Labor and Employment Law at the 2014–2015 Supreme Court: The Court Devotes Ten Percent of Its Docket to Statutory Interpretation in Employment Cases, But Rejects the Argument That What Employment Law Really Needs Is More Administrative Law

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Introduction

This Article summarizes and analyzes eleven employment and labor law decisions, including nine from the Supreme Court's 2014–2015 Term. It discusses the implications of each case and analyzes district and appellate court cases applying the decisions.[1] Part I of the Article examines the three employment discrimination cases: *EEOC v. Abercrombie & Fitch Stores, Inc.*,[2] *Young v. United Parcel Service, Inc.*,[3] and *Mach Mining, LLC v. EEOC*.[4] Part II discusses two wage and hour cases: *Integrity Staffing Solutions, Inc. v. Busk*[5] and *Perez v. Mortgage Bankers Ass'n*.[6] Part III analyzes two whistleblower cases: *Department of Homeland Security v. MacLean*[7] and *Kellogg Brown & Root Services, Inc. ex v.*

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1. In this Term, employment discrimination cases returned to the Court's docket after a one-year absence. *See* Michael Z. Green, *Unusual Unanimity and the Ongoing Debate on the Meaning of Words: The Labor and Employment Decisions from the Supreme Court's 2013–14 Term*, 30 A.B.A. J. Lab. & Emp. L. 175 (2015).

2. 135 S. Ct. 2028 (2015).

3. 135 S. Ct. 1338 (2015).

4. 135 S. Ct. 1645 (2015).

5. 135 S. Ct. 513 (2014). This Article also discusses the impact of *Integrity Staffing* in Part V.

6. 135 S. Ct. 1199 (2015).

7. 135 S. Ct. 913 (2015).

United States ex rel. Carter.[8] Part IV summarizes two retirement benefit cases: *Tibble v. Edison International*[9] and *M & G Polymers USA, Inc. v. Tackett*.[10] Finally, Part V examines the impact of *Integrity Staffing* and two decisions from the 2013–2014 Term, *Vance v. Ball State University*[11] and *University of Texas Southwestern Medical Center v. Nassar*,[12] that have already generated significant district and appellate court decisions.

I. Title VII: Religion, Pregnancy, and Conciliation Procedure

A. EEOC v. Abercrombie & Fitch Stores, Inc.*: Religious Discrimination: Must Employers Lacking Actual Knowledge of a Religious Need Still Offer Accommodations?*

1. The Facts: Meager Communication About Religious Needs in an Entry-Level Hiring Process

In *EEOC v. Abercrombie & Fitch Stores, Inc.*,[13] a style-conscious clothes retailer, citing its dress code against wearing "caps," refused to hire an applicant it deemed "qualified" because her religion required her to wear a headscarf.[14] That might have been an open-and-shut Title VII case, but there was a twist: the employee neither expressly said her religion required a headscarf, nor expressly requested a dress code accommodation to allow a headscarf.[15] Thus, the employer arguably lacked "actual knowledge" of the applicant's need for an accommodation. As the Court's decision summarizes

> Consistent with the image Abercrombie seeks . . . the company imposes a Look Policy that governs its employees' dress. The Look Policy prohibits "caps". . . as too informal. . . . Samantha Elauf is a practicing Muslim who, consistent with her understanding of her religion's requirements, wears a headscarf. She applied for a position . . . and was interviewed by Heather Cooke, . . . [who] gave Elauf a rating that qualified her to be hired; Cooke was concerned, however, . . . with the store's Look Policy. . . . Cooke turned to Randall Johnson, the district manager. Cooke informed Johnson that she believed Elauf wore her headscarf because of her faith. Johnson told Cooke that Elauf's headscarf would violate the Look Policy, as would all other headwear, religious or otherwise, and directed Cooke not to hire Elauf.[16]

These facts illustrate how a typically short, one-step job application process for an entry-level job, such as retail sales, might provide little

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8. 135 S. Ct. 1970 (2015).
9. 135 S. Ct. 1823 (2015).
10. 135 S. Ct. 926 (2015).
11. 133 S. Ct. 2434 (2013).
12. 133 S. Ct. 2517 (2013).
13. 135 S. Ct. 2028 (2015).
14. *Id.* at 2031.
15. *See id.*
16. *Id.*

opportunity for employees to detail religious needs or for employers to follow up after questions arise as to possible religious needs. Here, the employer itself perceived the applicant's possible religious beliefs and needs, yet never followed up before rejecting the applicant, leaving the employer's knowledge of the employee's religious needs incomplete.

2. The Holding: Requiring Less Employer Knowledge and More Accommodation Than Prior Case Law

A. Employers Are Liable Not Only for Acting on "Actual Knowledge," But Also for Acting on "Unsubstantiated Suspicion" of Employee Religious Needs

The district court granted summary judgment in favor of the Equal Employment Opportunity Commission (EEOC), but the Tenth Circuit reversed and ordered the district court to enter judgment for the employer because the EEOC had not shown that the employer had actual knowledge of the employee's religious belief.[17] The Supreme Court reversed with Justice Scalia writing for a seven-Justice majority.[18] Justice Alito concurred in the result,[19] and Justice Thomas declared that he concurred in part and dissented in part, though he appeared to disagree with the majority's entire reasoning and outcome.[20]

Declaring the inquiry to be employer motive, not employer knowledge, the Court found sufficient that the employer drew motivation

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17. EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1143 (10th Cir. 2013), *rev'd and remanded*, 135 S. Ct. 2028 (2015).

18. *Abercrombie & Fitch Stores*, 135 S. Ct. 2028 (2015).

19. Justice Alito disagreed with the majority view that religious discrimination does not require actual knowledge, but concurred in reversing the summary judgment grant because he believed the evidence supported a finding of actual knowledge. *Id.* at 2035 (Alito, J., concurring) (opining that Plaintiff was required to "prove that Abercrombie rejected Elauf because of a practice that Abercrombie knew was religious," but also that there was "ample evidence . . . Abercrombie knew that Elauf is a Muslim and . . . wore the scarf for a religious reason").

20. Justice Thomas agreed only on the basic point that there are two kinds of Title VII claims (disparate treatment and disparate impact); he would have affirmed the Tenth Circuit's order of judgment for the employer, rejecting the notion of a religious exemption from a neutral workplace policy. *See id.* at 2037 (Thomas, J., concurring in part, dissenting in part) ("I agree . . . that there are two . . . causes of action under Title VII . . . a disparate-treatment (or intentional discrimination) claim and a disparate-impact claim. Our agreement ends there. Unlike the majority, I adhere to what I had thought . . . undisputed. . . . Mere application of a neutral policy cannot constitute 'intentional discrimination.' Because . . . Abercrombie appli[ed] . . . [a] neutral Look Policy . . . I would affirm."). Thus, despite Justice Thomas's declaration that he "concurred in part," early analyses have viewed his opinion as a pure dissent. *See, e.g.*, Kathleen Kapusta, *Supreme Court: Applicant's Religious Practice, Confirmed or Otherwise, Can't Be Factor in Employment Decisions*, EMP. L. DAILY, http://www.employmentlawdaily.com/index.php/news/applicants-religious-practice-confirmed-or-otherwise-cant-be-factor-in-employment-decisions/ (last visited Jan. 2, 2016) ("In *dissent*, Justice Thomas [opined]: Mere application of a neutral policy cannot constitute 'intentional discrimination.'" (emphasis added)); Jake Simpson, *Justice Thomas Lets His Dissents Do the Talking*, LAW360 (June 30, 2015, 4:37 PM), https://www-law360-com.ezproxy.law.umn.edu/articles/674025/print?section=aerospace ("[In] *Abercrombie & Fitch Stores Inc.*, he was the only dissenter from Justices Scalia's majority opinion. . . .").

from even "unsubstantiated suspicion" of employee religious accommodation need.[21] Unlike some seven- to nine-Justice majority opinions that use tentative or watered-down language to maintain consensus among Justices with varied views, Justice Scalia's opinion, though short, offered a clear command to employers and lower courts:

> [A]n employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed. Thus, the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor. . . . Title VII's . . . disparate-treatment provision prohibits actions taken with the *motive* of avoiding the need for accommodating a religious practice. A request for accommodation, or the employer's certainty that the practice exists, may make it easier to infer motive, but is not a necessary condition of liability.[22]

B. Though Precedent Declares Religious Accommodation Duty To Be De Minimis, Title VII Requires Religious Exemptions from Neutral Policies

In a passage less widely analyzed than the core holding about employer knowledge, the Court arguably ratcheted upward the employer duty to offer nontrivial religious accommodations: "Title VII requires otherwise-neutral policies to give way to the need for an accommodation."[23] That may seem an unremarkable statement, given the statutory command to accommodate "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate . . . religious observance or practice without undue hardship . . . [to] the employer's business."[24] But the sparse prior Supreme Court and court of appeals precedent had declared the religious accommodation duty "de minimis," leaving employers free to deny accommodations that were "costly," required "extra work," or placed accommodated employees "in a more favorable position" than co-workers without accommodations:

> Title VII does not require religious accommodations that impose more than "de minimis" costs on an employer. In part, this is because costly accommodations would place the religious practitioner in a more favorable position, at the employer's expense, than her coworkers. Further, more than de minimis adjustments could require . . . extra work to accommodate the plaintiff.[25]

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21. *Abercrombie & Fitch Stores*, 135 S. Ct. at 2033.
22. *Id.*
23. *Id.* at 2034.
24. 42 U.S.C. § 2000e(j) (2012).
25. Tagore v. United States, 735 F.3d 324, 330 (5th Cir. 2013) (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)).

Undercutting such narrow interpretations of the accommodation duty, *Abercrombie & Fitch Stores* requires employers to offer even accommodations that place religious practitioners in a more favorable position than co-workers:

> Nor does the statute limit disparate-treatment claims to only those employer policies that treat religious practices less favorably than similar secular practices. . . . Title VII does not demand mere neutrality with regard to religious practices . . . Rather, . . . when an applicant requires an accommodation as an "aspec[t] of religious . . . practice," it is no response that the subsequent "fail[ure] . . . to hire" was due to an otherwise-neutral policy. Title VII requires otherwise-neutral policies to give way to the need for an accommodation.[26]

3. The Implications: What *Is* Required, If Not "Actual Knowledge"? And Does *Abercrombie & Fitch Stores* Apply to Other Discrimination Categories?

A. Discrimination Still Requires That Employers *Suspect* or *Should* Have Known a Religious Belief

Is *Abercrombie & Fitch Stores* mainly a near-unanimous Court engaged in error correction of a wayward Court of Appeals decision, or will lower courts interpret it as changing the law in some material way? The Court's possible raising employers' "de minimis" accommodation duty was subtle enough that it may take years to see its full effects—but the employer-knowledge holding already has drawn attention of lower courts and attorneys.

The Court's clarification that religious discrimination does not require actual knowledge, but merely a motive to deny or avoid possible accommodations, does not help plaintiffs whose employers are genuinely unaware of religious needs. In *Nobach v. Woodland Village Nursing Center, Inc.*,[27] the earliest Title VII appellate decision applying *Abercrombie & Fitch Stores*, the Fifth Circuit reversed a jury verdict for a plaintiff who claimed she was terminated as a nursing home activities aide for refusing to pray with a patient.[28] *Nobach* noted the *Abercrombie & Fitch Stores* rule that plaintiffs need not prove employers' actual knowledge of religious beliefs but still must prove the employer either "suspected, or reasonably should have known" of the religious need:

> When evaluating causation in a Title VII case, the question is not what the employer *knew* about the employee's religious beliefs. Nor is the question whether the employer *knew* that there would be a conflict between the employee's religious belief and some job duty. Instead, the critical question is what *motivated* the employer's employment decision.

26. *Abercrombie & Fitch Stores*, 135 S. Ct at 2034 (alterations in original).
27. 799 F.3d 374 (5th Cir. 2015).
28. *See id.* at 375.

. . . .

> Woodland [admits] . . . that Nobach's failure to perform the Rosary with the resident was the factor that precipitated her discharge. If Nobach had presented any evidence that Woodland knew, *suspected, or reasonably should have known* the cause for her refusing this task was *her conflicting religious belief* . . . the jury would certainly have been entitled to reject Woodland's explanation for Nobach's termination. But, no such evidence was ever provided. . . .[29]

Nobach arguably attempts to limit *Abercrombie & Fitch Stores* by requiring some limited employer knowledge, but only to a very modest extent. After all, in rejecting an "actual knowledge" requirement, what *Abercrombie & Fitch Stores* said would suffice is "an unsubstantiated suspicion that accommodation would be needed"—which still requires employer "suspicion" of a religious need.[30] It is hard to argue discrimination occurred if an employer (1) genuinely was unaware of a need for a never-requested accommodation, or (2) terminated an employee for refusing a task the employer had no reason to know or suspect was religiously forbidden.

Viewing *Nobach* as merely illustrating a common-sense limitation on the rule that religious discrimination does not require actual knowledge of the religious belief, *Nobach* and *Abercrombie & Fitch Stores*, taken together, illustrate what does and does not suffice to trigger an accommodation duty. On the one hand, if an employee needs off-schedule breaks without the employer knowing the breaks are for prayers, or needs otherwise impermissible days off without the employer knowing the days off are for religious holidays, then the employer commits no violation when, in response, it undertakes some adverse action (termination, imposition of discipline, firing, denial of the needed breaks or days off, etc.). On the other hand, an accommodation duty arises if the employer "suspected, or reasonably should have known the cause" for the employee's need "was her conflicting religious belief," *Nobach* held,[31] in conformity with the example *Abercrombie & Fitch Stores* provided:

> [S]uppose that an employer thinks (though he does not know for certain) that a job applicant may be an orthodox Jew who will observe the Sabbath, and thus be unable to work on Saturdays. If the applicant actually requires an accommodation . . . and the employer's desire to avoid the prospective accommodation is a motivating factor . . . the employer violates Title VII.[32]

Still, the line between an employer innocently unaware of religious need and an employer that "suspected, or reasonably should have

29. *Id.* at 378–79 (second paragraph emphasis added).
30. *Abercrombie & Fitch Stores*, 135 S. Ct. at 2033.
31. *Woodland Vill. Nursing Ctr.* 799 F.3d at 379.
32. 135 S. Ct. at 2033.

known" of religious need is inherently blurrier than a simple "actual knowledge" rule. The typically short, one-step interview process for entry-level, hourly-paid jobs, such as in retail stores or factories, risks leaving employers imperfectly aware not only of employee needs, but also of the reasons for such needs, including whether they are religious in nature. Thus the advice Seyfarth Shaw provided in a post-*Abercrombie & Fitch Stores* client alert: employers should consider treating religious accommodation needs more like disability accommodation needs by "consider[ing] engaging in an interactive process with the applicant" who appears to need any form of accommodation that may well prove religious in nature:

> There is still much wisdom in the time-honored advice to employers to avoid asking applicants about religion, or making assumptions based on stereotypes. However, in light of this decision, an employer who has any reason to believe, or even suspect, that accommodation may be necessary—from any source—will need to consider engaging in an interactive process with the applicant. Depending on the circumstances, that process may entail explaining to the applicant the relevant work rule, inquiring as to whether the applicant could comply with the rule or would require an accommodation, and analyzing whether any required accommodation is reasonable or would impose an undue hardship.[33]

B. Did the Court Abrogate Cases Requiring "Knowledge" of Other Unobvious Discrimination Grounds, such as Early Pregnancy and Some Disabilities, Ages, and Races?

A final implication of *Abercrombie & Fitch Stores* is that, logically, it could apply to "knowledge" of other forms of discrimination than religious. After all, religion is not the only protected classification that may be unobvious: while sex is almost always apparent and race usually is visually apparent, they might not be in certain cases; other classifications may be frequently unobvious, such as early-term pregnancy, disability, age, and sexual orientation. *Abercrombie & Fitch Stores* calls into question decades of case law imposing a strict actual knowledge requirement for protected classification claims. For instance, the Ninth Circuit held that "[a]n employer cannot intentionally discriminate against a job applicant based on race unless the employer knows the applicant's race;"[34] the Third Circuit ruled that a pregnancy discrimination plaintiff must allege knowledge "[i]f the pregnancy is not apparent and the employee has not disclosed it to her employer;"[35] and the Second Circuit

33. Dawn Reddy Solowey & Ariel D. Cudkowicz, *The Impact of the Supreme Court's Ruling in* EEOC v. Abercrombie & Fitch (June 1, 2015), http://www.seyfarth.com/publications/OMM060115-LE.

34. Robinson v. Adams, 847 F.2d 1315, 1316 (9th Cir. 1987).

35. Geraci v. Moody-Tottrup, Int'l, Inc., 82 F.3d 578, 581 (3d Cir. 1996).

held that "where a plaintiff relies on a substantial age discrepancy between herself and her replacement, she must adduce some evidence indicating defendants' knowledge as to that discrepancy."[36] In the last of the just-quoted cases, *Woodman v. WWOR-TV, Inc.*,[37] the Second Circuit surveyed the "knowledge" requirement as to various discrimination grounds, concluding that courts have "required a prima facie showing that a defendant *knew* of a plaintiff's protected status in connection with other discrimination claims."[38] *Abercrombie & Fitch Stores*, in holding that Title VII religious discrimination requires only motive, not actual knowledge,[39] arguably abrogated all of the above precedent requiring actual knowledge for other grounds of discrimination than religion.

B. Young v. United Parcel Service, Inc.*: Pregnancy Discrimination: Must Employers Offer Pregnant Employees Accommodations They Offer to Non-Pregnant Employees?*

1. The Facts: Pregnant Worker Seeks Accommodation Provided to Some, But Not All, Workers

Among the 2014–2015 Term's employment cases, *Young v. United Parcel Service, Inc.* drew the most news coverage, with the off-point focus common for pop legal coverage. "The fight for reproductive rights has been the dominant rallying point among feminists for at least a decade. As state after state continues to roll back abortion rights, and some even fear the eventual overturning of *Roe v. Wade*," one national article began, implying that, in a Court term featuring nine employment cases and zero reproductive rights cases, employment discrimination is a secondary yet possibly interesting women's rights cause.[40] "Peggy Young only has to look at her younger daughter to be reminded how long she has fought United Parcel Service over its treatment of pregnant employees, and why. Young was pregnant with Triniti, who's now 7 years old," wrote an *Associated Press* journalist,[41] who may have a brighter screenwriting than legal reporting future.

The actual issue in *Young* was an important one regardless of unrelated reproductive rights legislation or the eye color of Peggy Young's daughter: can the nontrivial subset of pregnant employees needing accommodations—restrictions on lifting or other high-effort physical tasks, time off work, etc.—demand them from employers providing

36. Woodman v. WWOR-TV, Inc., 411 F.3d 69, 82–83 (2d Cir. 2005).
37. 411 F.3d 69 (2d Cir. 2005).
38. *Id.* at 81 (emphasis added).
39. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2031 (2015).
40. Elissa Strauss, *The Feminist Battle That Too Many Women Ignore*, THE WEEK (Sept. 25, 2014), http://theweek.com/articles/443517/feminist-battle-that-many-women-ignore.
41. Mark Sherman, *Ex-UPS Driver's Pregnancy Bias Claim at High Court*, ASSOCIATED PRESS (Nov. 29, 2014), http://news.yahoo.com/ex-ups-drivers-pregnancy-bias-claim-high-court-130759759–finance.html.

such accommodations to other, non-pregnant workers? The facts of *Young* are typical of blue-collar workers facing high-risk pregnancies or temporary physical restrictions. In short, her pregnancy required reassignment from her "driver" job, which required package lifting, to an "inside job" doing other tasks on the employer's premises.[42] As the Court summarized:

> Peggy Young worked as a part-time driver for . . . United Parcel Service (UPS). Her responsibilities included pickup and delivery of packages. . . . [A]fter suffering several miscarriages, she became pregnant. Her doctor told her that she should not lift more than 20 pounds during the first 20 weeks . . . or more than 10 pounds thereafter. UPS required drivers . . . to be able to lift parcels weighing up to 70 pounds (and up to 150 pounds with assistance). UPS told Young she could not work while under a lifting restriction. Young consequently stayed home without pay . . . and eventually lost her employee medical coverage.[43]

Young would be an easier case if UPS had *always* or *never* accommodated other employees with a need for non-driving or otherwise lifting-restricted duty. Instead, like many employers, UPS lived in the middle ground of offering reassignment to only several discrete categories of temporarily restricted employees: "(1) drivers who had become disabled on the job, (2) those who had lost their Department of Transportation (DOT) certifications, and (3) those who suffered from a disability covered by the Americans with Disabilities Act."[44]

2. The Holding: Accommodation Denial May Constitute Disparate Treatment per *McDonnell Douglas* Pretext Analysis If Non-Pregnant Workers Enjoy Accommodations Pregnant Workers Do Not

While *Young's* facts are typical, its absence of a disability discrimination claim may have become less typical in recent years. The Americans with Disabilities Act (ADA) expressly requires reasonable accommodations of disabilities, but temporary lifting restrictions like Young's started qualifying as "disabilities" only once the coverage-broadening ADA Amendments Act of 2008 took effect—which was after Young's claims arose.[45] Given this quirk of timing, while future Peggy Youngs likely will plead pregnancy discrimination *and* disability discrimination, the actual Peggy Young enjoyed only the former claim. Consequently, the Court addressed only how such claims proceed under the Pregnancy Discrimination Act (PDA).

The Court reversed the Fourth Circuit's affirmance of the grant of summary judgment to the employer. Because Young's complaint fea-

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42. Young v. United Parcel Service, 135 S. Ct. 1338, 1346 (2015).
43. *Id.* at 1344.
44. *Id.*
45. *Id.* at 1348 (noting inapplicability of ADAAA to Young's claim that arose earlier).

tured no disparate impact claim, and the statute featured no accommodation duty, the Court focused on when and whether a failure to offer a pregnancy accommodation amounts to disparate treatment, i.e., intentional discrimination against pregnant workers. Absent the sort of direct evidence of discriminatory animus that is now rare, "an individual pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the *McDonnell Douglas* framework," the Court held.[46] The PDA's lack of a statutory accommodation mandate posed no barrier to such a claim because the basic antidiscrimination rule bars denying pregnant workers any material privilege other workers receive, whether a transfer or (as in *Young*) relief from onerous duty or some other accommodation. Accommodation denial thus is actionable disparate treatment if it amounts to "treating individuals within a protected class differently" as to a material condition of employment.[47]

Consistent with the rule that discrimination is actionable only if it adversely "affect[s] the terms and conditions of employment" based on protected status,[48] a pregnancy accommodation claim can succeed only if the accommodation denial "impose[s] a significant burden on pregnant workers."[49] Once the employee establishes a prima facie case, with the significantly burdensome accommodation refusal fulfilling the "adverse action" prong, the employer then asserts a legitimate nondiscriminatory reason under *McDonnell Douglas*; the employee then can prove "pretext" by showing the employer's asserted reasons "are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination."[50] Ultimately, the accommodation-as-discrimination inquiry boils down to the following rhetorical question the Court offered: "why, when the employer accommodated so many, could it not accommodate pregnant women as well?"[51]

After establishing its new PDA burden-shifting test, the Court remanded to the Fourth Circuit to determine whether Young could establish pretext.[52] Though not deciding the pretext issue, the Court noted that there was "a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from Young's" and that the Fourth Circuit had not considered Young's burdensome-effect arguments.[53]

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46. *Id.* at 1353.
47. *Id.* at 1355.
48. Burlington N. Santa Fe Ry. Co. v. White, 548 U.S. 53, 64 (2006) (holding actionable "discriminatory actions that affect the terms and conditions of employment").
49. *Young*, 135 S. Ct. at 1354.
50. *Id.*
51. *Id.* at 1355.
52. *Id.*
53. *Id.*

3. The Implications: How Much Accommodation of the Non-Pregnant Proves Discrimination? Either a "Large Percentage" of the Non-Pregnant or "Some" Who "Cannot Reasonably Be Distinguished"

If accommodating the non-pregnant can show discrimination in failing to accommodate a pregnant worker, how much non-pregnancy accommodation suffices to so prove? The Court's most basic holding in this regard was its clear rejection of UPS's view that the PDA "does no more than define sex discrimination to include pregnancy discrimination," allowing employers to deny pregnant workers accommodations that are not provided freely to all, but instead are provided only to others within a facially neutral category (such as those with off-the-job injuries)."[54] UPS and the dissenters would find that the PDA "does not prohibit denying pregnant women accommodations . . . on the basis of an evenhanded policy."[55] But the Court also rejected the most strongly pro-employee view, pressed by Young and the United States, that if an employer provides an accommodation (e.g., light duty) to *any* other worker, it is discriminatory to deny that accommodation to a pregnant worker[56]:

> Young's approach . . . seems to say that the statute grants pregnant workers a "most-favored-nation" status. As long as an employer provides one or two workers with an accommodation—say, those with particularly hazardous jobs, or those whose workplace presence is particularly needed, or those who have worked . . . for many years, or those who are over the age of 55—then it must provide similar accommodations to *all* pregnant workers (with comparable physical limitations), irrespective of the nature of their jobs, the employer's need to keep them working, their ages, or any other criteria.[57]

If providing accommodation to only "one or two workers"[58] with distinguishable situations (e.g., especially hazardous duties or integral roles) is not enough to prove discrimination in denying the same accommodation to a pregnant worker, what *is* enough? The Court offered two possible answers, one quantitative and one qualitative. This was the Court's quantitative answer:

> The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates *a large percentage* of nonpregnant workers while failing to accommodate *a large percentage* of pregnant workers. Here, for example, if the facts are as Young says they are, she can show that UPS accommodates *most* nonpregnant employees with

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54. *Id.*
55. *Id.* at 1363 (Scalia, J., dissenting).
56. *Id.*at 1349.
57. *Id.* at 1349–50.
58. *Id.*

lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations.[59]

In contrast to the above quantitative answer ("large percentage," "most," etc.), there is a qualitative answer to how much accommodation of the non-pregnant proves pregnancy discrimination in denying a pregnant worker that same accommodation. What fails as proof of pregnancy discrimination is accommodating only those with *distinguishable situations*: "those with particularly hazardous jobs, or those whose workplace presence is particularly needed, or those who have worked at the company for many years," etc.[60] What sufficed for Young to defeat summary judgment, in contrast, was evidence of "whether UPS provided more favorable treatment to *at least some* employees whose situation *cannot reasonably be distinguished* from Young's"; that sufficed to "create a genuine dispute of material fact" as to pregnancy discrimination.[61]

Litigants and courts likely will offer varied interpretations of *Young*, because the Court provided both qualitative and quantitative answers without clarifying whether they are conjunctive requirements (i.e., a large number of similarly situated workers offered similar accommodations) or disjunctive alternatives (i.e., a large number of workers *or* any number of similarly situated workers offered accommodations). The most plausible interpretation is that *either* the quantitative or the qualitative showing should suffice. Qualitatively, one of the oldest disparate treatment principles is that favoring any truly "similarly situated" workers evidences discrimination. Quantitatively, similarly situated individuals[62] become less important if an employer favors a truly "large percentage" of, or "most," workers outside the protected class.

Employers may argue otherwise, that accommodation of a "large percentage" of the non-pregnant is a requirement to infer pregnancy discrimination; at least one law firm representing employers is viewing *Young* as so requiring.[63] However, *Bray v. Town of Wake Forest*,[64] the first reported federal decision to address this issue, held that a

59. *Id.* at 1354 (emphasis added).

60. *Id.* at 1349–50.

61. *Id.* at 1355 (emphasis added).

62. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973) ("Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the 'stall-in' were nevertheless retained or rehired.").

63. *E.g.*, Putney, Twombly, Hall & Hirson LLP, *Supreme Court Weighs In on Pregnancy Discrimination* (Apr. 9, 2015), https://putneylaw.com/cu_040915.html ("According to the majority, pretext is shown by evidence that the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers. . . . [M]any questions remain unanswered in the wake of the Supreme Court's decision in *Young*. For example: . . . how many comparators are necessary to constitute a 'large percentage of non-pregnant workers?' ").

64. No. 5:14-CV-276-FL, 2015 WL 1534515 (E.D.N.C. Apr. 6, 2015).

pregnancy discrimination claim can be based on just two similarly situated non-pregnant workers receiving the same accommodation the employer refused to a pregnant worker. In *Bray*, a town's police department denied a pregnant worker reassignment to light duty, but admitted that, twice during plaintiff's employment, it "place[d] employees who have been injured on the job (in-service) in temporary light duty assignments . . . since they would otherwise receive workers' compensation benefits."[65] There was no evidence of light-duty accommodation for anyone other than those injured on the job, but the two examples of light-duty accommodation for those injured on the job sufficed, *Bray* held: "Construing these facts in the light most favorable to plaintiff, they are sufficient to set forth a plausible claim that defendants discharged plaintiff because of her pregnancy or related medical conditions."[66]

Litigation positioning aside, employers now need to consider whether they must provide more pregnancy accommodations if, like UPS, they provide similar accommodations not under narrow, distinguishable circumstances, but instead to a nontrivial swath of employees needing light duty, reassignment, etc. As one law firm explained in a client alert, *Young* "creates the possibility that workplace policies that provide accommodations to some workers but exclude pregnant employees may be in violation of the PDA"; more specifically, employers now "should consider taking steps to reconsider" their policies on when to offer employees accommodations, "particularly if the only justification for excluding pregnant workers from those policies are considerations of cost or convenience. At the very least, employers who have such a policy should be prepared with a legitimate rationale for maintaining it."[67]

C. *Is EEOC Conciliation Reviewable?* Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (Apr. 29, 2015)*

1. The Facts: An Employer Claims the EEOC Failed to Conciliate

After investigating a charge and finding "reasonable cause" to believe discrimination occurred, the EEOC must "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[68] "The statute leaves to the EEOC the ultimate decision whether to accept a settlement or bring a lawsuit,"[69] and "[n]othing said or done during" conciliation

65. *Id.* at *3.

66. *Id.* at *6.

67. Jessica A. Hurst, *Young v. UPS Calls for a Review of Accommodations Offered to Pregnant Employees* (Mar. 27, 2015), http://www.cozen.com/news-resources/publications/2015/young-v-ups-calls-for-a-review-of-accommodations-offered-to-pregnant-employees.

68. 42 U.S.C. § 2000e-5(b) (2012).

69. Mach Mining, LLC v. EEOC, 135 S. Ct. 1645, 1649 (2015).

can be "evidence in a subsequent proceeding" unless all parties agree.[70] But the EEOC cannot sue until it engages in conciliation and finds that the conciliation failed to resolve the case.[71]

In *Mach Mining*, the EEOC, after an investigation, found "reasonable cause" to believe that the company had discriminated based on sex:

> In a letter announcing that determination, the EEOC invited . . . "informal methods" of dispute resolution, promising that a Commission representative would soon "contact [them] to begin the conciliation process." The record does not disclose what happened next. But about a year later, the Commission sent Mach Mining a second letter, stating that "such conciliation efforts . . . have occurred and have been unsuccessful" and . . . further efforts would be "futile."[72]

During the ensuing litigation, Mach Mining asserted "that the EEOC had failed to 'conciliat[e] in good faith' prior to filing suit."[73] The EEOC moved for summary judgment on the issue, contending that its conciliation efforts were not subject to judicial review.[74] Mach Mining argued that the court should "consider the overall 'reasonable[ness]' of the EEOC's efforts, based on evidence the company would present about the conciliation process."[75]

2. The Holding: "Barebones Review" and Lack of Conciliation Yields Only a Temporary Stay

The Court unanimously held that courts may "review whether the EEOC satisfied its statutory obligation to attempt conciliation before filing suit."[76] The Court also held, however, that "the scope of that review is narrow" in order to protect "the EEOC's extensive discretion to determine the kind and amount" of conciliation effort.[77] The EEOC's argument that its conciliation efforts are unreviewable lost because the statutory "language is mandatory," and a "'strong presumption' favor[s] judicial review of administrative action."[78] The alternative argument that courts should review only its "cause" letter stating that conciliation would begin and the second letter reporting failure of conciliation "falls short of what Title VII demands."[79] The letters *say* conciliation occurred, but "the point of judicial review is instead to

70. *Id.*
71. 42 U.S.C. § 2000e-5(f)(1) (2012).
72. *Mach Mining*, 135 S. Ct. at 1650 (alteration in original).
73. *Id.* (alteration in original).
74. *Id.*
75. *Id.*
76. *Id.* at 1649.
77. *Id.*
78. *Id.* at 1650–51.
79. *Id.* at 1653.

verify" that the EEOC "actually, and not just purportedly, tried to conciliate."[80]

Yet the Court rejected Mach Mining's argument to apply the National Labor Relations Act (NLRA) standard of scrutinizing the substance of the EEOC's offers and subjective good faith in conciliation.[81] Whereas a key NLRA policy is to assure substantive bargaining, Title VII pursues only employer "compliance," leaving the EEOC "leeway respecting how to seek voluntary compliance and when to quit the effort" in favor of suing "whenever 'unable to secure' terms 'acceptable *to the Commission*.'"[82] Inquiry into "whether the EEOC had made a 'sincere and reasonable effort to negotiate'" would "fail[] to give effect to the law's non-disclosure provision . . . [and] undermine[] the conciliation process itself, because confidentiality promotes candor."[83]

Conciliation thus faces "relatively barebones review."[84] "[T]he EEOC must inform the employer about the specific allegation," as it "typically does in a letter announcing its determination of 'reasonable cause' . . . describ[ing] both what the employer has done and [to] which employees. . . ."[85] In the conciliation, "the EEOC must try to engage the employer in some form of discussion (whether written or oral)" to offer an "opportunity to remedy" the discrimination.[86] "Judicial review [is] of those requirements (and nothing else),"[87] and therefore a filing akin to a mere affidavit of service should suffice to establish EEOC compliance:

> A sworn affidavit from the EEOC stating that it has performed the obligations noted above but that its efforts have failed will usually suffice. . . . If, however, the employer provides credible evidence of its own, in the form of an affidavit or otherwise, indicating that the EEOC did not provide the requisite information about the charge or attempt to engage in a discussion about conciliating the claim, a court must conduct the factfinding necessary to decide that limited dispute.[88]

Finally, the Court held that conciliation failure is not a ground for dismissal: "Should the court find in favor of the employer, the appropriate remedy is to order the EEOC to undertake the mandated efforts."[89]

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80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 1653, 1655.
84. *Id.* at 1656.
85. *Id.* at 1655–56.
86. *Id.* at 1656.
87. *Id.*
88. *Id.*
89. *Id.* (citing 42 U.S.C. § 2000e–5(f)(1) (2012)).

3. The Implications: A Dispute Unlikely to Recur; Challenging Conciliation Accomplishes Nothing

Mach Mining may be the Court's least important employment decision ever. Arguably it was significant for rejecting arguments for tougher conciliation review; but the Court's unanimity makes it hard to see rejection of a different outcome as a significant bullet-dodge. In holding that a simple communication by the EEOC can suffice, the Court also reaffirmed the EEOC's great discretion regarding how seriously to pursue pre-litigation settlement, but that largely reaffirmed the decades-long status quo that the EEOC lacks NLRA-like detailed bargaining duties.

The *Mach Mining* holding, though technically declaring conciliation judicially reviewable, assures in practice that such review will recur extremely rarely, if ever. In the future, the EEOC can avoid such disputes with a brief pre-suit settlement inquiry; indeed, on remand, the district court held the EEOC's bare-bones affidavit was sufficient to meet its conciliation obligation.[90] Future employers will be hard-pressed to find any point in challenging conciliation efforts; it is hard to see a more wasteful filing than a motion to compel the EEOC to make a phone call during a brief stay for that purpose. So aside from delay of this case by appealing to the circuit and the Supreme Court, all Mach Mining won was the right to compel and dispute a one-page EEOC affidavit, in hopes of winning a short stay for the EEOC to make a phone call to discuss settlement. Query whether Mach Mining's six-figure (or higher) circuit, certiorari, and Supreme Court fees would have been better spent as an offer of the settlement it claims it wishes the EEOC had called to solicit.

II. Fair Labor Standard Act: Compensable Time and Rulemaking Procedure

A. Integrity Staffing Solutions, Inc. v. Busk*: Does the FLSA Require Payment for Time Spent Undergoing and Awaiting Mandatory Security Checks at the End of Each Day?*

1. The Facts: Warehouse Workers Must Undergo Security Screening After Clocking Out

Integrity Staffing Solutions (ISS), a major contractor of well-known retailer Amazon, stores Amazon products in ISS warehouses, packages customer orders, and ships those orders.[91] ISS "required its employees to undergo a security screening before leaving the warehouse at the end of each day. During this screening, employees removed items such as wallets, keys, and belts from their persons and

90. EEOC v. Mach Mining, LLC, Case No. 11-cv-00879-JPG-PMF, 2016 WL 212799 (S.D. Ill. Jan. 19, 2016).

91. Integrity Staffing Sols., Inc. v. Busk, 135 S. Ct. 513, 515 (2014).

passed through metal detectors."[92] Employees sued under the Fair Labor Standards Act (FLSA) and state wage law, alleging "that they were entitled to compensation . . . for the time spent waiting to undergo and actually undergoing the security screenings . . . roughly 25 minutes each day. . . ."[93]

Integrity Staffing was just the latest in a long line of cases, from the earliest days of the FLSA[94] to the modern era,[95] addressing what employee time at the start or end of the day the FLSA requires to be compensated. ISS argued, and the district court agreed in dismissing the suit, that time waiting for and undergoing screenings was not compensable: "because the screenings occurred after the regular work shift," the employees could claim compensability "only if the screenings were an integral and indispensable part of the principal activities they were employed to perform."[96] Instead, the district court held, screening time "fell into a noncompensable category of postliminary activities."[97] The employee argued, and the Court of Appeals agreed in reversing the dismissal, "that postshift activities that would ordinarily be classified as noncompensable postliminary activities are nevertheless compensable as integral and indispensable to an employee's principal activities if those postshift activities are necessary to the principal work performed and done for the benefit of the employer," as the security screenings were.[98]

2. The Holding: Security Screenings Are Noncompensable "Preliminary or Postliminary Activities," Not Compensable "Principal Activities"

The security screenings, the Court held, were noncompensable "preliminary or postliminary activities," not compensable "principal activities"—the statutory distinction between compensable and noncompensable time.[99] The Court began by stressing early FLSA history indicating statutory intent to narrow the compensability of "preliminary and postliminary" activities preceding and following workers' actual work at the start and end of their days. The 1940's Court "define[d] 'work' or 'workweek[]' . . . broadly" and thereby "found compensable the

92. *Id.*
93. *Id.*
94. *E.g.*, Mitchell v. King Packing Co., 350 U.S. 260 (1956) (knife-sharpening work before paid shifts started); Steiner v. Mitchell, 350 U.S. 247 (1956) (time changing clothes and showering, post-shift, to remove harmful chemicals); Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946) (unpaid time walking between a time clock near the factory gate and the work stations).
95. *E.g.*, IBP, Inc. v. Alvarez, 546 U.S. 21 (2005) (unpaid time undertaking, and waiting for, donning and doffing of required gear).
96. *Integrity Staffing*, 135 S. Ct. at 516.
97. *Id.*
98. *Id.*
99. *Id.* at 518 (quoting 29 U.S.C. § 254(a)(1) (2012)).

time spent traveling between mine portals and underground work areas"[100] in *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*,[101] as well as "the time spent walking from timeclocks to work benches"[102] in *Anderson v. Mt. Clemens Pottery Co.*[103] "These decisions provoked a flood of litigation," the Court recounted, and "Congress responded swiftly" with the "Portal-to-Portal Act,"[104] which amended the FLSA to assure that "no employer shall be subject to any liability" for not paying employees for "any of the following activities":

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are *preliminary to or postliminary* to said *principal activity* or activities, which occur either *prior* to the time on any particular workday at which such employee commences, *or subsequent* to the time on any particular workday at which he ceases, such *principal activity* or activities.[105]

Integrity Staffing turned on the Portal-to-Portal Act's distinction between principal activity and preliminary or postliminary activity. The Court's analysis of the distinction began with unhelpfully circular definitions of "principal activity" from dictionaries and precedents, essentially collecting unilluminating synonyms in noting that "principal" means "integral" and "indispensable":

> This Court has consistently interpreted "the term 'principal activity or activities' [to] embrac[e] all activities which are an 'integral and indispensable part of the principal activities.'" *IBP, Inc. v. Alvarez*, 546 U.S. 21, 29–30 . . . (2005) (quoting *Steiner v. Mitchell*, 350 U.S. 247, 252–253 . . . (1956)). Our prior opinions used those words in their ordinary sense. The word "integral" means "[b]elonging to or making up an integral whole; constituent, component; *spec[ifically]* necessary to the completeness or integrity of the whole; forming an intrinsic portion or element, as distinguished from an adjunct or appendage." 5 Oxford English Dictionary 366 (1933) (OED); . . . Webster's New International Dictionary 1290 (2d ed. 1954) (Webster's Second) ("[e]ssential to completeness; constituent, as a part"). And, when used to describe a duty, "indispensable" means a duty "[t]hat cannot be dispensed with, remitted, set aside, disregarded, or neglected." 5 OED 219; . . . Webster's Second 1267 ("[n]ot capable of being dispensed with, set aside, neglected, or pronounced nonobligatory"). An activity is therefore integral and indispensable to the principal activities that an employee is employed to perform if it is an

100. *Id.* at 516.
101. 321 U.S. 590, 598 (1944).
102. *Integrity Staffing*, 135 S. Ct. at 516.
103. 328 U.S. 680, 690–91 (1946).
104. *Integrity Staffing*, 135 S. Ct. at 516.
105. *Id.* at 517 (quoting 29 U.S.C. § 254(a) (2012)) (emphasis added).

> intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities.[106]

More helpful were examples in the precedents of what start-of-day and end-of-day activities are and are not compensable. Under three key precedents, preparation of equipment and necessary gear is compensable, but waiting in line for such preparation is not:

> [W]e have held compensable the time battery-plant employees spent showering and changing clothes because the chemicals . . . were "toxic to human beings" and . . . "the clothes-changing and showering activities . . . [were] indispensable to the performance of their productive work. . . ." *Steiner* . . . at 249, 251 . . . [W]e have held compensable the time meatpacker employees spent sharpening their knives because dull knives would "slow down production . . . ," "affect the appearance of the meat as well as the quality . . . ," "cause waste," and lead to "accidents." *Mitchell v. King Packing Co.*, 350 U.S. 260, 262 . . . (1956). By contrast, we have held noncompensable the time poultry-plant employees spent waiting to don protective gear because such waiting was "two steps removed from the productive activity on the assembly line." *IBP*, . . . at 42. . . .[107]

Department of Labor (DOL) regulations all the more clearly presume "waiting" time noncompensable, the Court added: "'when performed under the conditions normally present,' . . . 'checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks' are 'preliminary or postliminary' activities."[108]

Based on these principles, "[t]he security screenings at issue here are noncompensable postliminary activities," the Court held, "not the 'principal activity or activities which [the] employee is employed to perform.'"[109] Rather, the dispositive fact is that undergoing screening was secondary to, not part of, the principal work the employer sought from the employees:

> To begin with, the screenings were not the "principal activity or activities which [the] employee is employed to perform." Integrity Staffing did not employ its workers to undergo security screenings, but to retrieve products from warehouse shelves and package those products for shipment to Amazon customers. The security screenings also were not "integral and indispensable" to the employees' duties . . .

106. *Id.* (alterations in original) (quoting IBP, Inc. v. Alvarez, 546 U.S. 21, 29–30 (2005); then quoting 5 Oxford English Dictionary 366 (1933); and then quoting Webster's New International Dictionary 1290 (2d ed. 1954)).

107. *Id.* at 518 (first alteration in original) (quoting Steiner v. Mitchell, 350 U.S. 247, 249, 251 (1956); then quoting Mitchell v. King Packing Co., 350 U.S. 260, 262 (1956); and then quoting IBP, Inc. v. Alvarez, 546 U.S. 21, 42 (2005)).

108. *Id.* (quoting 29 C.F.R. § 790.7(g) (2015)).

109. *Id.*

> The screenings were not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment.[110]

The plaintiffs and Court of Appeals, the Court explained, "erred by focusing on whether an employer *required* a particular activity. The integral and indispensable test is tied to the productive work that the employee is *employed to perform*."[111] Though the employer required the screening, "[i]f the test could be satisfied merely by the fact that an employer required an activity, it would sweep into 'principal activities' the very activities that the Portal-to-Portal Act was designed to address," such as the required time clock-to-workstation walk in *Anderson*; "'the Portal-to-Portal Act evinces Congress' intent to repudiate *Anderson's* holding that such walking time was compensable.'"[112]

3. The Implications: Is *Integrity Staffing* a Helpful Data Point or Confusingly Fact-Specific?

Read by itself, without regard to any of the prior precedent, *Integrity Staffing* arguably implies that the Portal-to-Portal Act eliminates virtually any claim for "waiting and walking" time (viewing the process of proceeding through a screening as akin to "walking" from a workstation to another required place). Neither "waiting" for, nor "walking" to, "principal activities" is compensable time, the Court implies, because (1) employees' walking and waiting are not their "principal activities," and (2) the Portal-to-Portal Act eliminates wage claims for time before principal activities started, or after they ended, even if the employer requires the waiting and walking time. But that would be an over-reading of *Integrity Staffing* in two regards.

First, extensive case law holds that certain required "waiting" time is compensable, beginning with 1944's *Skidmore v. Swift & Co.*[113] holding that fire safety employees' time doing nothing useful while on-call waiting for fire emergencies was nevertheless potentially compensable:

> The men used their time in sleep or amusement as they saw fit, except that they were required to stay in or close by the fire hall and be ready to respond to alarms. . . . [W]e hold that no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time. . . . Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged. His compensation may cover both waiting and task. . . .[114]

110. *Id.* (quoting 29 U.S.C. § 254(a)(1) (2012)).
111. *Id*. at 519 (citing *IBP*, 546 U.S. at 42).
112. *Id*. (citing *IBP*, 546 U.S. at 41).
113. 323 U.S. 134 (1944).
114. *Id.* at 136–37.

Second, *Integrity Staffing* repeatedly and approvingly cited *IBP, Inc. v. Alvarez*,[115] the most recent precedent on start- and end-of-day tasks.[116] *IBP* held that some waiting time, and much walking time, *is* compensable,[117] as follows.

(1) Time *walking between changing and production areas, after donning and before doffing* special gear, *is* compensable: the gear was "integral and indispensable" to the "principal activity," and "any activity . . . 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' "[118]; thus, "the locker rooms where the . . . gear is donned and doffed are . . . [a] 'place of performance' of the principal activity."[119]
(2) Time *waiting to doff* the gear *is* compensable: "Because doffing gear . . . 'integral and indispensable' to employees' work is a 'principal activity' . . . the continuous workday rule mandates that time spent waiting to doff is . . . covered by the FLSA."[120]
(3) But time *waiting to don* the work gear *is not* compensable: "unlike the donning . . . which is always essential . . . to do his job, the waiting may or may not be necessary in particular situations"; though "necessary for employees to begin," it is akin to time "walking from a timeclock near the factory gate to a workstation," and the Portal-to-Portal Act "repudiate[d] *Anderson's* holding that such walking time was compensable." Thus, time "*waiting to check in* or . . . [for] paychecks [is] generally a 'preliminary' activity" noncompensable under the Portal-to-Portal Act.[121]

Does *Integrity Staffing* clarify or confuse inquiries into what start-of-day or end-of-day time is compensable? Arguably, it just applies the third holding of *IBP*: after *IBP* held noncompensable time *waiting to check in*, *Integrity Staffing* held the same for time *waiting to check out*. On the other hand, the newly drawn line between waiting to *doff safety gear* (compensable per *IBP*) and waiting for a *security check-out* (noncompensable per *Integrity*) is at best highly subtle and fact-specific. *Integrity Staffing* did not help make its distinction a clarifying rather than confusing one when it used language implying that no waiting time is compensable, yet approvingly cited precedent holding some waiting time compensable. The following visual summary

115. 546 U.S. 21 (2005).
116. *Integrity Staffing*, 135 S. Ct. *passim*.
117. *IBP*, 546 U.S. at 24.
118. *Id.* at 37.
119. *Id.* at 34.
120. *Id.* at 40.
121. *Id.* at 41.

illustrates the blurriness of the line between employee time the Court has held compensable and has held noncompensable:

Compensable?	**Pre- or Post-Shift Walking, Changing, and Gear Time**	**Pre- or Post-Shift Waiting Time**
Compensable	• Walking between changing and production areas, after donning & before doffing special gear (*IBP*) • Knife-sharpening before starting meatpacking work (*Mitchell*) • Showering post-shift to remove chemicals (*Steiner*)	• Waiting to don special gear required for work (*IBP*) • Required on-call waiting time (*Skidmore*)
Noncompensable	• Walking from a time clock near a factory gate to a workstation (Portal-to-Portal Act, repudiating *Anderson*) • Proceeding through a post-shift security screening (*Integrity*)	• Waiting to doff special gear required for work (*IBP*) • Waiting for a post-shift security screening (*Integrity*)

It is hard to intuit why some employee time is above the line marking compensability while other is below. Because of this lack of clarity, *Integrity Staffing* is one of the three Supreme Court cases for which this Article reviews the subsequent lower court case law, in Part V.A below, to examine how the doctrine evolved as a result of the Court's decision.

B. Perez v. Mortgage Bankers Ass'n*: Do Nonbinding Agency Issuances Require the Notice-and-Comment Process If They Reverse a Major Regulatory Interpretation?*

1. The Facts: The DOL Reverses Itself on FLSA White-Collar Exemptions

The outskirts of the FLSA "professional," "executive," and "administrative" exemptions include a wide range of middle-income white-collar jobs that are neither supervisory nor require advanced higher education—for example, insurance adjusters,[122] medical services case managers,[123] and mortgage brokers.[124] Overtime claims by mortgage sales employees have been particularly successful,[125] yielding

122. *See, e.g.*, *In re* Farmers Ins. Exch., Claims Representatives' Overtime Pay Litig., 481 F.3d 1119, 1134–35 (9th Cir. 2007) (holding insurance adjusters exempt).

123. *See, e.g.*, Rieve v. Coventry Health Care, Inc., 870 F. Supp. 2d 856, 859 (C.D. Cal. 2012) (holding workers' compensation medical services "case managers" non-exempt).

124. These include mortgage brokers and loan officers. *See, e.g.*, Partida v. Am. Student Loan Corp., No. CV-07-0674-PHX-DGC, 2008 WL 190440, at *2 (D. Ariz. Jan. 18, 2008) (mortgage brokers non-exempt); Barnett v. Wash. Mut. Bank, No. C 03-00753 CRB, 2004 WL 1753400, at *9 (N.D. Cal. Aug. 5, 2004) (same).

125. *See, e.g.*, cases cited *supra* note 124.

efforts by the DOL to opine on the subject—efforts that, spanning three presidential administrations, proved highly contested and inconsistent over time. In 1999 and 2001, the DOL Wage and Hour Division issued letters opining that mortgage-loan officers do not qualify for the "administrative" overtime exemption.[126] In 2004, the DOL issued new regulations that changed the general overtime exemption, without specifically addressing mortgage loan officers;[127] soon after, responding to a request from a real estate trade association (the Mortgage Bankers Association, or MBA) arguing for broader exemption of mortgage loan officers, the Wage and Hour Division issued a 2006 opinion that the "administrative" exemption now covered mortgage loan officers.[128] Then, in 2010, the DOL altered its interpretation of the administrative exemption, withdrawing the 2006 opinion letter and issuing an Administrator's Interpretation that mortgage loan officers are not overtime-exempt.[129] In 2011, MBA sued under the Administrative Procedure Act (APA), alleging that the DOL violated the notice-and-comment requirement for issuing, repealing, or amending federal regulations in 2010 when it withdrew its 2006 opinion letter and issued the new Administrator's Interpretation that mortgage loan officers were not overtime-exempt.[130]

2. The Holding: Issuing or Repealing Nonbinding Guidance (Opinion Letters, Administrator Interpretations, etc.) Does Not Require the Notice-and-Comment Process for Binding Regulations

After the district court dismissed MBA's challenge, the Court of Appeals for the District of Columbia Circuit—the Circuit that reviews the most federal agency decisions—reversed, holding that "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish [under the APA] without notice and comment."[131]

The Supreme Court unanimously reversed the Circuit, holding that the 2010 opinion letter withdrawal and Administrator's Interpretation were validly issued, even without the APA notice-and-comment procedures required for actual, binding regulations.[132] The Circuit's

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126. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015).

127. *Id.* at 1205.

128. *Id.*

129. *Id.*

130. *Id.*

131. Mortg. Bankers Ass'n v. Harris, 720 F.3d 966, 967 (D.C. Cir. 2013) (citations omitted) (quoting Alaska Prof'l Hunters Ass'n v. FAA, 177 F.3d 1030, 1034 (D.C. Cir. 1999)), *rev'd sub nom.* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015).

132. *Perez*, 135 S. Ct. at 1203. Justices Scalia, Thomas, and Alito concurred in the judgment but wrote separate concurrences.

requirement of notice-and-comment procedure "is contrary to the clear text of the APA's rulemaking provisions, and it improperly imposes on agencies an obligation beyond the 'maximum procedural requirements' specified in the APA."[133] The APA's "exemption of interpretive rules from the notice-and-comment process is categorical," leaving such processes applicable to only actual regulatory enactments, repeals, or amendments.[134] Because the APA "'sets forth the full extent of judicial authority to review executive agency action for procedural correctness,'" requiring APA rulemaking for lesser actions improperly creates "a judge-made procedural right" inconsistent with the balance Congress struck as to which agency actions trigger procedural protections.[135] Despite argument "'that where an agency significantly alters a prior, definitive interpretation of a regulation, it has effectively amended the regulation itself,'" the Court held that there remains a real difference between an actual amendment to a regulation (which is binding) and even the most impactful interpretation (which is not binding).[136]

3. The Implications: No, Employment Law Does Not Need More Administrative Law; the DOL Can Change Its Mind Freely As Long As It Does So in Nonbinding Communications

Taken together, *Mach Mining*[137] and *Perez*, the two employment law cases the Court fielded this term that were really administrative law cases, show that the Court has little taste for infusing employment law with more of the procedural hurdles, formalities, and delays that administrative law can impose.[138] To be sure, such procedural hurdles, formalities, and delays are important safeguards when federal agencies wield rulemaking authority to promulgate regulations with the binding force of federal law. But in *Mach Mining* and *Perez*, employers proved unable to inject those hurdles, formalities, and delays into agency actions short of rulemaking, such as agency litigation (in *Mach Mining*) or nonbinding agency policy issuances (in *Perez*).[139]

What is significant about *Perez* in particular is what it declined to say. Had the Court ruled that significant agency interpretations require formal rulemaking processes, it would have subjected the DOL, and possibly the EEOC, to more lawsuits about similar opinion

133. *Id.* at 1206 (quoting Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978)).

134. *See id.*

135. *Id.* at 1207 (quoting FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009)).

136. *Id.* at 1207–08 (citation omitted).

137. Discussed *supra* Part I.C.

138. *See supra* analysis in Parts I.C. and II.B.1–2.

139. *See Perez*, 135 S. Ct. at 1204; Mach Mining, LLC v. EEOC, 135 S. Ct. 1645, 1656 (2015).

letters and interpretive guidance—possibly chilling agencies from issuing opinions and guidance. But while keeping litigation floodgates closed, *Perez* may have kept lobbying floodgates open. By protecting easy agency reversals of major statutory interpretations, and protecting those reversals from litigation, *Perez* arguably kept it worthwhile to lobby agencies for favored interpretations, because regulations are hard to change, but easy to alter with interpretations that, under *Perez*, are unchallengeable in court. Consequently, we might continue to see agency flip-flopping akin to the DOL's three positions on mortgage brokers in ten years.

III. Federal Employees and Contractors: Whistleblower Protection Act and False Claims Act

A. Department of Homeland Security v. MacLean*: Under a Statute Protecting Whistleblowing Disclosures "Not Specifically Prohibited by Law," Is a Regulation a "Law"?*

1. The Facts: An Air Marshal Whistleblower's Leak to the Media Violates Federal Regulations

Less than two years after the al Qaeda passenger airplane hijackings of September 11, 2001, the Transportation Security Administration (TSA) in July 2003 confidentially informed air marshals of another possible al Qaeda hijacking plot.[140] Days later, however, the TSA eliminated air marshal presence on certain flights "to save money on hotel costs because there was no more money in the budget," a TSA supervisor explained.[141] This upset air marshal Robert J. MacLean, who "believed that cancelling those missions during a hijacking alert was dangerous. He also believed that the cancellations were illegal, given that federal law required the TSA to put an air marshal on every flight that 'present[s] high security risks' and provided that 'nonstop, long distance flights, such as those targeted on September 11, 2001, should be a priority.'"[142]

After his complaints to a supervisor and then to the TSA Inspector General proved unavailing, "MacLean contacted an MSNBC reporter and told him about the canceled missions."[143] This yielded a published story that air marshal cutbacks to save on hotel costs "were 'particularly disturbing to some' because they 'coincide[d] with a new high-level hijacking threat issued by the Department of Homeland

140. Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913, 917 (2015).
141. *Id.* (citation omitted).
142. *Id.* (citations omitted).
143. *Id.* (citation omitted).

Security.'"[144] Soon after, "Members of Congress criticized the cancellations," and "[w]ithin 24 hours, the TSA reversed its decision and put air marshals back on the flights."[145] The TSA did not learn MacLean was the source until he later leaked a similar security complaint to an NBC reporter in a manner that let a TSA investigation discover the source; once TSA learned MacLean was the 2003 leak, it fired him.[146]

MacLean sued to challenge his termination under the Whistleblower Protection Act,[147] which protects federal employees who undertake:

> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—
>
> (i) any violation of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs. . . .[148]

The Merit Systems Protection Board (MPSB) ruled against MacLean[149] because his 2003 disclosure concerned air marshal deployments,[150] and a TSA regulation barred disclosure of "[s]pecific details of aviation security measures . . . [such as] information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations."[151] Because a regulation expressly barred MacLean's disclosure, the MSPB held that the Whistleblower Protection Act exception for any "disclosure . . . 'specifically prohibited by law'" applied, stripping MacLean of whistleblower protection.[152]

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144. *Id.* (citation omitted).
145. *Id.* (citation omitted).
146. *Id.*
147. *Id.* at 918.
148. 5 U.S.C. § 2302(b)(8)(A) (2012).
149. *MacLean*, 135 S. Ct. at 918 (citing MacLean v. Dep't of Homeland Sec., 116 M.S.P.R. 562 (2011)). The Merit Systems Protection Board (MSPB) is "an independent, quasi-judicial agency in the Executive branch that serves as the guardian of Federal merit systems." *About MSPB*, U.S. MERIT SYSTEM PROTECTION BOARD, http://www.mspb.gov/About/about.htm (last visited Feb. 1, 2016). "MSPB carries out its statutory responsibilities and authorities primarily by adjudicating individual employee appeals and by conducting merit systems studies." *Id.*
150. *MacLean*, 135 S. Ct. at 917.
151. *Id.* at 919 (quoting 49 C.F.R. § 1520.7(j) (2003)).
152. *Id.* at 918 (quoting 116 M.S.P.R. at 569–72).

2. The Holding: The Whistleblower Statute's Exclusion from Protection of Disclosures "Prohibited by Law" Is Narrowly Construed, Leaving Protected Any Disclosures Prohibited by Regulations Only

The government argued that whistleblower protection did not protect MacLean because his disclosure was prohibited by TSA's regulations as well as the statute authorizing TSA to promulgate the regulations.[153] The Court, however, held that a mere *regulation* barring a disclosure did not make the disclosure unprotected as a "'disclosure . . . specifically prohibited by *law*,'" because that reference to "law" meant only *statutory* law.[154] Chief Justice Roberts's seven-Justice majority opinion[155] strongly rejected the TSA's argument as a matter of both textual analysis and workplace policy.[156]

In its textual analysis, Congress's decision to exclude from protection only matters prohibited by "law," not "law, rule, or regulation" was the first argument the Court stressed:

> In contrast, Congress did not use the phrase "law, rule, or regulation" in the statutory language at issue here; it used the word "law" standing alone. That is significant because Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.[157]

The Court was especially dismissive in rejecting the TSA argument that even if "prohibited by *law*" referenced statutes, not regulations, any agency's regulatory authority derives from an enabling statute.[158] A statute merely enabling an agency to enact regulations, the Court held, "does not prohibit anything. On the contrary, it *authorizes* something—it authorizes . . . [TSA] to 'prescribe regulations.' Thus, by its terms . . . [the statute] did not prohibit the disclosure . . . here."[159]

In its policy analysis, the Court reasoned that "a broad interpretation of the word 'law' could defeat the purpose of the whistleblower statute" by allowing the employer—the agency empowered to write regulations—to narrow the scope of the very whistleblower statute that polices its actions.

> If "law" included agency rules and regulations, then an agency could insulate itself from the scope of Section 2302(b)(8)(A) merely by promulgating a regulation that "specifically prohibited" whistleblowing. But Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their

153. *Id.* at 919.
154. *Id.* (quoting 5 U.S.C. § 2302(b)(8)(A) (2012)).
155. Justices Kennedy and Sotomayor dissented. *See id.* at 915–16.
156. *Id.* at 919–24.
157. *Id.* at 919 (citing Russello v. United States, 464 U.S. 16, 23 (1983)).
158. *See id.* at 921.
159. *Id.*

> ranks. Thus, it is unlikely that Congress meant to include rules and regulations within the word "law."[160]

While crediting the employee-side policy argument, the Court rejected the competing employer-side policy argument that secure information must be protected from leaks by rogue employees.

> [T]he Government warns that providing whistleblower protection to individuals like MacLean would "gravely endanger public safety" . . . [and] make the confidentiality of sensitive security information depend on the idiosyncratic judgment of each of the TSA's 60,000 employees. . . . Those concerns . . . are legitimate. But they are concerns that must be addressed by Congress or the President, rather than by this Court. . . . It is not our role to do so for them.[161]

3. The Implications: *MacLean* As Evidence of Signs of Mixed Employment Jurisprudence, Contrary to Commentary Declaring the Court "Conservative" or "Pro-Employer"

Reaching a conclusion as to the ideology, pattern, or worldview of the Court's recent jurisprudence is beyond the scope of this Article. But *MacLean* is a data point contrary to the declarations of many Court commentators that the Roberts Court, or the Court dating back to the late-era Rehnquist Court before it, is pro-business,[162] pro-employer in civil rights cases,[163] or "a conservative, activist Court."[164] But those are highly contested views, and *MacLean* shows how overstating such patterns can leave attorneys and commentators surprised when the Court rules for employees. Before the 2014–2015 Term's two notable Title VII wins for employees (the relaxation of the requirement of employer knowledge of the employee's protected classification in *EEOC v. Abercrombie & Fitch Stores, Inc.*[165] and the broadening of pregnant employees' ability to claim accommodations

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160. *Id.* at 920.

161. *Id.* at 923–24 (citation omitted).

162. *See, e.g.*, Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1472 (2013) (empirical analysis concluding "the Roberts Court is much friendlier to business than either the Burger or Rehnquist Courts.").

163. *See, e.g.*, Michael J. Zimmer, *Hiding the Statute in Plain View:* University of Texas Southwestern Medical Center v. Nassar, 14 NEV. L.J. 705, 705 (2014) (after the Court heightened "causation" showing in *University of Texas Southwest Medical Center v. Nassar*, 133 S. Ct. 2517 (2013), noting that "it was not a surprise that the Court would move its retaliation jurisprudence more in line with its recent pro-employer, anti-civil rights interpretation of statutes").

164. *See, e.g.*, Erwin Chemerinsky, *Supreme Court—October Term 2009 Foreword: Conservative Judicial Activism*, 44 LOY. L.A. L. REV. 863, 866–67 (2011) ("[O]ne can use the conservative justices' definition of judicial activism to see how much the Roberts Court is a conservative, activist Court. . . . [T]he activism of today on the Supreme Court is very much from the right. Conservatives continue to attack liberal judicial activism even when conservatives are solidly in control of the Supreme Court and they are the activists.").

165. 135 S. Ct. 2028 (2015); *see supra* Part I.A.

in *Young v. United Parcel Service*[166]), the Court's last Title VII cases were two notable Title VII wins for employers in its 2012–2013 Term (the narrowing of vicarious liability for harassment in *Vance v. Ball State University*[167] and the application of the tougher but-for causation standard rather than the lighter motivating-factor standard in *University of Texas Southwest Medical Center v. Nassar*[168]). Drawing too many lessons from the Court's last two Title VII cases would have led astray anyone predicting a pro-employer/conservative leaning Court might drive this term's two Title VII cases. *MacLean* may be even more surprising to those viewing the Court as pro-employer or conservative, given that its ruling for Air Marshal MacLean required not only a ruling for the employee against the employer, but for an individual against a national security agency, and for an individual standing up to the federal government.[169]

B. Kellogg Brown & Root Services, Inc. v. United States *ex rel.* Carter*: How to Construe Two Temporal Bars to False Claims Suits*

1. The Facts: Whistleblowing Employee Faces Two Ambiguous Statutory Barriers

A water purification operator working in Iraq for an American defense contractor claimed the contractor "fraudulently billed the Government for water purification services that were not performed or not performed properly."[170] He brought a *qui tam* civil lawsuit[171] under the False Claims Act (FCA), which "imposes liability on any person who 'knowingly presents . . . a false or fraudulent claim for payment or approval . . . to an officer or employee of the United States.'"[172]

A "remarkable sequence of dismissals and filings"[173] ended in a dismissal on two statutory grounds. First, "the "first-to-file" bar[] precludes a *qui tam* suit 'based on the facts underlying [a] *pending action*'" by another plaintiff.[174] Here, a similar suit was filed first in California, but then dismissed for failure to prosecute, yet the district

166. 135 S. Ct. 1338 (2015); *see supra* Part I.B.

167. 133 S. Ct. 2434, 2443 (2013) (holding that employer "may be vicariously liable for an employee's unlawful harassment only . . . [if it] . . . empowered . . . [a harasser] . . . to take tangible employment actions against the victim").

168. 133 S. Ct. 2517, 2533 (2013) ("[T]he Court now concludes . . . Title VII retaliation claims must be proved according to traditional principles of but-for causation. . . . This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action . . . of the employer.").

169. *See generally* Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913 (2015).

170. Kellogg Brown & Root Servs., Inc. v. United States *ex rel.* Carter, 135 S. Ct. 1970, 1974 (2015).

171. The False Claims Act (FCA) can be enforced either through government litigation or "civil *qui tam* actions that are filed by private parties, called relators, in the name of the Government." *Id.* at 1973 (quoting 31 U.S.C. § 3730(b)) (2012).

172. *Id.* (quoting 31 U.S.C. §§ 3729(a)(1)(A), 3729(b)(2)(A)(i)).

173. *Id.* at 1974.

174. *Id.* (emphasis added) (quoting § 3730(b)(5)).

court in Virginia still dismissed Plaintiff Carter's suit, finding that the California suit, though dismissed, remained a prior "pending" action.[175] Second, Plaintiff refiled after the similar California and other suits were dismissed, but by then his new suit was past the six-year limitations period.[176] He argued "[t]he Wartime Suspension of Limitations Act (WSLA) . . . suspends the statute of limitations for 'any *offense*' involving fraud against the Federal Government."[177] But the district court held that the WSLA was inapplicable because it applied only to criminal charges.[178]

2. The Holding: The Limitations Period Extension for Any "Offense" Applies Only to Criminal, Not Civil, Cases, But an Earlier Suit Precludes Later Suits Only While It Remains "Pending"

In a unanimous opinion by Justice Alito, Carter's FCA suit survived, though only on one of the two alternative grounds he argued. First, the Court held that the WSLA's wartime-duration suspension of limitations periods for fraud "offenses" against the government applied only to criminal cases, not to civil claims like Carter's.[179] When Congress enacted the relevant statutory language in the 1940s, not only *Black's Law Dictionary*, but also lay dictionaries, defined an "offense" as a "crime," not a "civil violation."[180] The earlier, original version of the WLSA all the more expressly elaborated that it applied to only "indictable" offenses; and even though certain other statutes use "offense" to include civil violations, the WLSA resides in Title 18 of the United States Code, which consistently defines "offense" to cover only crimes.[181]

Second, however, Carter survived despite the limitations period expiring on his effort to re-file after similar cases elsewhere were dismissed—because his timely first suit should not have been dismissed.[182] Of the three similar suits filed elsewhere, only the one in California preceded Carter's first complaint.[183] By the time Carter faced a motion to dismiss, that prior California suit had been dismissed for failure to prosecute,[184] so it was not the sort of prior "pending" suit that barred Carter's, the Court held.[185] Justice Alito recognized the policy logic in the employer's argument that the statute

175. *Id*.
176. *Id*.
177. *Id.* (emphasis added) (quoting 18 U.S.C. § 3287 (2012)).
178. *Id.*
179. *Id.* at 1975–78.
180. *Id.* at 1976 (citation omitted) (collecting citations to dictionaries).
181. *Id.* at 1977.
182. *See id.* at 1978–79.
183. *See id.* at 1974.
184. *Id.* at 1979.
185. *Id*. at 1978.

aimed to preclude any copycat suit, so "the term 'pending' is . . . a short-hand for the first filed action. . . . Thus, as petitioners see things, the first-filed action remains 'pending' even after it has been dismissed, and it forever bars any subsequent related action."[186] But statutory text and dictionary word usage trump such policy arguments, Justice Alito held: "This interpretation does not comport with any known usage of the term 'pending.' Under this interpretation, *Marbury v. Madison* . . . is still 'pending.' So is the trial of Socrates."[187] Thus, the Court held, "an earlier suit bars a later suit while the earlier suit remains undecided but ceases to bar that suit once it is dismissed."[188]

3. The Implications: *Qui Tam* Cases Are Not Precluded by an Early Weak Filing, and *Kellogg* Is a Further Indication of the Court's Predilection for Ideologically Neutral Statutory Textualism

The exact "remarkable sequence of dismissals and filings"[189] the Court untangled in *Kellogg* seems unlikely to recur, but the Court's holding does have import for future FCA claims. At the very least, it assures that a meritorious claim will not be precluded by an ill-conceived voluntarily dismissed complaint or by a complaint the relator simply declines to pursue after filing. For example, a whistleblower may file a *qui tam* claim hoping the government will choose to litigate the case itself, providing the relator a modest percentage of the recovery for little effort, but then decline to prosecute a civil case alone if the government decides not to litigate. Had the rule the defense advanced in *Kellogg* prevailed, that even a voluntarily dismissed suit precludes any future claim, the government's and a private relator's discretionary decision not to prosecute would generate an odd form of non-mutual estoppel of any future plaintiffs. The Court's rejection of such preclusion protects the viability of FCA claims by assuring that one plaintiff's weak or retracted complaint does not preclude all future complaints.

More broadly, Justice Alito's unanimous opinion is another data point showing two tendencies that the Roberts Court has displayed in federal statutory cases. First, its main tool of analysis is a relatively ideologically neutral form of textualism. In prior decades, pro-employer and pro-employee policy considerations drove various Justices' analyses of remedial federal statutes.[190] In contrast, Justice Alito's opinion

186. *Id.* at 1979.

187. *Id.* (citation omitted).

188. *Id.* at 1978.

189. *Id.* at 1974; *see also supra* note 173 and accompanying text.

190. *Compare* Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 163 (1982) (Burger, C.J., concurring and dissenting in part) ("Like so many Title VII cases, this case has already gone on for years, draining judicial resources as well as resources of the litigants."), *with*

(which no other Justice rejected by writing a separate concurrence) expressly and strongly based its analysis on pure textualist statutory interpretation. "We begin with the WSLA's text," Justice Alito explained at the start of his analysis of what could have been a policy or case law-driven analysis of whether a wartime limitations period extension should apply only to criminal fraud prosecutions or also to civil claims of similar fraud.[191] Eschewing policy and case law, Justice Alito's first paragraph of analysis began by citing four dictionary definitions of the disputed term (an "offense") before any actual case law or discussions of statutory purpose.[192] After exhaustively surveying 1940s dictionaries, Justice Alito moved on to other equally textualist arguments: how other provisions in the same title of the United States Code used the same word and how the relevant language changed since a 1921 version of the statute.[193] Vintage booksellers likely once found old dictionaries a tough sell, but now the Supreme Court library seems to need a robust complement of old dictionaries from all years in American history in which Congress enacted a statute that might need interpreting.

Second, whatever its virtues or shortcomings, the modern Court's brand of statutory textualism has proven neither inherently pro-plaintiff nor inherently pro-defendant. "Our inquiry . . . must focus on the text," Justice Thomas wrote for the majority in *Gross v. FBL Financial Services, Inc.*,[194] citing multiple dictionaries contemporaneous with relevant statutory enactments to impose a stricter causation standard under the Age Discrimination in Employment Act than under Title VII.[195] "Our precedents make clear that the starting point for our analysis is the statutory text," Justice Thomas also wrote for a unanimous Court in *Desert Palace, Inc. v. Costa*,[196] imposing a less strict causation standard under Title VII because of one word in the statutory causation language:

Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401–02 (1968) ("When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation. . . . When a plaintiff . . . obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority. . . . It follows that one who succeeds in obtaining an injunction . . . should ordinarily recover an attorney's fee. . . .").

191. *Kellogg*, 135 S. Ct. at 1976.

192. *See id.*

193. *See id.* at 1976–77.

194. 557 U.S. 167, 174 (2009).

195. *Id.* ("'Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.' . . . The words 'because of' mean 'by reason of: on account of.'" (quoting Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004) (citing three dictionaries, including two from 1966, the year before enactment of the Age Discrimination in Employment Act) (other citations omitted)).

196. 539 U.S. 90, 98 (2003).

> [W]here . . . words of the statute are unambiguous, the "judicial inquiry is complete." Section 2000e–2(m) unambiguously states that a plaintiff need only "demonstrat[e]" that an employer used a forbidden consideration. . . . On its face, the statute does not . . . require . . . a heightened showing through direct evidence.[197]

Thus, *Kellogg* was far from the Court's first employment case to turn almost exclusively on textual analysis—but it is telling as to how particular Justices decide cases. Both *Gross* and *Desert Palace* were opinions by Justice Thomas; he and Justice Scalia examine history and social context in their "public meaning" originalism in *constitutional* interpretation,[198] but in *statutory* interpretation they focus more narrowly on the enacted text.[199] It is telling that Justice Alito authored his *Kellogg* opinion for the employment plaintiff in much the same way Justices Thomas or Scalia would.[200]

While the Justices joined the Alito opinion unanimously, opinions this term by Chief Justice Roberts (*Department of Homeland Security v. MacLean*)[201] and Justice Breyer (*Young v. United Parcel Service*),[202] in contrast, far more deeply relied on policy arguments and precedent in their own rulings for employment plaintiffs.[203] For example: "If 'law' included agency rules and regulations," Chief Justice Roberts opined in holding that a regulation cannot render whistleblowing forbidden by "law," "then an agency could insulate itself" from whistleblowers "merely by promulgating a regulation that 'specifically prohibited' whistleblowing. But Congress passed the whistleblower statute precisely because it did not trust agencies,"[204] Chief Justice Roberts concluded, focusing not on dictionary definitions, but on policy arguments and Congress's likely subjective intent. So while the popular coverage of the Court focuses more on "Obamacare" as evidence of Justice Roberts's conservative apostasy,[205] the employment case law, too,

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197. *Id.* at 98–99 (second alteration in original) (citation omitted).

198. *See, e.g.*, Randy E. Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405, 410 (2007) ("Justice Scalia deserves tremendous credit for shifting the focus of originalists away from Framers' and ratifiers' intentions to the public meaning of the text.").

199. William N. Eskridge, Jr., *Should the Supreme Court Read* The Federalist *but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1302 (1998) ("[T]he new textualists, particularly Justice Scalia, refuse to consider the debating history of statutes as relevant context but do consider such history of the Constitution and its amendments, sometimes in great detail.").

200. *See* Kellogg Brown & Root Servs., Inc. v. United States *ex rel.* Carter, 135 S. Ct. 1970, 1978–79 (2015).

201. *See supra* Part. III.A (*MacLean*).

202. *See supra* Part I.B (*Young*).

203. *Compare Kellogg*, 135 S. Ct. at 1978–79, *with* Gross v. FBL Fin. Serv., Inc., 557 U.S. 167, 174 (2009), *and* Desert Palace, Inc. v. Costa, 539 U.S. 90, 98 (2003).

204. *See* Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913, 920 (2015); *see also supra* note 160 and accompanying text.

205. *See generally* King v. Burwell, 135 S. Ct. 2480 (2015) (Chief Justice Roberts writing for majority, upholding President Obama's signature health care reform legislation); *see also id.* at 2496–2507 (Justices Scalia, Thomas, and Alito dissenting).

shows how his method of analysis differs markedly from that of Justices Scalia, Thomas, and Alito.

IV. ERISA: Claims of Impropriety in 401(k) Retirement Investing and in Revoking Health Benefits

A. Tibble v. Edison International*: Is an ERISA Fiduciary's Bad Investment Complete Upon Purchase, or Is It a Recurring Violation Due to an Ongoing Duty of Care?*

1. The Facts: A Fiduciary for a Large Retirement Fund Allegedly Violates Fiduciary Duties in Choosing Which Fund to Buy—But Employees Did Not Sue Until More Than Six Years After the Purchase

Employees of Edison International filed a class action under the Employee Retirement Income Security Act (ERISA), alleging that Edison and other fiduciaries of the employees' 401(k) plan wasted their retirement assets by choosing the wrong investment funds.[206] "[L]arge institutional investor[s] with billions of dollars, like the Plan, can obtain materially identical lower priced institutional-class mutual funds that are not available to a retail investor," yet Edison allegedly "offer[ed] six higher priced *retail-class* mutual funds as Plan investments when materially identical lower priced *institutional-class* mutual funds were available (the lower price reflects lower administrative costs)."[207] The plaintiffs prevailed on the merits: the defendants "had 'not offered any credible explanation' for offering retail-class, *i.e.,* higher priced mutual funds that 'cost the Plan participants wholly unnecessary [administrative] fees,'" and they therefore "failed to exercise 'the care, skill, prudence and diligence under the circumstances' that ERISA demands of fiduciaries."[208]

But the plaintiffs won as to only three of the six higher-fee funds, because the fiduciary bought the other three before the six-year ERISA fiduciary breach limitations period.[209] The violation was complete upon the purchase of the funds, the lower courts held, rejecting the plaintiffs' arguments that the fiduciaries repeated their violations by choosing to keep the retirement assets in those funds: "the Ninth Circuit held that petitioners' claims were untimely because petitioners had not established a change in circumstances that might trigger an obligation to review and to change investments within the six-year statutory period."[210]

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206. Tibble v. Edison Int'l, 135 S. Ct. 1823, 1826 (2015).
207. *Id.*
208. *Id.* (quoting Tibble v. Edison Int'l, No. CV 07-5359 SVW(AGRx), 2010 WL 2757153, at *30 (C.D. Cal. July 8, 2010)).
209. *Id.* at 1827 (citing 29 U.S.C. § 1113 (2012)).
210. *Id.* (citing Tibble v. Edison Int'l, 729 F.3d 1110 (9th Cir. 2013)).

2. The Holding: Plaintiffs Bringing ERISA Breach of Fiduciary Duty Claims Cannot Challenge Pre-Limitations *Purchases* of Imprudent Investments, But Can Challenge Ongoing *Retention and Monitoring* of Them

While ERISA fiduciary breach plaintiffs cannot challenge decisions *to purchase* imprudent investments *before* the limitations period, they still can challenge decisions *to retain* imprudent investments *during* the limitations period, the Court held.[211] Normally, a pre-limitations misdeed does not become continuously actionable just because the wrongdoer failed to remedy it. But the broader "nature of the fiduciary duty" compels a different result for claims against ERISA fiduciaries,[212] who face broad, ongoing duties under trust law,[213] including:

> a continuing duty to *monitor* trust investments and *remove* imprudent ones . . . separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset. . . . "[T]he trustee cannot assume that if investments are legal and proper for retention at the beginning of the trust, or when purchased, they will remain so indefinitely." Rather, the trustee must "systematic[ally] conside[r] all the investments of the trust at regular intervals. . . ."[214]

Thus, "[t]he Ninth Circuit erred by applying a 6-year statutory bar based solely on the initial selection of . . . funds without considering the contours of the alleged breach of fiduciary duty."[215] Instead, ERISA fiduciary breach plaintiffs "may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones . . . so long as the alleged breach of the continuing duty occurred within six years of suit."[216]

3. The Implications: Probably No Significant Alteration of Limitations Period Case Law

Did *Tibble* signal the Court's willingness to take a less hard line on limitations periods than it has taken in other decisions such as *Kellogg*[217] and *Ledbetter v. Goodyear Tire & Rubber Co.*?[218] Probably no, because the unanimous decision in *Tibble* drew adherence from all five Justices who held exactly the opposite in *Ledbetter*.[219] *Ledbetter* held that an unlawful economic *decision made before* the limitations period

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211. *Id.* at 1828–29.
212. *Id.* at 1827.
213. *See id.* at 1828.
214. *Id.* (last two alterations in original) (citations omitted).
215. *Id.* at 1829.
216. *Id.*
217. *See supra* Part III.B.
218. *See* 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified at 42 U.S.C. § 2000e-5 (2012)).
219. *Compare id.* at 628, *with Tibble*, 135 S. Ct. at 1828.

(setting an improper wage in *Ledbetter*, or making an improper purchase in *Tibble*) does not become a "continuing violation" just because it *remains in effect during* the limitations period (keeping a woman's pay lower in *Ledbetter*, or keeping assets in the imprudent fund in *Tibble*).[220] Which is to say that *Tibble* probably is no sea change in the Court's view of limitations periods: the heightened duties that trust law imposes on fiduciaries likely made the difference, because it is unlikely a majority of Justices all changed their view on disallowing lawsuits challenging pre-limitations decisions just because they have continuing *effects*.

B. M & G Polymers USA, Inc. v. Tackett*: Is a CBA Promise of Retiree Health Benefits Presumed Permanent or Revocable After the CBA?*

1. The Facts: Retirement Health Benefits Promised in a CBA, But Restricted in a Later CBA

Retirees from a polyester plant and their union sued their former employer under the Labor Management Relations Act (LMRA) and ERISA for not providing the "lifetime contribution-free health care benefits for retirees" promised by collective bargaining agreement (CBA) provisions.[221] The employer argued "that those provisions terminated when the agreements expired" and were replaced by a new agreement not promising such benefits.[222] The district court dismissed the action, finding that the expired CBA did not establish employees' vested right to the benefits.[223] On appeal, the Sixth Circuit relied on extensive precedent that a CBA promise of benefits vested for life.[224] A three-decade line of circuit precedent, beginning with *UAW v. Yard-Man, Inc.*,[225] presumed that a promise of retirement benefits in a CBA does not terminate upon the CBA's expiration, but is perpetual—even if a CBA has a general termination clause limiting its duration:

> Although [*Yard-Man*] found the text of the provision in that case ambiguous, it relied on the "context" of labor negotiations to resolve that ambiguity in favor of the retirees' interpretation. Specifically, [*Yard-Man*] inferred that parties to collective bargaining would intend retiree benefits to vest for life because such benefits are "not mandatory" or required to be included in collective-bargaining agreements, are "typically understood as a form of delayed compensation or reward for past services," and are keyed to the acquisition of retirement status. . . . [T]hese inferences "outweigh[ed] any contrary impli-

220. *See Ledbetter*, 550 U.S. at 623–32.
221. M & G Polymers USA, LLC v. Tackett, 135 S. Ct. 926, 930 (2015).
222. *Id.*
223. *Id.* at 932.
224. *Id.*
225. 716 F.2d 1476 (6th Cir. 1983).

cations [about the termination of retiree benefits] derived from" general termination clauses.[226]

The Sixth Circuit reversed, and on remand, the district court granted the employees "a permanent injunction ordering M & G to reinstate contribution-free health care benefits."[227] On a second appeal, the Sixth Circuit affirmed, finding that the district court had not clearly erred in "'presum[ing]' that, 'in the absence of extrinsic evidence to the contrary, the [collective bargaining] agreements indicated an intent to vest lifetime contribution-free benefits.'"[228]

2. The Holding: Courts Cannot Presume CBA Retiree Benefits Outlast the CBA; Ambiguous Terms Do Not Ordinarily Create Lifetime Promises, But Case-Specific Evidence Can Prove Such Intent

Justice Thomas's unanimous opinion rejected the Sixth Circuit's presumption that CBA promises of retiree benefits vest for life rather than for the CBA's duration.[229] The core basis for the holding was contract interpretation, because courts "interpret collective-bargaining agreements, including those establishing ERISA plans, according to ordinary principles of contract law."[230] "*Yard-Man* violates ordinary contract principles by placing a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements," the Court bluntly declared, because "[t]hat rule has no basis in ordinary principles of contract law. And it distorts the attempt 'to ascertain the intention of *the parties*,'" an inquiry that contract law demands.[231] While purporting to presume parties' intent from the context—promising employees benefits extending into their future as retirees—"*Yard–Man*'s assessment of likely behavior in collective bargaining is too speculative and too far removed from the context of any particular contract to be useful in discerning the parties' intention," the Court held:

> the Court of Appeals derived its assessment of likely behavior not from record evidence, but instead from its own suppositions about the intentions of employees, unions, and employers. . . . Although a court may look to known customs or usages in a particular industry to determine the meaning of a contract, the parties must prove those customs or usages using affirmative evidentiary support in a given case. *Yard–Man* relied on no record evidence. . . . Worse, the Court of Appeals has taken the inferences in *Yard–Man* and applied

226. *M & G Polymers*, 135 S. Ct. at 932 (last two alterations in original) (quoting *Yard-Man*, 716 F.2d at 1482–83).

227. *Id.*

228. *Id*. (first alteration in original) (quoting Tackett v. M & G Polymers USA, LLC, 733 F.3d 589, 600 (6th Cir. 2013), *vacated* M & G Polymers USA, LLC v. Tackett, 135 S. Ct. 926 (2015)).

229. *Id.* at 933–37.

230. *Id.* at 933.

231. *Id.* at 935 (citations omitted).

> them indiscriminately across industries[:] . . . automobile[]; . . . electronics[]; . . . steel[].[232]

If anything, the Court opined, ordinary contract principles and ERISA presume that retirement benefits are revocable when a CBA ends, not vested for life, regardless of a CBA ending or being replaced by a CBA with different benefit promises. For retiree welfare rather than pension benefits, ERISA does not presume permanence, instead allowing revocability:

> Although ERISA imposes elaborate minimum funding and vesting standards for pension plans, it explicitly exempts welfare benefits plans from those rules. . . . "[E]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." As we have previously recognized, "[E]mployers have large leeway to design disability and other welfare plans as they see fit."[233]

With ERISA not guaranteeing lifetime continuation of welfare benefits, the Court turned to contract law, which similarly supports no presumption that a limited-duration agreement creates lifetime benefits—and may even presume the opposite:

> The Court of Appeals also failed even to consider the traditional principle that courts should not construe ambiguous writings to create lifetime promises. . . .
>
> Similarly, the Court of Appeals failed to consider the traditional principle that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement."[234]

Finally, the Court rejected the Sixth Circuit's logic that interpreting retiree benefit provisions as revocable in just a few years violates "the rule that contracts should be interpreted to avoid illusory promises."[235] Instead, the Court held, even a later-revoked benefit promise "benefited some class of retirees," so it was not "illusory."[236] The Court vacated the judgment and remanded to the Sixth Circuit with a directive to apply ordinary principles of contract law.[237]

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232. *Id.* (citations omitted).

233. *Id.* at 933 (second alteration in original) (citations omitted) (quoting Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995); then quoting Black & Decker Disability Plan v. Nord, 538 U.S 822, 833 (2003)).

234. *Id.* at 936–37 (citation omitted) (quoting Litton Fin. Printing Div., Litton Bus. Sys., Inc. v. NLRB, 501 U.S. 190, 207 (1991)).

235. *Id.* at 934.

236. *Id.* at 936.

237. *Id.* at 937.

3. The Implications: Will Lower Courts Keep Holding That CBA Retiree Benefits Are Life-Guaranteed Under Contract Law, or Reverse Course Based on the Court's Skepticism?

While changing an important *interpretive rule* for high-stakes class actions, *M & G Polymers* commanded no particular *outcome*: "We vacate the judgment of the Court of Appeals and remand the case for that court to apply ordinary principles of contract law in the first instance."[238] Court decisions abrogating long-established appellate precedent, yet not expressly commanding opposite verdicts, leave open the possibility that lower courts could keep reaching the same verdicts, just based on a different analysis.

Skepticism of lifetime-guaranteed CBA benefits pervades the Court's approving citations to, for example, a "traditional principle that courts should not construe ambiguous writings to create lifetime promises," and a "traditional principle that 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.'"[239] But a skeptical tone in an opinion is not a rule of law. Even if Justice Thomas's opinion could be read as almost applying a *presumption against* life-guaranteed benefits, any such view was shared by only five Justices, given that four Justices adhered to the concurrence of Justice Ginsburg, who joined the majority on the "understand[ing]" that "ordinary contract principles" are "shorn of presumptions" *either way* as to life-guaranteed CBA benefits, and that "[c]ontrary to M & G's assertion, no rule requires 'clear and express' language . . . that parties intended health-care benefits to vest."[240]

Following *M & G Polymers*, a court applying "ordinary contract principles" could find, in a fact-based individualized examination of the parties' intent, that those parties intended a CBA promise of life-guaranteed retiree benefits. Would a district court finding of life-guaranteed CBA retiree benefits survive on appeal? Likely it could, at least if the contract was ambiguous about the duration of the benefits provision. *M & G Polymers* did not expressly mandate a legal *presumption against* life-guaranteed CBA benefits.[241] Absent such a mandated presumption, the deferential appellate standard of review protects against reversal: "while interpretation of an unambiguous contract is a question of law, clear error is the standard of review when a district court uses extrinsic evidence to interpret an ambiguous contract."[242] Thus, unless the CBA unambiguously limits its

238. *Id.*

239. *Id.* at 936–37 (citations omitted) (quoting *Litton*, 501 U.S. at 207).

240. *Id.* at 937–38 (Ginsburg, J., concurring).

241. *See id.* at 930–37.

242. Ergon-W. Va., Inc. v. Dynegy Mktg. & Trade, 706 F.3d 419, 424 (5th Cir. 2013) (quoting Tarrant Distribs. Inc. v. Heublein Inc., 127 F.3d 375, 377 (5th Cir. 1997)). *Accord* Am. Land Holdings v. Jobe, 604 F.3d 451, 457 (7th Cir. 2010) ("[C]lear error [is] the

promise of benefits to the CBA term, a finding that the parties intended lifetime-guaranteed benefits is reversible not de novo, but only if clearly erroneous—a high hurdle for an employer as appellant, or for a reviewing court skeptical of a district court's findings.

V. Where Are They Now? How District and Appellate Courts Are Applying Recent Precedents

Reviews of new Supreme Court decisions are like profiles of new bands: they offer more detail than you need; they yield breathless hype about their game-changing potential; but years later, the bias toward writing about new things can leave you wondering what happened to them. The semi-popular VH-1 television series *Where Are They Now?* targeted these gaps, each episode reporting what became of bands, people, or cultural events that drew great attention years ago, then faded from memory.[243] Inspired by *Where Are They Now?*, following are analyses of how district and appellate courts are applying three recent Supreme Court decisions that, when decided, were highly contested or predicted to have significant impact. One is *Integrity Staffing*, discussed in Part II.A of this Article. The other two are decisions from the Court's 2013–2014 term.

A. Integrity Staffing*: FLSA Compensability of Required But Secondary Tasks Outside a Normal Work Shift*

1. Cases Applying *Integrity Staffing* to Dismiss Compensable Time Claims

Case law applying *Integrity Staffing* features mixed results for plaintiffs and defendants. Unsurprisingly for a decision holding unanimously for an FLSA defendant, numerous cases have cited it as support for dismissing FLSA claims. Several cases have held that *Integrity Staffing* requires reading narrowly, and distinguishing, older precedent on compensable time for time devoted to work gear and post-shift safety protections. *Dinkel v. MedStar Health Inc.*[244] held noncompensable hospital employees' time spent on "uniform maintenance" under "policies that required Plaintiffs to 'clean and maintain . . . work uniform[s] in good and presentable condition' . . . includ[ing] spot cleaning, washing, drying, and ironing."[245] That work took the

proper standard of appellate review of a decision interpreting a contract, deed, or other document with the aid of extrinsic evidence.").

243. *See, e.g.*, *VH-1 Where Are They Now? (TV Series), Classic Rock (2000) Plot Summary*, IMDb, http://www.imdb.com/title/tt0957443/plotsummary?ref_=tt_ov_pl ("Where Are They Now? catches up with classic rock bands America, Jethro Tull, George Thoroughgood, Don McLean, Kansas, Peter Frampton, Marty Balin (Jefferson Starship), Foreigner, Iron Butterfly, Ambrosia, and the Mysterians. Find out what they've been up to since their time on top of the charts.").

244. 99 F. Supp. 3d. 37 (D.D.C. 2015).

245. Dinkel v. MedStar Health, Inc., 286 F.R.D. 28, 30–31 (D.D.C. 2012). The court referred readers to a description of the facts in its earlier 2012 pre-trial decision. *Dinkel*,

employees one to three hours per week "because their work exposes them to bacteria and germs that could be transmitted . . . [unless] they regularly wash their uniforms after each use and separately from their ordinary laundry."[246] *Integrity Staffing* makes even *required* uniform maintenance not a "principal activity," *Dinkel* held:

> [A] requirement to comply with these several policies is not enough to establish uniform maintenance as a principal work activity. An activity is only compensable as a principal activity if the employee is "employed to perform" that activity. . . . Because Plaintiffs are not employed for the purpose of maintaining their own uniforms—regardless of whether uniform maintenance activities are required by Defendants—those activities do not qualify as principal activities.[247]

Nor did it suffice that the maintenance "promote[d] safety" under hospital "infection control policy."[248] *Dinkel* found that in limiting compensability to "integral and indispensable" work, *Integrity Staffing* applied *Steiner* v. *Mitchell*[249] narrowly on the compensability of health-based hygiene time:

> [N]one of the reasons for uniform maintenance approach the way in which the [*Steiner*] battery-plant employees' activities were critically important—integral and indispensable . . . Plaintiffs argue that their uniform maintenance activities were important to the hospital's infection control policy, and they do not argue . . . their jobs would be *so unsafe as to be effectively impossible to carry out their jobs without* their uniform maintenance activities. For the battery-plant employees, they themselves had to shower and change immediately at their workplace upon completing their other work. By contrast, . . . [m]inimizing infection—even accepting Plaintiffs' experts' testimony regarding the importance of infection control—does not reach the level of importance to Plaintiffs' principal activities as the showering and changing of the battery-plant employees.[250]

Another post-*Integrity Staffing* case distinguishing *Steiner* was *Olive v. Tennessee Valley Authority*,[251] a case interestingly addressing time viewable *either* as walk-and-wait time (as in *IBP* and *Integrity*) or as end-of-shift anti-contamination time (as in *Steiner*). *Olive* dismissed nuclear power plant security guards' challenge to the noncompensability of ten to fifteen minutes each day that the employees were "required to walk 'approximately 150 yards' to the exit and wait in line to undergo radiation screening before leaving the plant."[252] *Olive*

99 F. Supp. 3d. at 39 ("The pertinent facts in this case were laid out previously by this Court in [286 F.R.D. 28].").

246. *Dinkel*, 286 F.R.D. at 30.
247. *Dinkel*, 99 F. Supp. 3d at 40–41.
248. *Id.* at 42.
249. 350 U.S. 247 (1956).
250. *Dinkel*, 99 F. Supp. 3d at 42–43 (emphasis added).
251. No. 5:15-cv-00350-AKK, 2015 WL 4711260 (N.D. Ala. Aug. 7, 2015).
252. *Id.* at *2.

viewed radiation screening as more similar to security screening time (as in *Integrity Staffing*) than to anti-contamination time (as in *Steiner*):

> The reliance on *Steiner* is misplaced because, as plaintiffs concede, "working at a nuclear power plant is not as caustic as working at a battery manufacturing plant . . . ." While the plaintiffs are correct that they "are exposed to radiation on a daily basis . . . [and] that radiation can be very harmful to humans," there is nothing in the Amended Complaint to suggest that their potential exposure differs from what the average citizen experiences, or that their level of purported exposure makes their daily environment akin to that in *Steiner*.[253]

Paralleling *Olive* and *Dinkel* in narrowly construing what health-or-safety tasks require compensation is *Dekeyser v. Thyssenkrupp Waupaca, Inc.*,[254] which held that clothes-changing and showering are mandatorily compensable only if they "significantly" reduce health risk.[255]

Post-*Integrity Staffing* cases also have distinguished the *IBP, Inc.* holding regarding compensability of basic donning and doffing time. *Stanley v. Car-Ber Testing Texas, LLC*[256] held that "donning and doffing of *generic* protection gear such as safety glasses and hearing protection" by refinery employees are "'non-compensable, preliminary tasks' under the Portal-to-Portal Act" because "[t]he integral and indispensable test is tied to the productive work that the employee is employed to perform. . . . [*Integrity Staffing*] forecloses many of the arguments relied on by plaintiffs in support of their claims that the wearing of [equipment] . . . qualif[ies] as 'integral and indispensable' to their work."[257] Distinguishing prior cases on the compensability of special gear (as in *IBP*) and on guarding against hazardous exposure (as in *Steiner*), *Stanley* noted that "the plaintiffs could functionally do their specific craft without wearing PPE" (personal protective equipment), partly because "the PPE required in this case was generic as additional and specialized PPE is required . . . with hazardous and toxic chemicals"; thus, the gear in question did not "rise[] above the level of simple 'clothes changing' under normal working conditions."[258]

Finally, *Perez v. City of New York*[259] held (like *Stanley*) that city parks department employees' time donning and doffing uniforms and security equipment was noncompensable.[260] The protective gear in

253. *Id.* at *4 (citations omitted).
254. No. 08-C-0488, 2015 WL 1014612 (E.D. Wis. Mar. 9, 2015).
255. *Id.* at *3.
256. No. 1:13-CV-374, 2015 WL 3980272 (E.D. Tex. June 29, 2015).
257. *Id.* at *7–8 (emphasis added).
258. *Id.* at *8.
259. No. 12 CIV. 4914 SAS, 2015 WL 424394 (S.D.N.Y. Jan. 15, 2015).
260. *Id.* at *5.

question was "generic" (unlike in *Steiner*), the sort that could be donned or doffed at home—making the time it requires the sort of pre- or postliminary activities the Portal-to-Portal Act renders noncompensable.[261]

These post-*Integrity Staffing* cases dismissing claims show that some courts are (1) narrowly construing *IBP* as to donning-and-doffing time; (2) narrowly construing *Steiner* as to post-shift anti-contamination time; and (3) viewing compensability of gear-and-equipment time as a fact-based inquiry into how generic, job-specific, or risk-mitigating it is.

2. Cases Holding Start-of-Shift or End-of-Shift Activities Compensable Following *Integrity Staffing*

Several cases, however, have declined to dismiss claims to compensation for start-of-shift or end-of-shift activities, viewing *Integrity Staffing* as leaving unchanged the established principles that "preparatory" activities are compensable if necessary for employees to perform their jobs and that end-of-day time required to return company equipment is also compensable.

Brantley v. Ferrell Electric, Inc.[262] denied the defendant summary judgment on electricians' claims to compensation for unpaid time spent on (1) "morning activities" (receiving job orders, collecting relevant supplies and loading trucks), (2) "evening activities" (reporting work progress to supervisors and storing unused equipment), and (3) returning company vehicles from job sites to the shop prior to performing "evening activities."[263] Addressing the morning activities in the most depth, *Brantley* held that obtaining work orders, and collecting and loading necessary equipment, is "integral and indispensable" to the employees' "principal activities" as electricians.[264] Though noting that *Integrity Staffing* issued "a more precise, albeit more restrictive, view" of what activities are sufficiently "integral and indispensable" to be "principal activities,"[265] *Brantley* rejected the argument that only an employee's specific core tasks, not more mundane "preparatory" tasks, are compensable:

> To be sure, Plaintiffs' "morning activities" were not the "principal activity or activities which [the] employee[s] [are] employed to perform." Ferrell Electric did not employ its workers to retrieve sockets and wire from the warehouse and load those implements on . . . trucks, . . . but to install, service, and repair electrical equipment. These tasks, though preparatory, were "integral and indispensable" to . . . work as electricians: intrinsic in installing, servicing, and repairing electrical equipment is (1) obtaining the order . . . ; (2) obtaining instructions

261. *Id.* at *2.
262. No. CV 114-022, 2015 WL 3541552 (S.D. Ga. May 29, 2015).
263. *Id.* at *7.
264. *Id.* at *23.
265. *Id.* at *18.

on the scope of such work; and (3) collecting and loading the specific parts necessary.[266]

Brantley also held that employees' time spent travelling back from job sites to the shop was compensable.[267] Distinguishing the Portal-to-Portal Act's exclusion of commuting time, *Brantley* found that the travel time was a required task, not merely an extension of the employees' personal commute.[268]

Chavez v. Excel Services Southeast, Inc.[269] similarly found potential merit in a claim to merely "preparatory" time employees spent before departing to on-location jobs.[270] In reviewing the merits of a class settlement, *Chavez* held that a bona fide dispute existed as to start-of-day time that cleaning company employees spent "report[ing] to [employer] offices to obtain keys, cleaning supplies, and their assignments for the day, because their presence was required and thus was an 'integral and indispensable' part of their 'principal activity' (i.e., cleaning work)."[271]

Brantley distinguished the Portal-to-Portal Act's exclusion of commute time by allowing a claim for end-of-day time returning company vehicles, given that it was a required task, not merely an extension of employees' commute[272]—and *Lassen v. Hoyt Livery, Inc.*[273] held similarly. *Lassen* granted the limousine driver plaintiffs summary judgment as to liability for unpaid time drivers spent traveling to pick up their first passengers of the day.[274] *Lassen* acknowledged that compensable time does not include personal commuting time under the Portal-to-Portal Act or required activities not integral or indispensable to employees' "principal activities" under *Integrity Staffing.*[275] Despite those limitations on what time is compensable, *Lassen* held that picking up passengers was the employees' "principal activity," so driving to a location to pick up passengers is "integral and indispensable" to that activity, even if it occurs outside the normal work shift of "principal activities."[276]

Finally, several courts have held that *state law* wage claims for unpaid security screening time, particularly under California law, sur-

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266. *Id.* at *19.

267. *Id.* at *21–22.

268. *Id.* The court did not analyze the merits of the employer's summary judgment motion with regard to the evening activities because it found that the employer failed fully to brief the issue. *Id.* at *21.

269. No. 13-CV-03299-CMA-BNB, 2015 WL 4512276 (D. Colo. July 27, 2015).

270. *Id.* at *4.

271. *Id.*

272. *Brantley*, 2015 WL 3541552, at *21–22.

273. No. 3:13-cv-01529 (VAB), 2015 WL 4656500 (D. Conn. Aug. 5, 2015).

274. *Id.* at *10.

275. *Id.* at *6.

276. *Id.* at *7.

vive *Integrity Staffing*. *Miranda v. Coach, Inc.*[277] denied the employer's motion to dismiss the employees' wage claim for unpaid mandatory bag checks upon leaving the store, which cut into employees' breaks and delayed their post-shift departures.[278] The employer noted the high similarity between these departure security checks and those held non-compensable in *Integrity Staffing*.[279] However, the plaintiffs sued not under the FLSA, but under California state wage law, which features no exemptions to compensable time similar to those in the Portal-to-Portal Act.[280] Because *Integrity Staffing* arose under the federal statute, and because the employer could not point to "case law applying *Integrity Staffing* to California state law claims," *Miranda* denied the employer's motion to dismiss.[281] Corroborating *Miranda*'s interpretation of California law, *Ceja-Corona v. CVS Pharmacy, Inc.*[282] similarly held that *Integrity Staffing* did not foreclose employees' wage claim for a fifteen- to twenty-minute security process before clocking in and after clocking out:

> *Integrity Staffing Solutions* was premised on its interpretation of the Portal-to-Portal Act of 1947 and how it exempts employers from liability for certain categories of work-related activities. In contrast, California law's definition for "hours worked" is defined differently and . . . does not include an exemption similar to the Portal-to-Portal Act. . . . Accordingly, Plaintiffs' claims under the California Labor Code are still viable in light of *Integrity Staffing Solutions*.[283]

While California's size and broad wage law make it unsurprising that it was the source of early cases distinguishing *Integrity Staffing*, other jurisdictions may allow similar arguments. *Dinkel v. MedStar Health Inc.*,[284] discussed above, granted summary judgment against challenges to unpaid uniform maintenance activities under the FLSA, but not under the District of Columbia Minimum Wage Act, which required additional analysis regarding whether it applied differently than the FLSA to such outside-of-shift non-primary activity.[285]

B. Vance v. Ball State University*: Employer Vicarious Liability for Hostile Work Environments*

Since *Burlington Industries, Inc. v. Ellerth*[286] and *Faragher v. City of Boca Raton*,[287] employer liability for a hostile work environment has

277. No. 14-CV-02031-JD, 2015 WL 1788955 (N.D. Cal. Apr. 17, 2015).
278. *Id.* at *2.
279. *Id.*
280. *Id.*
281. *Id.*
282. No. 1:12-CV-01868-AWI-SA, 2015 WL 222500 (E.D. Cal. Jan. 14, 2015).
283. *Id.* at *4.
284. No. 11-998 (CKK), 2015 WL 1735078 (D.D.C. Apr. 16, 2015).
285. *Id.* at *5–6.
286. 524 U.S. 742, 765 (1998).
287. 524 U.S. 775, 807 (1998).

depended heavily on the harasser's role within the defendant's employee hierarchy.

- "If the harassing employee is the victim's *co-worker*, the employer is liable only if it was *negligent* in controlling working conditions."[288]
- If the harasser is a *supervisor*, and if the harassment "culminates in a *tangible employment action*, the employer is *strictly liable*."[289]
- If the harasser is a *supervisor* but no tangible employment action occurred, then the employer's strict liability comes with a two-part "*affirmative defense*, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided."[290]
- If the harasser's "high rank in the company makes him or her the employer's *alter ego*[,]" the employer faces "direct liability"—strict liability without the option to prove an affirmative defense.[291]

Alter ego harassers are rare, so the major open question after *Faragher* and *Ellerth* was who, among the wide range of mid-level employees wielding some authority over others, qualifies as a "supervisor." This is a high-stakes matter, given that "supervisor" status flips the vicarious liability inquiry, from a *plaintiff's burden* of proving negligence to an *employer's burden* of proving a two-part affirmative defense. In 2013, *Vance* v. *Ball State University* resolved conflicting definitions of supervisor as follows: "We hold that an employer may be vicariously liable for an employee's unlawful harassment *only when the employer has empowered that employee to take tangible employment actions against the victim*."[292] *Vance* affirmed a grant of summary judgment to the employer, finding that, as to vicarious liability, a "catering specialist" was not the "supervisor" of a "catering assistant": the specialist's "job description . . . gave her leadership responsibilities,

288. Vance v. Ball State Univ., 133 S. Ct. 2434, 2439 (2013) (emphasis added).

289. *Id.* (emphasis added).

290. *Id.* (emphasis added) (citing *Ellerth*, 524 U.S. at 765, and *Faragher*, 524 U.S. at 807).

291. *Ellerth*, 524 U.S. at 758 (under agency law, employer "direct liability" applies "where the agent's high rank in the company makes him or her the employer's alter ego"); *see, e.g.*, Mallinson-Montague v. Pocrnick, 224 F.3d 1224, 1226 (10th Cir. 2000) (harasser, who was "Senior Vice-President of Consumer Lending . . . had the authority to hire and fire employees in the consumer lending department [and] was the ultimate supervisor of all employees in the department, . . . answered only to . . . [defendant's] president," and had "policy-making" power, was employer's alter ego).

292. *Vance*, 133 S. Ct. at 2443 (emphasis added).

and . . . [she] at times led or directed Vance and other employees in the kitchen,"[293] but that was insufficient because the specialist "did not have the power to hire, fire, demote, promote, transfer, or discipline."[294]

Vance has drawn strong responses. Justice Ginsburg's dissent bluntly suggested "[t]he ball is once again in Congress' court to correct the error into which this Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today,"[295] and Members of Congress quickly proposed exactly such legislation to reverse *Vance*—but that legislation has not come close to passage.[296] "Because of the Court's narrow definition of 'supervisor,'" one commentator predicted, "*Vance* will make it difficult for employees to bring and win harassment claims against employers for strict and vicarious liability under Title VII. Such a definition will certainly reduce the incentive for employees to sue their employers."[297] The prediction that *Vance* would make harassment claims more difficult to prove has largely come true, but some courts have allowed plaintiffs to prove their harassers were "supervisors" with only modest evidence of supervisory authority.

1. Cases Rejecting "Supervisor" Arguments That Could Have Prevailed Pre-*Vance*

Vance definitely has increased employers' ability to argue successfully that they are not vicariously liable for mid-level harassers who wield some, but not complete, supervisory authority. The question is not how many plaintiffs lost supervisor claims after *Vance*; it is whether they lost claims they might have won before *Vance*—an inquiry requiring brief examination of what *Vance* changed.

Pre-*Vance*, several circuits defined "supervisor" broadly to include mid-level figures who *formally* were not decision-makers but, as a matter of workplace reality, had meaningful power over the plaintiff, as two examples show. First, being the senior-most employee delegated control over day-to-day work was enough in *Mack v. Otis Elevator*

293. *Id.* at 2449.

294. *Id.* at 2439–40.

295. *Id.* at 2466 (Ginsburg, J., dissenting).

296. *See* Lisa Milam-Perez, *Democrats Introduce Legislation to Undo Supreme Court's 2013* Vance *Decision*, Accommodating Disabilities—Bus. Mgmt. Guide (CCH) ¶ 74336D, 2014 WL 1050073 (Mar. 19, 2014).

> The Fair Employment Protection Act (S. 2133) "corrects the error in the *Vance* decision and clarifies when employers should be held directly responsible for unlawful harassment." . . . The legislation "restores workplace protections weakened by the *Vance* decision to ensure that Americans harassed on the job by supervisors and those with authority to direct people's day-to-day work are treated fairly and receive the justice they deserve."

Id. (quoting bill's sponsors). The bill has twelve co-sponsors in the Senate and seventeen in the House. *Id.*

297. Lakisha A. Davis, *Who's the Boss? A Distinction Without A Difference*, 19 BARRY L. REV. 155, 169 (2013).

Co.[298] There, a mechanic claimed harassment by another mechanic who, by being "the senior employee on the work site," was "the mechanic in charge" who exercised "the right to assign and schedule work, direct the work force, assure the quality and efficiency of the assignment, and to enforce the safety practices and procedures . . . [as] to the other mechanics."[299] That harasser was the plaintiff's supervisor, *Mack* held, because of his "special dominance over other on-site employees," and their "remoteness from others with authority."[300]

A second case illustrating what sufficed, pre-*Vance*, was a holding that a low-level "Store Manager" only one step above the plaintiff (an "Assistant Manager") was her "supervisor" in *Whitten v. Fred's Inc*.[301] There, the harasser's manager title came with the limited actual power commonly held by *assistant* managers, or by store managers many steps down from a large corporate hierarchy, as in *Whitten*, in which the employer operated hundreds of discount retail stores, with the "store manager" working in "a small, semi-public office," supervised by a "district manager" elsewhere, and a "corporate office" above them all.[302] "Green lacked the authority to fire, promote or demote, or otherwise make decisions that had an economic effect."[303] But it sufficed that Green had the same highest-onsite-employee practical power as the *Mack* "mechanic in charge": "Green was the highest ranking employee in the Belton store . . . [He] directed Whitten's activities, giving her a list of tasks he expected her to accomplish . . . controlled Whitten's schedule and . . . discipline[d] Whitten by giving her undesirable assignments and work schedules."[304] "[S]upervisory status is not determined solely by the ability to take tangible employment actions," *Whitten* concluded[305]—a holding that *Vance* abrogated.

An unusually express declaration that *Vance* changed an outcome appears in the case of an "Assistant Team Leader" who allegedly harassed an employee on his team, *Chavez-Acosta v. Southwest Cheese Co.*[306] Expressly noting that "based on the pre-*Vance* definition of a supervisor for Title VII purposes, the district court found that Stewart qualified as a supervisor," *Chavez-Acosta* found not that the district court was wrong, only "that Stewart was not a supervisor under *Vance*" because "[w]hile . . . Stewart was a part of the 'supervisory hierarchy' . . . this is not enough," because his "Assistant Team Leader"

298. 326 F.3d 116 (2d Cir. 2003), *abrogated by Vance*, 133 S. Ct. 2434.
299. *Id.* at 120, 125.
300. *Id.* at 125.
301. 601 F.3d 231, 236 (4th Cir. 2010), *abrogated by Vance*, 133 S. Ct. 2434.
302. *Id.* at 236–37.
303. *Id.* at 244.
304. *Id.* at 246.
305. *Id.* at 245.
306. 610 F. App'x 722 (10th Cir. 2015).

role "did not give him the authority to take any 'tangible employment actions.' . . . Instead, that authority resided with [the employer's] Production Managers and Human Resources Director. Whatever . . . Stewart's 'de facto supervisory status,' *Vance* tells us that his position did not amount to that of a 'supervisor.' . . ."[307]

The post-*Vance* case law confirms: the *Mack* finding of "supervisor" status in a highest-onsite-employee's practical power (there, the "mechanic in charge")[308] clearly does not survive the *Vance* requirement that a "supervisor" is the "only" one who is "empowered . . . to take tangible employment actions against the victim."[309] A "foreman," closely analogous to the *Mack* "mechanic in charge," was held not a supervisor in *Spencer v. Schmidt Electric Co*.[310] Though "tasked with leading the work of other employees" (including both plaintiffs),[311] "the foremen were not a part of management and did not have hiring and firing power"; instead, "[t]hough they had some authority to fire, it was an indirect right that required going . . . up the ranks for permission."[312] Accordingly, the foreman was not "empowered to take tangible employment actions," but instead "was 'authorized to direct the employee's daily work activities,' which is the definition of supervisor expressly rejected by the Supreme Court" in *Vance*.[313]

"Assistant" managers, though holding clearer "manager" titles and authority to assign and control work, have been similarly held "non-supervisors," sometimes after only cursory inquiry. Even where a plaintiff "would need to follow . . . [his] instructions," an "assistant store manager" was held a "non-supervisor" under *Vance* after only the briefest discussion of the lack of "evidence that [he] was able to hire, fire, promote, demote, or reassign."[314]

Nor do even some store-level "managers" lacking actual firing authority qualify as "supervisors," some post-*Vance* case law holds—contrary to the pre-*Vance* holding in *Whitten* finding a relatively weak "Store Manager" lacking full firing authority can be a "supervisor."[315] *McCafferty v. Preiss Enterprises, Inc*.[316] rejected an argument that a McDonald's "Shift Manager" qualified under *Vance* as a "supervisor" be-

307. *Id.* at 703.
308. 326 F.3d 116, 125 (2d Cir. 2003).
309. *Vance*, 133 S. Ct. at 2454.
310. 576 F. App'x 442 (5th Cir. 2014).
311. *Id.* at 446.
312. *Id.* at 447.
313. *Id.* at 447–48.
314. Kim v. Coach, Inc., No. CIV. 13-00285 DKW, 2014 WL 2439676, at *5 (D. Haw. May 30, 2014).
315. 601 F.3d 231, 245–46 (4th Cir. 2010).
316. 534 F. App'x 726 (10th Cir. 2013).

cause he "lacked the authority to hire, fire, promote, demote, or transfer employees," even though he wielded the following authority:

> [The manager] directly oversaw the work of crew members . . . directing the day-to-day activities . . . by assigning them to specific duties (e.g., cash register or deep fryer), and scheduling breaks during shifts. [He] could request that a crew member cover another employee's shift when necessary, authorize a crew member to stay . . . past their scheduled shift, and send an employee home before the end of a shift. . . . [He was] "authorized to a certain degree to impose direct formal discipline . . . ," such as by "writing up an employee for employee misconduct, or making an employee clock out early due to employee misconduct." [He] also [had] a "significant amount of influence or say" in hiring, firing, and promotion decisions.[317]

McCafferty held, "these actions do not constitute 'a *significant* change in benefits,'" a phrase *Vance* used to describe supervisory power,[318] even though near-identical responsibilities and limits sufficed, pre-*Vance*, to make a low-level retail "Store Manager" a supervisor in *Whitten*.[319]

Finally, *Velázquez-Pérez v. Developers Diversified Realty Corp*.[320] held insufficiently supervisory a "human resources manager," but also noted ways an employee lacking formal firing authority still might qualify as a "supervisor." The manager, Martínez, "provided advice to management on human resource issues, including employee discipline" and also held "accounting duties"; she "gave direction to company managers, including [Plaintiff] Velázquez, on their compliance with company budget and accounting practices."[321] The lack of formal firing authority was *not* dispositive, *Velázquez-Pérez* held, stressing a *Vance* passage allowing for a finding of supervisory status held by those wielding sufficient *unofficial* power:

> As *Vance* recognizes, at some point the ability to provide advice and feedback may rise to the level of delegated authority sufficient to make someone a supervisor. For example, where the employer vests formal authority in a person who, due to physical remoteness, must rely entirely (or, perhaps, mostly) on the recommendation of another, the person whose recommendation is relied upon may be deemed to have been delegated the authority to make the decision.[322]

But in *Velázquez-Pérez*, the employer had not "delegated to Martínez any relevant authority over any tangible employment actions affecting Velázquez (including the authority to discipline him)."[323] "At most she possessed some limited 'responsibility to direct' Velázquez in certain

317. *Id.* at 728.
318. *Id*. at 731 (quoting *Vance*, 133 S. Ct. at 2456).
319. *Id.*
320. 753 F.3d 265, 272 (1st Cir. 2014).
321. *Id.* at 267–68.
322. *Id.* at 272 (citing *Vance*, 133 S. Ct. at 2452).
323. *Id.*

accounting and human resource protocols," which was not authority to undertake tangible employment actions.[324] Notably, Martínez's successful effort to "lobby" for Velázquez's termination did not show she was empowered to take tangible employment actions: "That she was successful may show that she was a formidable adversary as a co-worker . . . , but it does not make her Velázquez's supervisor as defined in *Vance*."[325]

2. Borderline Cases Finding "Supervisor" Status Post-*Vance*

Post-*Vance*, numerous district and appellate courts still have allowed claims that individuals lacking formal authority to fire (or undertake other tangible actions) can be "supervisors." Such efforts to distinguish *Vance* are unsurprising, and not only because *Vance* was a hotly contested decision, decided 5-4 with a stinging dissent and strong political opposition. *Vance* did not quite declare an ironclad rule that full authority to execute tangible employment action is required for "supervisor" status. As noted by even a decision rejecting "supervisor" status like *Velázquez-Pérez*, *Vance* left room for courts to deem a "supervisor" someone who lacks formal decision-making authority, but in practical terms wields strong persuasive or informally delegated authority regarding tangible actions.[326] As *Vance* discussed:

> [E]ven if an employer concentrates all decisionmaking authority in a few individuals, it likely will not isolate itself from heightened liability under *Faragher* and *Ellerth*. If an employer does attempt to confine decisionmaking power to a small number of individuals, those individuals will have a limited ability to exercise independent discretion when making decisions and will likely rely on other workers who actually interact with the affected employee. *Cf. Rhodes v. Illinois Dept. of Transp.*, 359 F.3d 498, 509 (C.A.7 2004) (Rovner, J., concurring in part and concurring in judgment) ("Although they did not have the power to take formal employment actions . . . [they] necessarily must have had substantial input into those decisions, as they would have been the people most familiar with her work—certainly more familiar with it than the off-site . . . Manager."). Under those circumstances, *the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies*.[327]

Ellerth and *Faragher*, which *Vance* cited with approval, without purporting to limit them, actually deemed "supervisory" various individuals lacking formal, final authority to undertake tangible actions. In *Ellerth*, the harasser was a large corporation's "midlevel manager" who could "make hiring and promotion decisions [only] subject to the

324. *Id.*
325. *Id.* at 272–73.
326. *Id.* at 272.
327. *Vance*, 133 S. Ct. at 2452 (emphasis added) (citing Rhodes v. Ill. Dep't of Transp., 359 F.3d 498, 509 (7th Cir. 2004)).

approval of his supervisor."[328] In *Faragher*, those recognized as "supervisors" included a city parks department's officials who appeared to have broad authority over the plaintiff, a lifeguard, but not quite full authority to fire:

> Terry served as Chief of the . . . Division [that had] authority to hire new lifeguards (subject to the approval of higher management), to supervise all aspects of the lifeguards' work assignments, . . . to deliver oral reprimands, and to make a record of any such discipline. Silverman [and] . . . Gordon . . . [were] promoted to . . . captain. In these capacities, [they were] responsible for making the lifeguards' daily assignments, and for supervising their work and fitness training. . . .
>
> Lifeguards reported to . . . captains, who reported to Terry. He was supervised by the Recreation Superintendent, who in turn reported to a Director of Parks and Recreation, answerable to the City Manager.[329]

This broad power without final authority sufficed because, as in the above *Vance* excerpt, the employer was a large organization that, though reserving for higher-ups the final power to fire, heavily relied on its on-the-ground supervisors: "[T]hese supervisors 'were granted virtually unchecked authority' over their subordinates, 'directly controll[ing] and supervis[ing] all aspects of [Faragher's] day-to-day activities.' . . . Faragher and her colleagues were 'completely isolated from the City's higher management.'"[330]

Lindquist v. Tanner,[331] after detailing the room *Vance* and *Faragher* left for courts to find those lacking final decision-making authority to be "supervisors," denied the defendant, a city parks commission, summary judgment against a claim that "a Commission employee who managed operations at the site where Lindquist worked" was a "supervisor."[332]

> *Vance* . . . recognized that supervisor status is not conferred solely by formal designations but [also] . . . where an alleged harasser amounts to a *de facto* supervisor based on the "tangible actions" that individual has in fact been empowered by the employer to take. . . .
>
> Indeed the *Vance* majority went to great pains to make this point . . . confirm[ing] that the alleged harassers in *Faragher*, an earlier Supreme Court case, were "supervisors" . . . because their recommenda-

328. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 745–47 (1998); *see id.* at 766 ("Burlington is still subject to vicarious liability for [the midlevel manager's] activity, but Burlington should have an opportunity to assert and prove the affirmative defense.").

329. Faragher v. City of Boca Raton, 524 U.S. 775, 781 (1998).

330. *Id.* at 808 (alteration in original) (quoting Faragher v. City of Boca Raton, 111 F.3d 1530, 1544 (11th Cir. 1997)) (vicarious liability for supervisory harassment applied).

331. No. CA 2:11-3181-RMG, 2013 WL 4441946 (D.S.C. Aug. 15, 2013).

332. *Id.* at *1.

> tions with respect to hiring, firing, discipline, raises and promotion were, in practice, often followed.[333]

Lindquist found "that Tanner was *delegated* authority allowing him to make *effectively determinative* decisions with respect to Plaintiff's hiring, promotion and discipline, and firing."[334] Specifically, what sufficed was that the individual successfully made hiring recommendations, credibly threatened that he could fire her, and "was the most senior employee on-site":

> [In] hiring . . . , it was Tanner who actively sought Plaintiff's name because he thought she might be a good fit. . . . Tanner said he "owned" Plaintiff[,] . . . interpreted by one . . . as meaning that "it would be [Tanner's] determination" whether Plaintiff "would go full time or not work out." The fact that Tanner was the most senior employee on-site, . . . at times direct[ing] Plaintiff's work activities even though she technically fell under the supervision of an off-site employee, may also heighten the import of these statements; it makes it reasonable to infer that Tanner would have had significant, possibly determinative, say over Plaintiff's performance reviews, hours, and potential for promotion.[335]

This sort of broad recognition of unofficial supervisory power arguably conflicts with some of the above-detailed stricter applications of *Vance*. But as *Lindquist* detailed, it draws support from portions of *Vance*, as well as from the *Faragher* and *Ellerth* portions it cited approvingly.

Boyer-Liberto v. Fontainebleau Corp.[336] relied on *Vance* and *Faragher* in holding that a restaurant "Food and Beverage Manager" could qualify as a supervisor.[337] Plaintiff Liberto, a cocktail waitress, admitted "that she never thought of Clubb as her manager," seeing her as "merely a 'glorified hostess.'"[338] But formal role was not dispositive, because "[t]o be considered a supervisor, the employee need not have the final say as to the tangible employment action":

> [T]he employee's decision may be "subject to approval by higher management." *Vance* . . . determined that one of the harassers in *Faragher* "possessed the power to make employment decisions having direct economic consequences for his victims" based on the following: "No one [had been] hired without his recommendation"; he "initiated firing and suspending personnel"; his performance evaluations "translated into salary increases"; and he "made recommendations regarding promotions."[339]

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333. *Id.* at *3 (citations omitted).
334. *Id.* at *4 (emphasis added).
335. *Id.*
336. 786 F.3d 264 (4th Cir. 2015).
337. *Id.* at 269.
338. *Id.* at 296.
339. *Id.* at 278–79 (second alteration in original) (quoting Vance v. Ball State Univ., 133 S. Ct. 2434, 2446 n.8 (2013)).

Boyer-Liberto "deem[ed] Clubb to have been Liberto's supervisor" because "Liberto believed—and reasonably so—that Clubb could make a discharge decision or recommendation that would be rubber-stamped by Dr. Berger,"[340] on the following evidence. First, "Clubb repeatedly and effectively communicated to Liberto . . . that Clubb had [owner] Dr. Berger's ear and could have Liberto fired."[341] Second, "General Manager Elman validated Clubb's assertion of authority by declaring Clubb to be Liberto's 'boss.'"[342] Third was Clubb's "assertion of power in the course of her harassment": she not only used racial epithets, but did so in the course of "berat[ing] Liberto's job performance before threatening 'to get [her]' and 'make [her] sorry.'"[343]

Kramer v. Wasatch County Sheriff's Office[344] noted that employer liability for non-decision-maker but influential "supervisors" drew support from not only *Vance*, but also *Staub v. Proctor Hospital*,[345] a case on employer liability when impartial decision-makers are influenced by a biased subordinate. In *Kramer*, the plaintiff was a jailor and bailiff claiming harassment by her Sergeant, Rick Benson.[346] "[T]he Sheriff, not Sergeant Benson, was the 'department head' . . . [and] officially the only person who could fire."[347] Showing the importance of a deep dive into employer policies and witness testimony about how powerful a mid-manager like Sergeant Benson truly was, *Kramer* detailed extensive evidence to find a "likelihood that Sergeant Benson had the power to influence or recommend tangible employment actions"[348]:

> Sergeant Benson was Ms. Kramer's direct manager . . . he was the sole person responsible for writing her performance evaluations . . . [that] could cause her to be promoted, demoted, or fired. . . . Sergeant Benson could recommend . . . that any of his supervisees be fired. Sergeant Benson's responsibility to "document noteworthy . . . behaviors of employees" was explicitly defined by the County as potentially affecting his subordinates' "job advancement, rewards, discipline and discharge." . . . Sergeant Benson was considered a "supervisor" in the rank hierarchy. These designations are relevant because while the County policy manual refers to some forms of discipline as being done by the "department head," department heads or "supervisors" are referred to with regard to other types of discipline, . . . includ[ing] "closer supervision, training, . . . *reassignment or transfer*, use of appropriate level career counseling, *or separation*." . . .

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340. *Id.* at 280.
341. *Id.* at 279.
342. *Id.* at 279–80.
343. *Id.* at 279 (alterations in original).
344. 743 F.3d 726 (10th Cir. 2014).
345. 562 U.S. 411 (2011).
346. *Kramer*, 743 F.3d at 731.
347. *Id.* at 740.
348. *Id.*

> "Relief of Duty" . . . occurs "in cases *where a supervisor finds it necessary*" . . . indicat[ing] that the Sheriff would determine whether relief of duty was with or without pay, but apparently the "supervisor" could decide in the first instance whether one of his subordinates would be relieved from duty.[349]

Notably, the formal decision-maker (the Sheriff) was not on-site with the employee and her mid-manager (Sergeant Benson)—which was evidence, *Kramer* held, that the Sheriff delegated authority to the Sergeant:

> Where an harasser is empowered to effect significant changes in employment status indirectly through recommendations [and] performance evaluations . . . and where the person with final decision-making power does not work directly with the plaintiff, the harasser may be a "supervisor." . . . In contrast to a coworker who can only cause a demotion or a pay cut through "some elaborate scheme," a supervisor who lacks the direct power to impose tangible employment consequences can accomplish the same easily . . . if the employer has "effectively delegated" the power to make those decisions to him by empowering him to evaluate his supervisees and then relying on his recommendations.[350]

It was relevant that "Sergeant Benson repeatedly told Ms. Kramer he did in fact possess such powers" to terminate her.[351] But *Kramer* held that actual power to terminate was unnecessary:

> Kramer is not required to establish that the Sheriff would follow Sergeant Benson's recommendations blindly. Even if the Sheriff undertook *some* independent analysis when considering employment decisions recommended by Sergeant Benson, Sergeant Benson would qualify as a supervisor so long as his recommendations were among the proximate causes of the Sheriff's decision-making. . . . A manager who works closely with . . . subordinates and who has the power to *recommend* or . . . substantially influence tangible employment actions, and . . . thus indirectly effectuate them, also qualifies as a "supervisor." The holding in *Vance* is consistent with . . . *Staub v. Proctor Hospital*, . . . [which] held that employers could be liable for tangible employment actions influenced by a biased subordinate, even though the final decisionmaker was unbiased.[352]

Based on its analysis of apparent authority principles, *Vance*, and *Staub*, the court held that there were sufficient fact disputes regarding the Sergeant's supervisory status to preclude summary judgment.

Gillum v. Safeway Inc.[353] denied summary judgment against a claim that a below-store-manager employee (one of two supermarket

349. *Id.* at 739–41 (quoting the record).
350. *Id.* at 741 (citations omitted) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762 (1998)).
351. *Id.* at 743.
352. *Id.* at 738, 741 (citations omitted).
353. No. 2:13-CV-02047, 2015 WL 1538453 (W.D. Wash. Apr. 7, 2015).

"meat market managers") was the "supervisor" of those working under him ("meat cutters," such as the plaintiff). "Meat market managers" worked under "store managers" and "district managers," and under "meat merchandisers" in a more specific meat-affairs hierarchy.[354] The court nevertheless held that Gillum survived summary judgment on his claim that "the managers allegedly responsible for the hostile work environment actually possessed the authority to discipline and otherwise affect Gillum's employment."[355] *Gillum* so held based on the same sort of detailed fact analysis as in *Kramer*, above, regarding employer policies and witness testimony as to how major decisions (hiring, firing, etc.) formally made by higher-up managers could, in practice, base heavily on the recommendations and lesser actions (changing shifts, imposing minor discipline, etc.) of low-level managers like "meat managers":

> Gillum offers evidence that meat market managers possessed and exercised significant authority over some aspects of the terms and conditions of employment. . . . [M]eat market managers can provide written discipline to employees and these "write ups" can result in either suspension and/or termination. . . . [M]eat market managers have substantial input into promotion and firing decisions: for example, if, as Gillum claims, Safeway employees attempted to effectuate Gillum's firing by assigning him to certain meat market managers, it would suggest that meat market managers can punish employees. . . . Brown could and did change the shifts of the employees, which affected compensation and working conditions. . . . Trutmann, a store manager with the clear authority to fire employees, participated in the meeting with Kaiser and Brown during which they threatened to fire Gillum, and, during which, Brown called Gillum "boy."[356]

The court denied the employer summary judgment, holding that this evidence created a genuine issue of material fact regarding whether the plaintiff's harassers had supervisory status.[357]

Finally, as in many areas of employment law, scattered state laws may differ from a rule the Supreme Court declared, such as the *Vance* limitation of which harassers are "supervisors" whose actions subject employers to strict liability unless they prove the *Faragher/Ellerth* affirmative defense. The New Jersey Supreme Court in *Aguas v. New Jersey*[358] held as follows in interpreting the New Jersey Law Against Discrimination:

> We decline to adopt the restrictive definition of "supervisor" prescribed by . . . *Vance.* In light of our fact-specific approach to sexual harassment cases, we respectfully disagree. . . . We agree with the

354. *Id*. at *2–3.
355. *Id*. at *6.
356. *Id.*
357. *Id.*
358. 107 A.3d 1250 (N.J. 2015).

> EEOC that the term "supervisor" [is] defined more expansively to include not only employees granted the authority to make tangible employment decisions, but also those placed in charge of the complainant's daily work activities. . . .[359]

Vance is inapplicable for the opposite reason in states wholly rejecting the *Faragher/Ellerth* framework for claims under their state discrimination laws. For example, Michigan requires plaintiffs to prove employer negligence on claims of harassment by supervisors and co-workers alike, making the harasser's role irrelevant to vicarious liability.[360]

C. University of Texas Southwestern Medical Center v. Nassar*: Does "But-For" Causation Mean an Act Must Be the Sole Cause, or Just a Sufficient Cause, of the Harm?*

In 2013, *University of Texas Southwestern Medical Center v. Nassar*[361] "held that to prove retaliation under Title VII, a plaintiff must show that, but for protected activity, the retaliatory act would not have occurred"—a ruling that "departed from the standard . . . in many jurisdictions" that plaintiffs "could prove causation using the more relaxed 'motivating factor' test."[362] The Civil Rights Act of 1991 amended Title VII with a broader causation standard allowing plaintiffs to "prove causation with evidence that his or her status was a motivating factor for adverse treatment," but it "did not insert similar language into Title VII's anti-retaliation" clause, leading *Nassar* to find that Congress intended to hold retaliation claimants to the higher but-for causation standard.[363] The pure statutory interpretation *Nassar* issued would seem to require less case-by-case interpretation than a fact-specific decision like *Integrity Staffing* or a legal definition that must be applied in varied fact settings like the "supervisor" definition of *Vance*. Yet since *Nassar*, some courts have disagreed as to the definition of a "but-for" cause.

Since *Nassar*, and before *Nassar* in age discrimination cases (which have faced the same but-for causation standard under *Gross v. FBL Financial Services, Inc.*[364]), some courts have disagreed as to whether a "but-for" cause must be the *sole* cause of the harm, or just one sufficient

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359. *Id.* at 1271.

360. *See, e.g.*, Chambers v. Trettco, Inc., 614 N.W.2d 910, 917–18 (Mich. 2000) ("*Faragher* and *Ellerth* would be inconsistent with our . . . appl[ying] agency principles to hold that it is the plaintiff's burden to prove that the employer failed to take prompt and adequate remedial action upon reasonable notice of . . . a hostile environment, even where the harassing conduct is committed by a supervisor.").

361. 133 S. Ct. 2517 (2013).

362. Michael Rosen & Allison Anderson, *Employment Law: "But For" a Criminal Case*, 42 Labor & Emp. L. 1, 5 (2014).

363. *Id.*

364. 557 U.S. 167 (2009) (applying same but-for causation standard to age discrimination claims).

cause among *multiple* causes. *Hendon v. Kamtek, Inc.*[365] strongly espoused the "sole cause" view, but cited and quoted a recent case holding the opposite, *Zann Kwan v. Andalex Group, LLC*[366]:

> [S]ome courts have held[] that "'but-for' causation does not require proof that retaliation was the only cause of the employer's action, but only that the adverse action would not have occurred in the absence of the retaliatory motive." *Zann Kwan*. . . . This court, however, finds that the contrary conclusion is the natural and, indeed, the only logical conclusion to be drawn from the Supreme Court's language in *Gross*[and] in *Nassar*. . . .
>
> As the Supreme Court said in *Gross*, in order to qualify as the "but-for" cause, the alleged cause must be "*the* 'reason' that the employer decided to act." To impose a lesser "but-for" standard would require an entirely incorrect reading of *Gross*[and] *Nassar*. . . .[367]

The Second Circuit held the opposite in *Zann Kwan*, as did the Seventh Circuit in *Malin v. Hospira, Inc.*: "A single event can have multiple but-for causes, so [Plaintiff's] FMLA leave request and . . . sexual harassment complaint could both have been but-for causes. . . ."[368]

As a recent post-*Nassar* article observed, a later Supreme Court criminal decision, *Burrage v. United States*,[369] "expounded on *Nassar*" by citing it in an "opinion focused mainly on explaining what 'but-for' causation actually means."[370] One particular cause of an event that "combines with other factors to produce the result" remains a "but-for" cause, "so long as the other factors alone would not have done so," Justice Scalia's *Burrage* majority held:

> "[W]here A shoots B, . . . we can say that . . . but for A's conduct B would not have died." . . . The same conclusion follows if the predicate act *combines with other factors to produce the result, so long as the other factors alone would not have done so*—if, so to speak, it was the straw that broke the camel's back. Thus, if poison is administered to a man debilitated by multiple diseases, *it is a but-for cause of his death even if those diseases played a part* in his demise, so long as, without the *incremental effect* of the poison, he would have lived.[371]

The *Burrage* definition of a but-for cause as one sufficient cause among many seems to preclude district and appellate courts from holding the contrary, that but-for causation is absent unless discrimination is the sole cause of the adverse action. Differences between criminal

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365. No. 2:14-CV-2255-WMA, 2015 WL 4507990 (N.D. Ala. July 24, 2015).
366. 737 F.3d 834, 846 (2d Cir. 2013).
367. *Hendon*, 2015 WL 4507990, at *5 (citations omitted) (quoting *Zann*, 737 F.3d at 846).
368. Malin v. Hospira, Inc., 762 F.3d 552, 562 n.3 (7th Cir. 2014).
369. 134 S. Ct. 881 (2014).
370. Rosen & Anderson, *supra* note 362, at 4.
371. 134 S. Ct. at 888 (emphases added).

statutory (in *Burrage*) and employment statutory (in *Nassar*) causation standards cannot distinguish the *Burrage* "combine[s] . . . factors" holding, given that *Burrage* expressly cited *Nassar* with approval.

Conclusion

The 2014–2015 Supreme Court Term was a significant one for labor and employment law, more so than the prior or subsequent term. The 2013–2014 Term featured no employment discrimination cases and "unusual unanimity" in the modest range of labor and employment cases it did decide.[372] The 2015–2016 Term saw the passing of Justice Antonin Scalia, leaving an eight-Justice Court with likely 4-4 splits in a range of public law cases that previously had greater potential for significant holdings on, among other topics, public employee unions, affirmative action, and an employer mandate to cover contraceptive care.[373] For labor and employment law observers and practitioners, until the Supreme Court returns to full nine-Justice strength and perhaps a bit longer—after a Court-shifting appointment, it can take the Justices one or two terms to figure out what outcomes are likely, and thus which cases to grant certiorari—district and appellate court decisions fleshing out the large batch of 2014–2015 Supreme Court decisions may be more worthy of observation than the Supreme Court itself.

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372. Green, *supra* note 1, at 175.

373. *See* Jordan Weissmann, *How Scalia's Death Affects This Term's Biggest Supreme Court Cases*, SLATE (Feb. 13, 2016), http://www.slate.com/blogs/the_slatest/2016/02/13/how_scalia_s_death_effects_the_term_s_biggest_cases.html (noting likely 4-4 splits in these and other public law cases).