3, 2013) (Alutto, Arb.) (discussing the potential impact of other similar cases for a disparate impact argument):

If such assertions were substantiated equity concerns might argue against discharge in this case. However, in the few instances referred to by the Union during the arbitration hearing it failed to provide sufficient details (such as the setting of events, prior disciplinary actions for the individual, contributing factors, whether repeat actions were involved, etc.) to determine levels of comparability.

*Id.*

117. For an analysis of the impact of “inconsistent or discriminatory meting out of discipline” arbitrators’ decision-making, see COOPER ET AL., *supra* note 23, at 268–79.

personal responsibility. For example, an officer was discharged in a 2013 case for sexually harassing another officer.<sup>118</sup> The arbitrator concluded that the discharged officer's conduct "was pervasive enough to create a hostile work environment and did constitute harassment."<sup>119</sup> The arbitrator nonetheless overturned the discharge in light of the officer's "willingness to accept blame for his actions."<sup>120</sup> Of particular importance to the arbitrator was the officer's "general truthfulness about his culpability."<sup>121</sup>

Conversely, in a 2011 case, an officer was discharged for excessive force after dragging a suspect through the snow and striking him with his fists over a dozen times.<sup>122</sup> In his testimony, the officer refused to admit to acting inappropriately.<sup>123</sup> The arbitrator referred to the officer's evasiveness in upholding the discharge, stating, "It may be significant that the Grievant's denial in his testimony was less than foursquare since he made exceptions for what he characterized as defensive strikes."<sup>124</sup>

However, some arbitrators interpret acceptance of responsibility as an admission of guilt supporting the discharge. In a 2013 case, a police sergeant was discharged for failing adequately to supervise a group of officers who had physically beaten and abused a suspect in custody.<sup>125</sup> The discharged sergeant had previously received exemplary performance reviews and was considered "a leader and a multi-purpose individual."<sup>126</sup> The arbitrator upheld the sergeant's discharge despite these mitigating factors, stating that his "discipline was appropriate for his conduct during the incident and his acceptance of responsibility for his actions."<sup>127</sup>

These cases illustrate the conundrum police officers face in deciding whether to accept responsibility for their actions. While admitting to wrongdoing and accepting responsibility can support a police officer's case for reinstatement, it can also be used by arbitrators to uphold the department's discharge. The decisions nevertheless suggest that it normally is in an officer's best interest to admit conduct and accept responsibility when under disciplinary investigation.

---

118. Labor Arbitration Decision, No. 148141-AAA, 2013 BNA LA Supp. 148141 (Sept. 9, 2013) (Cochran, Arb.).

119. *Id.*

120. *Id.*

121. *Id.*

122. City of Youngstown, 2011 BNA LA Supp. 119789 (May 10, 2011) (Fullmer, Arb.).

123. *Id.*

124. *Id.*

125. City of Bartlesville, 131 BNA LA 1502 (2013) (Williams, Arb.).

126. *Id.*

127. *Id.*

### 5. Honesty of the Officer

Generally, discharged police officers are more likely to be reinstated if they can present a credible narrative to the arbitrator.<sup>128</sup> Upholding public trust in the criminal justice system is of paramount importance to arbitrators in the context of police discipline.<sup>129</sup> Officers who appear evasive or dishonest undermine this trust.<sup>130</sup>

Accordingly, an officer's candor during a disciplinary investigation can be important to arbitrators deciding whether to uphold a discharge. This is exemplified by a 2013 case in which an officer was discharged for improperly fraternizing with inmates.<sup>131</sup> Throughout the investigation, the officer untruthfully mischaracterized the nature and extent of his relationships with inmates before eventually admitting to misconduct.<sup>132</sup> The arbitrator upheld the discharge, citing the officer's failure to cooperate in the investigation:

If the Grievant had been honest when originally queried, immediately admitted his actions, and cited . . . a basis for his actions . . . his forthrightness could be construed as a mitigating factor. However, the Grievant did not immediately disclose his [misconduct], further supporting the . . . conclusion that the Grievant was aware that he had violated the [collective bargaining agreement] and that he lied about his circumstances before eventually admitting the truth. Given . . . that the Grievant was unacceptably less than forthright in disclosing the relationship when confronted by a direct inquiry from a superior officer investigating a complaint involving the Grievant and a former inmate, there is no valid basis to overturn the Employer's conclusion that the Grievant failed to fulfill his duty of honest dealing with the employer.<sup>133</sup>

Because the appearance of trustworthiness in police officers is so important to their public responsibilities, including their testimony in criminal trials, arbitrators also consider whether the offense that led to an officer's discharge involved dishonesty. Examples include of-

---

128. *See, e.g.*, Labor Arbitration Decision, No. 148719-AAA, 2012 BNA LA Supp. 148719 (Mar. 13, 2012) (De Treux, Arb.) (quoting an arbitrator in a previous disciplinary proceeding involving the grievant saying that “[g]rievant has lost his credibility and no longer can continue as an Officer in the police department”); *City of Marengo*, 131 BNA LA 1729 (2013) (Kravit, Arb.) (reinstating officer that arbitrator found credible).

129. *See, e.g.*, Labor Arbitration Decision, No. 149956-AAA, 2013 BNA LA Supp. 149956 (Nov. 12, 2013) (Langbein, Arb.) (“Sightings like these discredit the Department. They erode public confidence in the ethical standards expected of police officials and the measure of service that will be provided . . . . The Arbitrator agrees with the County that not even Grievant’s long and good history with the Department can mitigate the seriousness of her acts.”).

130. *See, e.g., id.*

131. Labor Arbitration Decision, No. 148453-AAA, 2013 BNA LA Supp. 148453 (July 29, 2013) (Brent, Arb.).

132. *Id.*

133. *Id.* (alteration in original); *see also* Labor Arbitration Decision, No. 149904-AAA, 2011 BNA LA Supp. 149904 (Dec. 26, 2011) (Ryan, Arb.) (“The Department cannot be expected to tolerate an officer with repeated episodes of untruthfulness.”).

**Table 4: Officer Dishonesty in Police Discharge Arbitration**

Category	Number of Cases	Percentage of Cases	Number Guilty	Percent Guilty
Discharge Upheld	23	60.5%	20	76.9%
Discharge Overturned	15	39.5%	6	23.1%
Alleged Dishonesty	38	—	26	—

fenses in which an officer misreported working hours and on-duty activities,<sup>134</sup> lied during an official investigation,<sup>135</sup> and feigned an injury for workers' compensation.<sup>136</sup>

As seen in Table 4, thirty-eight of the ninety-two cases studied for this Note involved officers discharged for alleged dishonesty. Of those thirty-eight, the arbitrator upheld the discharge in twenty-three (60.5%). In twenty-six cases, the arbitrator concluded that the officer was guilty of dishonesty. The arbitrator upheld the discharge in twenty of the twenty-six decisions (76.9%).

These results suggest that the arbitrator's perception of the officer's credibility is one of the strongest factors determining officer reinstatement. At a glance, the honesty factor in police misconduct arbitration appears to create a system in which an officer fired for falsifying log reports to go shopping while on duty<sup>137</sup> may be less likely to be reinstated than an officer whose alleged use of excessive force results in a suspect's death.<sup>138</sup> With this in mind, it is easy to imagine how an observer without access to the details of arbitrators' decision-making can conclude that police discipline is deficient.<sup>139</sup> This does not mean, however, that severity of police misconduct has no impact on arbitrators' decision-making.

134. Labor Arbitration Decision 149956-AAA, 2013 BNA LA Supp. 149956 (Nov. 12, 2013) (Langbein, Arb.) (upholding officer discharge for shopping during patrol hours).

135. Broward Sheriff's Office, 133 BNA LA 87 (2014) (Zaiger, Arb.) (upholding officer discharge for swearing under oath that he was the victim of an armed robbery and then recanting his claim during the same interview).

136. Polk Cty, 135 BNA LA 406 (2015) (Landau, Arb.) (upholding officer discharge for exaggerating the severity of an on-duty injury).

137. Labor Arbitration Decision, No. 149956-AAA, 2013 BNA LA Supp. 149956 (Nov. 12, 2013) (Langbein, Arb.).

138. La Crosse Cty., Case 225 No. 71108 MA-15092, 2013 WI ERC LEXIS 45 (June 21, 2013) (Emery, Arb.) (reinstating officer due to good work record). *See also* City of Oakland Police Dep't, 128 BNA LA 1217 (2011) (Gaba, Arb.) (reinstating officer where department failed to prove a violation of its use of force policy).

139. *See supra* notes 1–13 and accompanying text.

*C. Factual Context of the Discharge*

Arbitrators regularly consider the context of the alleged offense. This includes whether the offense occurred while the officer was on-duty or off-duty and whether the alleged misconduct involved a civilian’s mistreatment.

1. Off-Duty Misconduct

The majority of cases analyzed involved on-duty misconduct. The alleged offense occurred on-duty in sixty-five of the ninety-two cases (70.7%). Of those sixty-five, the discharge was upheld in thirty-two decisions (49.2%).

The data suggest that officers discharged for off-duty misconduct are less likely to be reinstated. Of the remaining twenty-seven cases in which the alleged offense occurred while the officer was off-duty, the discharge was upheld in seventeen decisions (63%). The data are shown below in Table 5.

**Table 5: Off-Duty Misconduct in Police Discharge Arbitration**

Category	Number of On-Duty Cases	Percentage of On-Duty Cases	Number of Off-Duty Cases	Percentage of Off-Duty Cases
Discharge Upheld	32	49.2%	17	63%
Discharge Overturned	33	50.8%	10	37%
Total Cases	65	–	27	–

Intuitively, this makes sense because police departments are unlikely to be concerned with off-duty conduct unless it is severe misconduct. Arbitrators upheld discharges for off-duty misconduct for such things as domestic violence<sup>140</sup> and DUIs.<sup>141</sup>

2. Involvement of Civilians

The police misconduct cases that receive the most media attention involve mistreatment of citizens.<sup>142</sup> Indeed, the manner with which police treat civilians is at the very core of the controversy concerning the adequacy of police discipline.<sup>143</sup> Police officers can be discharged

---

140. City of Hillsboro, 135 BNA LA 654 (2015) (Lalka, Arb.) (officer discharged for assaulting his wife).

141. Labor Arbitration Decision, No. 148550-AAA, 2013 BNA LA Supp. 148550 (Oct. 22, 2013) (McNeill, Arb.) (officer discharged for off-duty DUI and lack of cooperation with ensuing investigation).

142. See *supra* notes 1–13 and accompanying text.

143. See *supra* notes 4–13 and accompanying text. See generally Douglas B. McKechnie, *Don’t Daze, Phase, Or Lase Me, Bro! Fourth Amendment Excessive-Force Claims, Future Nonlethal Weapons, and Why Requiring an Injury Cannot Withstand a Constitutional or Practical Challenge*, 60 U. KAN. L. REV. 139 (2011).

for their abuse of suspects, inmates, or even innocent bystanders. Examples include the use of excessive force<sup>144</sup> or sexual misconduct against citizens.<sup>145</sup>

Of the ninety-two cases analyzed, thirty-six (39.1%) involved citizen mistreatment. This includes only cases in which citizens were abused by on-duty officers. It does not include, for example, cases involving off-duty domestic violence.

Of those thirty-six cases, the discharge was upheld in seventeen decisions (47.2%). The arbitrator concluded that the officer was guilty<sup>146</sup> of the alleged citizen mistreatment in twenty-three of those thirty-six cases. When a conclusion of guilt was made, the discharge was upheld in sixteen decisions (69.6%). The data are shown below in Table 6.

**Table 6: Mistreatment of Citizens in Police Discharge Arbitration Cases**

Category	Number of Cases	Percent of Cases	Number Guilty	Percent Guilty
Discharge Upheld	17	47.2%	16	69.6%
Discharge Overturned	19	52.8%	7	30.4%
Civilian Mistreatment	36	—	23	—

These findings suggest that a mere allegation of civilian involvement does not itself significantly influence the likelihood of reinstatement. However, officers found guilty of mistreatment are unlikely to be reinstated.

This observation is not necessarily inconsistent with media reports and critical commentary on police discipline. Cases involving citizen abuse typically constitute severe misconduct and understandably get the most media attention. However, if the only fact reported by the media is that many officers accused of severe misconduct are reinstated through arbitration, this may contribute to the impression that police officers can get away with anything without being fired. This impression may be misleading, however, if the insufficiency of evidence demonstrating an officer's guilt, as well as factors like the officer's integrity and work record, are largely ignored by the media.

Even though severe alleged misconduct may not decrease the odds of an officer's reinstatement, it nonetheless has a demonstrable impact on receipt of back pay.

144. *City of Tampa*, 133 BNA LA 1128 (2013) (Smith, Arb.) (officer discharged for striking a suspect while making an arrest).

145. Labor Arbitration Decision, No. 149974-AAA, 2013 BNA LA Supp. 149974 (Nov. 7, 2013) (Spring, Arb.) (officer discharged for sexually harassing female citizens).

146. *See supra* Part III(A)(1)(c).

*D. Split Outcomes: Challenging the Myth of the Untouchable Officer*

The media typically report police discharge arbitration outcomes as if they are binary proceedings with a clear winner and loser. The only relevant fact usually reported is that a police officer was reinstated.<sup>147</sup> Reports often fail to explain that arbitration usually does not exonerate a discharged police officer of wrongdoing. Most reinstated police officers have their punishment reduced.

In the forty-three decisions that reinstated an officer, the arbitrator awarded full back pay in twenty-one decisions (48.8%). In the remaining twenty-two decisions (51.2%), the officer was reinstated with only partial or no back pay.<sup>148</sup>

Because arbitration decisions are issued several months, or even years, after a discharge, losing back pay can mean significant wage loss. The average time between discharge and decision in the cases analyzed was 12.48 months.<sup>149</sup> This means that a discharged police officer could expect to lose an average of about one year's salary if not awarded back pay.

Arbitrators do not always give precise reasons for not awarding back pay. Of the twenty-two decisions without an award of back pay, the arbitrator offered a justification for not awarding back pay in nine (40.9%). By far, the most often-cited reason for not awarding back pay was the seriousness of the offense, cited in eight of nine decisions (88.9%) that provided a reason.<sup>150</sup>

While nine cases are only a few, they suggest that even if a police officer is reinstated, the seriousness of misconduct affects the arbitral remedy. In cases characterized by arbitrators as severe misconduct, the odds of an officer being reinstated with full back pay and an expunged disciplinary record are diminished. The record of the disciplinary sanction is also likely to prove an important deterrent to future misconduct in light of the significance in arbitration of poor disciplinary records.<sup>151</sup>

---

147. See *supra* notes 11–12 and accompanying text.

148. A recent study of discharge arbitration outcomes in Minnesota that did not control for occupation found that when arbitrators reinstated the employee, they were awarded full back pay and benefits 40.4% of the time. See COOPER ET AL., *supra* note 23, at 52, 196 tbl.7.3. This suggests that outcomes for police officers do not meaningfully differ from outcomes in other contexts.

149. There were some outliers. Two cases took thirty months to decide and one only took five.

150. In one case, an arbitrator cited the officer's dishonesty and evasiveness during the disciplinary investigation as a reason for not awarding back pay. Geauga Park Dist., FMCS 11-03249-6, 2012 BNA LA Supp. 147416 (Jan. 5, 2012) (Goldberg, Arb.).

151. See *supra* Part III(B)(1).

**Conclusion**

Discharged police officers are regularly reinstated by arbitrators despite allegations of excessive force, sexual harassment, and substance abuse. This contributes to a popular impression that there is no misconduct severe enough to justify firing police officers. However, police discharge cases are not adjudicated entirely on the basis of the alleged misconduct's severity.

At times, the department is to blame for an officer's reinstatement. Police departments occasionally fail to observe important procedural steps before firing officers. In other cases, they do not provide sufficient evidence to prove officers were even guilty of the offense for which they were fired.

But perhaps more importantly, arbitrators care about who the officer is. They care about whether an officer is sufficiently trustworthy to deserve a second chance. In that sense, perhaps what is more important in the context of police discipline is not whether an officer is a good cop; rather, what matters is whether that officer has good character.