Chapter 1

Employment and Labor Year in Review

Samuel J. Cordes, Attorney
Rothman Gordon, PC
Pittsburgh, Pa.

Mariah Passarelli, Attorney
Cozen & O'Conner
Pittsburgh, Pa.

Table of Contents

Year in Review

I. TRENDS

CASES

➢Law360 reports (source Lex Machina) that in 2022, just 20,994 employment cases, **an 18.5% drop from 2012.**

This continues a steady decline in employment cases since 2018 when the number of employment cases filed in federal courts were 25,674.

✓In 2018 17,177 discrimination cases filed in federal court; in 2022 only 13,662 – a 20% drop.

✓In 2018 7,870 FLSA cases filed in federal court; in 2022, 6,307 – a 26.5% drop.

Some have tried to explain the reasons for the decline:

•Arbitration agreements
•Employer's general reluctance to fire employees
•Shift to file in state court

•Pandemic work habits. Most discrimination and harassment occurs in person, and between 2020 and 2022 may workers were not in the office. Claims may still arise while working remotely, but it is easier for employees to distance themselves from the

conditions of work when they are not in the office every day. Also a lot of uncertainty existed during the pandemic, which forced a lot of people to tolerate behavior that would otherwise be reported.

UNION MEMBERSHIP

☛Law360 reports that the Bureau of Labor Statistics' annual unionization report found 10.1% of workers in the U.S. were members of unions in 2022, down slightly from 10.3% the year before. That marks a second straight year of declining union membership after a slight increase in 2020.

☛The share of workers *represented* by unions declined in 2022 down to 11.3% from 11.6% the year before. Overall, roughly 200,000 more workers were represented by unions in 2022 than in 2021, according to the BLS.

☛The total number of union members rose by 273,000 to about 14.3 million in 2022.

☛Public sector workers continue to be much more heavily unionized than their private sector counterparts, with 33.1% being members of unions (a decrease from 33.9% in 2021); while private section is 6.0%.

☛Polling shows public support for unions is high, with a Gallup poll from August, 2022 finding 71% of Americans approve of unions, the highest level since 1965.

United States Supreme Court Cases.

Religion

1. Groff v. Dejoy. 143 S.Ct. 2279 (2023) Religious Accommodations–What is "Undue Hardship"

> **The Court unanimously held that Title VII requires an employer that denies a religious accommodation to show the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business**.

In *Groff*, the Supreme Court, by claiming it was merely clarifying the "undue hardship standard under which an employer can deny a religious accommodation under Title VII of the Civil Rights Act of 1964, rejected a "de minimis cost" test and held that an employer denying a religious accommodation must show that the burden of granting an accommodation "would result in substantial increased costs in relation to the conduct of its particular business."

The case was brought by Gerald Groff, a U.S. Postal Service mail carrier who believed for religious reasons that Sundays should be devoted to worship and rest. When Groff refused to work Sundays, the USPS redistributed his Sunday deliveries to other staff and disciplined Groff, who later resigned. Groff then sued USPS under Title VII, asserting that USPS could have accommodated his Sunday Sabbath practice without undue hardship.
The district court granted summary judgment to USPA. The Third Circuit affirmed based on a widely held construction of "undue hardship" in the Supreme Court's 1977 decision in *Trans World Airlines, Inc., v. Hardison*, 432 U.S. 63 (1977). *Hardiso*n had been construed to hold that an employer is not required to "bear more than a de minimis cost" to accommodate an employee's religious practice. Because exempting Groff from Sunday work imposed on his co-workers, diminished employee morale and disrupted the workplace and workflow, the panel majority found the de minimis standard met.

The question presented in Groff was twofold: (1) whether the Court should disapprove the de minimis cost test for refusing Title VII religious accommodation as stated in Hardison; and (2) whether an employer may demonstrate "undue hardship" under Title VII merely by showing burden on the employee's coworkers rather than the business itself.

On the first question, the Court held that an "undue burden" was one that would result in "substantial increased costs in relation to the conduct of its particular business"–a fact specific inquiry that comports with both *Hardison* and the meaning of "undue hardship" in ordinary speech. The Court said the test must be applied in a manner that takes into account "all relevant factors in the case at hand, including the particular accommodations at issue and their practical

impact in light of the nature, size and operating cost of the employer. The Court declined to determine whether USPS had met this standard, and instead remanded to the lower court to make that determination.

On the second question presented, the Court clarified that not all impacts on coworkers were relevant to whether a requested religious accommodation was an undue hardship, but only those that "go on to affect the conduct of the business." Likewise, the Court explicitly said that a hardship due to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice cannot be considered "undue."
Further, the Court said it was not enough to conclude whether a requested religious accommodation was an undue hardship; the employer must also consider other possible options. Thus, in Groff's case, looking only at forcing other employees to work overtime is insufficient to establish an undue hardship defense, and other options would have to be considered.

The importance of *Groff's* change in the practical assertion of a Title VII religious accommodation case cannot be overstated. The first Court of Appeals to address this importance found is highly significant:

> For decades inferior federal courts read a single line from *Hardison* for more than it was worth. The *de minimis* test had no connection to the text of Title VII. And by blessing "the denial of even minor accommodation in many cases," the *de minimis* test made it harder for members of minority faiths to enter the job marked. *Groff*, 143 S.Ct. at 2292 (citing *amicus* briefs from *inter alia*, The Sikh Coalition, Union of Orthodox Jewish Congregations of America, and Seventh-day Adventist Church). No more. The decision in *Groff* enables Americans of all faiths to earn a living without checking their religious beliefs and practices at the door.

Hebrew v. Tex. Dep't of Crim. Justice, 80 F.4th 717 (5th Cir. Sept. 15, 2023)

2. ***303 Creative LLC v. Aubrey Elenis***, 143 S.Ct. 2298 (2023)

> **The Court held in 6-3 decision that the First Amendment prohibits state from forcing website designer to create expressive designs that convey a message contrary to the designer's religious beliefs**.

In *303 Creative LLC v. Elenis*, the Supreme Court held that the First Amendment prohibits Colorado from compelling a website designer to engage in expressive conduct that conflicts with her beliefs.

Colorado's Anti-Discrimination Act prohibits all public accommodations from denying "the full and equal enjoyment" of its goods and services to any customer based on numerous protected characteristics, including sexual orientation.

Lorie Smith, the owner of 303 Creative LLC, a Colorado based web and graphic design business, wanted to expand her service to including wedding websites, but was concerned that the CADA would compel her to create websites celebrating marriages she did not endorse, such as same-sex marriages. She sued seeking an injunction to prevent Colorado from compelling her to create websites that ran counter to her belief that marriage should be between a man and a woman. The district court denied her request for an injunction; the Tenth Circuit affirmed.

In a 6-3 decision, the Supreme Court reversed. The Court first focused on the foundational principles underlying the Free Speech Clause of the First Amendment, saying that "freedom to think and speak is among our inalienable human rights" and "indispensable to the discovery and spread of political truth." The Court also cited several of its precedents where the First Amendment protected an individual's right to free speech "regardless of whether the government considers his speech sensible and well intentioned or deeply misguided."

The Court then relied heavily on the parties' stipulated facts to conclude the wedding websites Smith sought to create qualified as "pure speech." Specifically, the parties stipulated that the websites promised to contain modes of expression; that every website will be Smith's original, customized creation; and that Smith will create those websites to communicate ideas–namely to celebrate and promote what Smith understood to be a true marriage. Since the parties stipulated that Smith was willing to work with all individuals, regardless of sexual orientation, the Court explained that this case was about expression, not access to public accommodations.

Since Smith's wedding websites were expressions of speech protected by the First Amendment, the Court applied the strict scrutiny test. Specifically, Colorado had to show that forcing Smith to create speech would serve a compelling government interest and that no less restrictive alternative existed to secure that interest. The Court ultimately held that Colorado failed to meet that standard. While the Court recognized that states have a compelling interest in eliminating discrimination, it held that public accommodation statutes sweep "too broadly" when deployed to compel speech.

Dissenting, Justice Sotomayor, Kagan and Jackson declared that the Court, for the first time in its history grants a business open to the public a constitutional right to refuse to serve members of a protected class...and that the company has a right to post a notice that says "no [wedding websites] will be sold if they will be used for gay marriages."

The dissent argued the law was narrowly tailored to achieve the compelling state interest in eliminating discrimination, as the law "responds precisely to the substantive problem which legitimately concerns the state: the harm from status-based discrimination in the public marketplace.

The dissent also emphasized that "a public accommodations law does not force anyone to start a business, or hold out the business' goods or services to the public at large. The law also does not compel any business to see any particular good or service. But if a business chooses to

profit from the public market, which is established and maintained by the state, the state may require the business to abide by a legal norm of nondiscrimination."

Since the law did not abridge Smith's freedom of speech in any meaningful sense, and was unrelated to the suppression of expression, the dissent argued the law was subject to lesser constitutional scrutiny. Specifically the standard was satisfied if it promoted a substantial government interest that would be achieved less effectively absent the regulation–a standard the dissent argued was easily met here.

While not specifically an employment case, the decision raises significant questions for the American workplace.

Does the decision support an employer's right to disobey generally applicable anti-discrimination laws because of a religious belief for example, that Muslims, atheists or Jews should not supervise true Christians or that black employees should not work next to white employees or that a woman's place is not on the shop floor?

Ruling expands ability of employees who work for places of public accommodation to deny services to customers based on religious grounds. This is especially true given *Groff* decision. *303 Creative* leaves unanswered question regarding an employee's ability to object to providing services to customers based on the employee's asserted religious beliefs.

Instead of being the sole-member-owner" of a company, what if website designer was an employee of a mid-size or large company. Although employer might not be opposed to designing a website for a same-sex wedding, the individual employee–the content creator–might object to the website on religious grounds and seen an exemption or accommodation to avoid working on the project

Pre-*303 Creative*, and *Groff*, an employer might have been able to deny the request and claim an undue hardship based on its need to comply with applicable public accommodations laws. But now, considering those holdings, it is unclear whether the employer would have to accommodate the employee's request.

Political Retaliation Claims: Some states prohibit an employer from attempting to coerce or influence its employees political activities through threat of discharge or loss of employment. Liability under those sections is triggered if employer fires an employee based on a political motive.

Religious exemptions to serving certain customers or complying with public facing anti-discrimination policies, or threaten more political retaliation claims in face of potential discharge. *303 Creative* predicated its holding on the forced speech context of the First Amendment, and so the areas of political retaliation is ripe for reconsideration.

A. Kennedy v. Bremerton School Dist., 142 S.Ct. 2407 (2022).

Free Exercise Rights For Public Employees And the Demise of *Lemon v. Kurtzman*.

In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), the Supreme Court expanded the free exercise protection offered to public employees, even when that might have previously been found to violate the establishment clause.

Joseph Kennedy, a football coach for a public high school, made it a practice to "give thanks through prayer on the playing field" at the conclusion of each game. Players began to join him in prayer until most of the players joined in. The school district instructed Kennedy to avoid any religious activity that might give the appearance of an endorsement of religion. In so doing, the school district highlighted the tension between the free exercise clause and the establishment clause of the first amendment. *Id.* at 2416-17.

The Supreme Court held that the free speech and free exercise rights of Kennedy were violated when he was instructed not to pray with students. The Court stated that a government policy is not "neutral" if it is specifically directed at a religious practice. *Id.* at 2422. The Court rejected the argument that restricting Kennedy's prayers on the field was necessary to avoid a violation of the establishment clause. It rejected the school district's reliance on *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and the assumption that the establishment clause is violated when a practice gives the appearance of an "endorsement" of a particular religious belief. *Id.* at 2427-28. The Court made clear that *Lemon* is now overruled.

The Court concluded that Kennedy's speech was while off duty, and therefore it was also protected as free speech under *Garcetti v. Ceballos,* 547 U.S. 410 (2006). Thus, the Court held, the school district was neither required nor permitted to restrict Kennedy's "off-duty" speech.

4. Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, et. al., 143 S.Ct. 2141 (2023)

In *Students for Fair Admissions, Inc. v . President and Fellows of Harvard College, et. al.*, 143 S.Ct. 2141 (2023), the Supreme Court held that the admissions process used by Harvard College and the University of North Carolina violated the Equal Protection Clause of the 14th Amendment of the U.S. Constitution due to the degree each admissions process used race as a factor in admissions consideration. Each failed to satisfy the very limited strict scrutiny test which asks first whether the racial classification is used to further compelling governmental interests, and second whether the government's use of race is "narrowly tailored" i.e. necessary to achieve that interest.

The 14th Amendment provides that no State shall "deny to any person...the equal protection of the laws." As such, the prohibitions primarily relate to government actions (or, in

the case of Title VI of the Civil Rights Act of 1964, to federal funding recipients). At the same time, however, since private sector employers are covered under Title VII, which prohibits discrimination in employment on the basis of race, the Court's decision is instructive regarding the limitations placed on decisions that are made in any part based on race.

The Court concluded that the School's race-based admissions program failed strict scrutiny. In support of their race-based admissions programs, the Schools asserted the following educational goals as their compelling interests.

> Training future leaders in the public and private sectors/preparing engaged and productive citizens and leaders.
>
> Preparing graduates to adapt to an increasingly pluralistic society/broading and refining understanding.
>
> Better educating students through diversity/enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes/promoting the robust exchange of ideas.
>
> Producing new knowledge stemming from diverse outlooks/fostering innovating and problem solving.
>
> Preparing engaged and productive citizens and leaders.

The Court noted that although those goals were laudable, they were too amorphous to pass muster under the strict scrutiny standard. The Court recognized that a court would have no way to know whether leaders have been adequately trained; whether the exchange of ideas is sufficiently robust, or whether, and in what quantity, racial diversity leads to the development of new knowledge. In other words, the Court took issue with the fact the asserted interests could not be measured in any meaningful, quantifiable way.

The Court also found no meaningful connection between the School's use of race in the admissions process and the claimed benefits. For example, the Court noted that while diversity may further the asserted interests, the Schools failed to establish that racial diversity would. The Court took particular issue with what it viewed as the overbroad and arbitrary nature of the School's race considerations, as they were under inclusive (for example, failing to distinguish between South Asians or East Asians, or define what Hispanic means, or account at all for Middle Eastern applicants). The Court reasoned that the overbroard, arbitrary and under inclusive racial distinctions employed by the Schools undermine the Schools' asserted interests–essentially noting that the Schools' race-based admissions programs sought to "check the diversity box" rather than obtain a truly diverse (racially or otherwise) student body.

In addition, each School's program's failure to survive strict scrutiny, the Court also recognized that the Schools' race based admissions process promoted stereotyping, negatively impacted nonminority applicants, and, contrary to Court precedent, did not have a durational limit or any cognizable way in which to adopt a durational limit.

The Court's decision rested largely on two prior cases addressing race-based admission programs in higher education: *Regents Univ. Of Cal. v. Bakke*, 438 U.S. 265 (1978), and *Grutter v. Bollinger*, 539 U.S. 206 (2003). As a guiding principle, the Court noted that the Equal Protection Clause of the 14th Amendment bars admissions programs that use race as a stereotype or a negative.

In *Bakke*, while rejecting other asserted interests the Court explained that obtaining the educational benefits associated with having a racially diverse student body was "a constitutionally permissible goal for an institution of higher education," provided that certain guardrails were in place. This, despite the Court's recognition that racial preferences cause serious problems of justice. The Court said that race could only operate as "a plus" in a particular applicant's file, and the weight afforded to race must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant."

In *Grutter*, the Court decided "student body diversity is a compelling state interest that can justify the use of race in university admissions" provided that sufficient limitations were in place–notably, that under no circumstances would race-based admissions decisions continue indefinitely. The Court cautioned that, because the use of race was a deviation from the norm of equal treatment, race-based admissions programs must not result in "illegitimate...stereotyping," must not "unduly harm nonminority applicants," and must be "limited in time."

Of critical importance to the Court's ruling was the fact that neither School's race-based admissions program had an articulable end point. The Court noted the School's arguments to overcome the lack of a definite end point were, essentially, "trust us, we'll know when we're there." Yet such arguments, the Court held, were insufficiently persuasive to offset the pernicious nature of racial classifications. Justices Thomas and Gorsuch, who joined the majority opinion, took additional issue with the Schools' "trust us" arguments in separate concurrences, noting (1) their view of the Schools' histories of harmful racial discrimination, and (2) that courts are not to defer to the morality of alleged discriminators.

Additionally, the Court took issue with the logical necessity that, in any instance when a limited number of positions are available, a race-based "plus factor" for applicants of a certain race is a negative for applicants who do not belong to the favored race. "How else but 'negative' can race be described if, in its absence, members of some racial groups would be admitted in greater numbers than they otherwise would have been?" In this, the Court recognized that equal protection is not achieved through the imposition of inequalities.

Impact on Private Employers

The Court's decision has no direct legal impact on private employers. The Court based its decision on the Equal Protection Clause of the 14th Amendment, applicable to the Schools under

Title VI, which does not intrinsically apply to private companies; it is Title VII and analogous state and local laws that apply to private employers and prohibit them from discriminating against employees and applicants on the basis of race and other protected characteristics.

Title VII has always prohibited any consideration or race in decision-making, such as who to hire or who to promote, except in extremely narrow and limited situations, but, even then, quotas and set-asides are strictly prohibited.

Generally a private employer's affirmative action plan is permissible under Title VII in two scenarios: (1) if the plan is needed to remedy an employer's past discrimination, and (2) if the plan is needed to prevent an employer from being found liable under Title VII's disparate impact prohibitions (which operate to prohibit facially neutral policies that nevertheless disproportionately disadvantage certain groups).

Regarding No. 2, it is unlikely *Students for Fair Admissions* will have much if any impact. For an affirmative plan to survive scrutiny on this basis, an employer must first prove a disparate impact case against itself: it must identify a specific policy, prove that such policy has a disparate impact on a certain group, and either show that the policy is not justified by business necessity or show there is a viable alternative that both (a) accounts for the employer's business necessity and (b) has less of a disparate impact on the affected group. Then, the employer must prove how its affirmative action steps offset the disparate impact. Nothing in *Students for Fair Admissions* suggests an employer's effort to remedy an ongoing Title VII violation would itself be a Title VII violation.

However, language in *Students for Fair Admissions* suggests an affirmative action plan implemented to remedy an employer's past discrimination could be problematic, especially if not carefully designed. A number of appellate decisions even before *Students for Fair Admissions* have struck down employer affirmative action programs. Permissible affirmative action programs are typically implemented to remedy past racial imbalances in an employer's workforce overall, and are not tied to past discrimination against an identifiable employee or applicant. The *Students for Fair Admissions* opinion admonished Justice Sotomayer's dissent where she proposed a world where schools consider race indirectly through, for example, essays submitted alongside applications. The Court noted that such consideration would nevertheless violate the Constitution, and clarified that admission decisions can rely on the content of application essays, but that such decisions must be based on an individual's character or experiences, and not based on the applicant's race. Similarly, Justice Thomas's concurring opinion recognized that "whatever their skin color, today's youth simply are not responsible for instituting the segregation of the 20th century and they do not shoulder the moral debts of their ancestors."

Thus, challenges to affirmative action plans that attempt to remedy past discrimination generally, by using race in the decision-making may run into the headwinds of the logic in the Court's closing sentiments and Justice Thomas' concurrence. Although a standard less exacting than "strict scrutiny" is used to evaluate discrimination claims under Title VII, the sentiment expressed by members of the Supreme Court could make the judiciary increasingly skeptical of affirmative actions programs that resemble those used by the schools in *Students for Fair Admissions*.

Diversity, Equity and Inclusion (DEI) programs may be the subject of challenges based on the Supreme Court's skepticism of the benefits of "racial" diversity, as opposed to diversity focused on less-pernicious characteristics. For example, DEI programs that seek to increase racial diversity based on broad racial definitions may be subject to challenges because of their overbreath or purportedly arbitrary nature. And DEI programs that highlight racial diversity, rather than, for example, diversity based on socio-economic, ideological or experiential characteristics may suffer challenges to their legitimacy in reliance on the Supreme Court's implication that there may be no identifiable tether between "racial" diversity and the purported benefits of diversity as a concept.

a. Thompson v. Henderson, 143 S.Ct. 2412 (2023)(Alito, J, joined by Thomas, J)

In the aftermath of *Students for Fair Admissions*, some justices are advancing a "race blind" theory and seeking to extend that decision beyond its facts. Citing *Students for Fair Admissions*, Justices Alito and Thomas have criticized the Washington Supreme Court's treatment of claim of racial bias in jury tort award because of over inclusive nature of the practice.

5. Helix Energy Solutions Group, Inc. v. Hewitt, 598 U.S. 39, 143 S.Ct. 677 (2023).

The Court held in a 6-3 decision that an offshore oil rig employee who earned more than $200,000 annually and whose paychecks were based solely on a daily rate (without overtime) is not paid on a salary basis and thus a non-exempt employee entitled to overtime pay under the Fair Labor Standards Act.

In *Helix*, the Supreme Court considered whether an oil rig worker making more than $200,000 was entitled to overtime. Under the Fair Labor Standards Act, a worker is entitled to overtime pay unless he or she works in a capacity that is exempt. Executive administrative, or professional workers are exempt from overtime. Highly compensated workers are one subset of these exemptions. For highly compensated workers, the definitional duties test is relaxed, but the worker must earn at least $107,432.

Hewitt plainly earned far more than the minimum amount needed to be considered a "highly compensated employee." However, the Court held, the employer could not consider Hewitt to be a highly compensated employee unless he also was salaried. Hewitt was not paid a salary, but was paid a day rate.

The Court held payment by the day did not meet the definition of salary in the regulations.

This holding affirms the importance of long-standing U.S. Department of Labor salary pay regulations under the FLSA. The Court analyzed 29 C.F.R. §541.602's definition of "salary basis." Justice Kagan wrote that the fact the employee was highly paid was not enough. A "true salary" is a "steady stream of pay, which the employer cannot much vary and the employee may

thus rely on week after week." In other words, because Hewitt was paid based on the number of days he worked, and not paid a guaranteed minimum weekly wage, he was not paid in the form of a salary, so he must be paid overtime.

Tea leafs: There are at least three votes for granting certiorari on whether the Secretary of Labor's salary basis regulations are consistent with the FLSA itself. Justices Gorsuch, Kavanaugh and Alito, in dissent, noted it is an open question whether they are.

6. Glacier Northwest, etc. v. Teamsters Local No. 174, 143 S. Ct. 1404 (2023)

National Labor Relations Act did not preempt an employer's tort claims alleging that its employees' labor union intentionally destroyed company property during a labor dispute.

Glacier Northwest, Inc. ("Glacier") sells ready-mix concrete to customers in Washington State. Each batch of Glacier's concrete is mixed to its customer's specifications. Glacier combines raw ingredients (cement, sand, aggregate, admixture and water) in a hopper and transfers the resulting concrete to one of its trucks for prompt delivery. Concrete is highly perishable because it begins to harden immediately once it is at rest. Glacier's ready-mix trucks can preserve the concrete for a limited time in rotating drums on the back of the trucks. If the concrete stays in the rotating drum for too long, however, it will harden and cause significant damage to the truck. And, the concrete will also begin to harden right away if the drum stops revolving.

Teamsters Local 174 ("Union") is the exclusive bargaining representative of Glacier's truck drivers. After the collective bargaining agreement between Glacier and the Union expired in the summer of 2017, the parties tried to negotiate a new contract. That had not succeeded by August 11, 2017. On that morning a Union agent signaled to the drivers for a work stoppage, purportedly when the Union knew Glacier was in the midst of mixing and loading substantial batches of concrete into the ready-mix trucks and making deliveries. Glacier instructed its drivers to finish the deliveries in progress, but the Union told the drivers to ignore Glacier's instruction. Of the 16 drivers who had already set out for deliveries and returned fully loaded, 7 parked their trucks, notified a Glacier representative and took action to protect their trucks. The remaining 9 drivers abandoned their trucks "without a word to anyone." Glacier could not leave its concrete in the trucks, but it also could not dump that concrete at random because of the environmentally sensitive chemicals in the mixture. Over a five hour period Glacier's nonstriking employees built special bunkers and offloaded the concrete from the trucks. While the trucks were spared damage, the concrete in the bunkers hardened and became useless. Glacier sued the Union for damages in a Washington state court,

claiming that the Union intentionally destroyed the concrete, thereby amounting to common law conversion and trespass to chattels. The Union moved to dismiss the tort claims on the ground that the NLRA preempted them. The Union, relying on *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), claimed that the NLRA at least arguably protected the drivers' strike conduct and that the State thus had no power to hold the Union accountable for any of the strike's consequences. The trial court agreed with the Union, but an intermediate appellate court reversed. The Washington Supreme Court reinstated the trial court's decision, expressing the view that the NLRA preempted Glacier's tort claims because any loss of concrete was incidental to a strike arguably protected by federal law.

The U.S. Supreme Court, in an 8 to 1 decision, reversed the Washington Supreme Court and held in a majority opinion by Justice Barrett (joined by the Chief Justice and Justices Sotomayor, Kagan and Kavanaugh) that the NLRA did not preempt Glacier's state tort action claiming that the Union intentionally destroyed company property during a strike. Justices Thomas, Gorsuch and Alito concurred in the judgment. Justice Jackson dissented.

Justice Barrett's majority opinion, accepting Glacier's allegations as true, first concludes that the Union did not take "reasonable precautions" to protect Glacier's property from imminent danger resulting from the drivers' sudden cessation of work. The majority additionally noted that the Union's manner of conducting its strike was designed to expose Glacier's bespoke concrete batches to foreseeable and imminent danger of destruction. Accordingly, the majority concluded that the Union's conduct was not arguably protected by the NLRA and the state court thus erred in dismissing Glacier's tort claims as preempted.

Justice Barrett first rejected the Union's argument that the right to strike should be interpreted generously, emphasizing that the right is not absolute and the Court must analyze whether the strike exceeded the limits of conduct protected by the NLRA. Second, the majority also rejected the Union's position that it does not forfeit NLRA protection by striking when loss of a perishable product is foreseeable. Pointing out that by reporting for duty and pretending that they would deliver the new batches, the Union effectively prompted the product's mixing and loading, thus bringing about its eventual destruction, as well as putting Glacier's trucks in harm's way. Third, while acknowledging that initiating a strike during the workday and failing to give specific notice to an employer do not themselves make the Union's conduct unprotected, these actions are relevant considerations in evaluating whether the Union took reasonable precautions to avoid foreseeable and imminent harm to company property. Finally, while the majority noted that some drivers took steps to protect their trucks, it found more pertinent that the strikers affirmatively planned conduct posing a material risk of harm to the trucks. Given these circumstances, the majority concluded that the NLRA does not arguably protect the Union's conduct, as characterized in Justice Barrett's opinion. Accordingly, the Court reversed the judgment of the Washington Supreme Court and remanded

the case for further proceedings.

Justice Thomas, joined by Justice Gorsuch, concurred in the Court's judgment while emphasizing "the oddity of *Garmon's* broad pre-emptive regime." Criticizing what he characterizes as the "strange" and "unusual" *Garmon* doctrine, Justice Thomas openly invites a re-examination of labor law preemption that would focus on the NLRA's text and confront what should happen when federal and state law are in logical contradiction. Justice Alito, joined by Justices Thomas and Gorsuch, filed an opinion concurring in the Court's judgment based on precedent limiting *Garmon* preemption where (as Glacier alleged here) employees intentionally destroy their employer's property.

Justice Jackson, dissenting faulted the Court for ignoring the pendency of a Board complaint against Glacier that will determine whether the Union's strike conduct is arguably protected by the NLRA. In her view the Washington Supreme Court was correct in suspending state examination of the Union's conduct in deference to a Board proceeding that had already been tried and was in the midst of final briefing. Justice Jackson consequently explained that in addition to impeding the Board's uniform development of federal labor law, the Court's decision also threatens to erode the right to strike under the NLRA.

7. ***Ohio Adjutant General's Dept. v. Federal Labor Relations Authority***, 143 S.Ct. 83 (2023)

Federal Labor Relations Authority has jurisdiction over a labor dispute involving dual-service technicians who work in both civilian and military roles for a state National Guard.

Dual-status technicians are federal civil service employees who work in both civilian and military roles for State National Guards. As civilian employees they organize, administer, instruct, train and maintain and repair supplies to assist the National Guard. As a condition of their employment, however, they must maintain membership in the National Guard and wear a uniform while working. Except when participating in National Guard part-time drills, training or active-duty deployment, these employees work full time in a civilian capacity and receive federal civil service pay. The dispute in this case centers on whether the Federal Labor Relations Authority ("FLRA") has jurisdiction over an unfair labor practices dispute between the American Federation of Government Employees, Local 3970, ("Union"), which represents dual-status technicians and their employer, the Ohio Adjutant General, the Ohio Adjutant General's Department and the Ohio National Guard (collectively the "Guard").

In 1971 the Guard recognized the Union as the exclusive representative of the Guard's

dual-status technicians under the Federal Service Labor-Management Relations Statute ("FSLMRS.") The Union and the Guard operated under collective bargaining agreements until expiration of the last agreement in 2014. The parties then adopted a memorandum of understanding in March of 2016 whereby the Guard promised to abide by certain practices in the expired bargaining agreement. Later that year, however, the Guard reversed course and asserted that it was not bound by the FSLMRS or any practices in the former bargaining agreement. Ultimately the Guard also terminated Union dues deductions for its dual-status technicians.

The Union filed unfair labor practice charges with the FLRA, whose General Counsel investigated and issued complaints against the Guard alleging that it had refused to negotiate in good faith and that its termination of dues deductions interfered with the exercise of worker rights. The Guard (and its intervenors) argued to an Administrative Law Judge ("ALJ") that it was not a statutory "agency" and that dual-status technicians are not statutory "employees." The ALJ ruled that the FLRA had jurisdiction over the Guard, that the technicians had bargaining rights as statutory employees and that the Guard's repudiation of the bargaining agreement's practices violated the FSLMRS. It ordered the Guard to bargain with the Union in good faith and to reinstate the dues withholding. A divided panel of the FLRA adopted the ALJ's ruling. The Sixth Circuit denied the Guard's petition for review, holding that the Guard is an agency subject to the FSLMRS when it employs dual-status technicians, that the technicians are federal civil service employees with bargaining rights under the FSLMRS and that the parties' dispute fell within the jurisdiction of the FLRA. The Supreme Court granted certiorari "to consider whether the FLRA had jurisdiction over this labor dispute under the [FSLMRS]".

The Court held 7 to 2 that the FLRA had jurisdiction over this labor dispute because the Guard acts as a federal agency for purposes of the FSLMRS when it hires and supervises dual-status technicians serving in their civilian role. Justice Thomas' majority opinion first finds that when the Guard employs dual-status technicians (who are technically employed by the Army or Air Force, components of the Department of Defense), it is exercising the authority of a federal agency. Furthermore, Congress has required the Secretary of the Army to designate state adjutant generals to employ dual-status technicians, and a 1968 order of the Secretary of the Army did so. Under that former regime, dual-status technicians were employees of the designee of the Secretary of the Army. Finally, Justice Thomas, referring to a Mississippi National Guard case, notes that the precursor to the FSLMRS (an Executive Order) also treated dual-status technicians as federal employees when they were employed and supervised by state adjutant generals acting as agents of the Army or Air Force. Accordingly, the Court presumes that the FSLMRS maintained the same coverage that existed and was approved under the prior regime. In short, the upshot is that the Guard functions as an agency under the FLSMRS when it employs dual-status technicians, and the FLRA thus has

jurisdiction over the labor dispute at issue.

Justice Alito, joined by Justice Gorsuch, dissented because they argued the FLRA lacks jurisdiction over the Guard because the Court holds only that the Guard "acts as an agency" and exercises the authority of an agency, but does not actually determine that it and the adjutant generals are in fact agencies.

8. ***Health and Hosp. Corp., etc. v. Talevski*, 143 S. Ct. 1444 (2023)**

The Federal Nursing Home Reform Act ("FNHRA") creates private right of enforcement under 42 U.S.C. §1983.

This care and discharge dispute under the Federal Nursing Home reform Act between a county-owned nursing home and one of its residents with dementia has no relationship to employment law, but the holding is based partly on rejection of an argument that statutes enacted pursuant to the Constitution's Spending Clause cannot be enforced by means of a private action under 42 U.S.C. §1983. To the extent, therefore, that Congress enacts any employment-related statutes pursuant to the Spending Clause, this decision assures that rights under those statutes may be enforced by a private action under Section 1983.

Justice Jackson's opinion for the majority concludes that the nursing home legislation here unambiguously confers individual rights on nursing home residents without any intent to preclude their private enforcement under section 1983. Justice Gorsuch filed a concurring statement agreeing with the Court's disposition, but noting the constitutionality of Spending Clause legislation's application to the States is an issue "lurking" here to be resolved "another day." Justice Barrett's concurring opinion, joined by the Chief Justice, restates the majority's reasoning in different terms and expresses the view that courts "must tread carefully before concluding that Spending Clause statutes may be enforced through section 1983." Justice Thomas dissented declaring that Spending Clause legislation does not "secure" rights by "law" within the meaning of section 1983. Justice Alito dissented concluding that the remedial scheme of the nursing home legislation here forecloses enforcement under section 1983. The importance of this case in the employment realm relates to Spending Clause statutes such as Title IX of the Education Amendments of 1972 prohibiting sex discrimination in schools and the Rehabilitation Act of 1973 prohibiting disability discrimination. A majority of the Court supports the notion that legislation based on the Constitution's Spending Clause can be enforced by a private right of action under 42 U.S.C. §1983, if the statute unambiguously confers private rights without any indication of precluding that enforcement.

Grants of Certiorari for Oct. 2023 Term

1. Muldrow v. City of St. Louis, Mo. No. 22-193, 143 S.Ct. 2686 (2023) (Argument 12-3-23)

> **Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage**.

Muldrow, a police department sergeant sued her employer alleging sex discrimination when she was involuntarily transferred from the Intelligence Division to a patrol position because her supervisor wanted to hire a man for her job. The Eighth Circuit ruled against Muldrow because her transfer had not resulted in any significant employment disadvantage to her. The Supreme Court's grant of certiorari was limited by the Court to the Title VII question stated above.

In a brief filed by the EEOC, urging the justices to grant review, the Solicitor General argued that the rulings by the 8th Circuit had "no foundation in Title VII's text, structure, or purpose."

This issue has ramifications for at least two pending on appeal Western District of Pennsylvania decisions

> *See:* ***Dennison v. Indiana Univ of Pa.***, 2022 U.S. Dist. Lexis 141164; 2022 WL 3213657 (W.D. Pa. Aug. 9, 2022), *on appeal submitted* Sept. 12, 2023).
>
> *Klingensmith v. Armstrong School Dist.*, 2022 U.S. Dist. Lexis 231395, 2022 WL 1790246 (W.D. Pa. Dec. 23, 2022)

In *Dennison v. Indiana Univ. of PA*, 2023 WL 1253638 (3d Cir. 2023), Plaintiff appealed an adverse ruling from the Western District of Pennsylvania. Dennison alleged her job transfer, which she characterized as a demotion, unlawfully discriminated against her based on her age in violation of the ADEA. 2023 WL 1253638 at *3. The EEOC filed an amicus brief citing *Chambers v. District of Columbia*, 35 F.4th 870 (D.C. Cir. 2022) arguing that the straightforward meaning of Title VII prohibits all discriminatory transfers, even those that do not result in changes in benefits, salary, or worsened working conditions. *Id.* at *9. The matter is pending in the Third Circuit. Case was submitted on September 12, 2023.

In *Chambers v. District of Columbia*, 35 F.4th 870 (D.C. Cir. 2022), the court overruled its own decision in *Brown v. Brody,* 199 F.3d 446 (D.C. 1999), holding that an employer who transfers an employee or denies an employee's transfer request because of the employee's protected status, violates Title VII by discriminating against the employee with respect to terms, conditions, or privileges of employment, even if the transfer does not result in a change of compensation. *Chambers*, 35 F.4th at 870. The court determined the transfer of an employee to a new role, unit or location is included under section 703(a)(1) of Title VII. *See Chambers*, 35 F.4th at 874.

But compare those two cases with the factual situation in *Klingensmith v. Armstrong School Dist*., 2022 U.S. Dist. Lexis 231395, 2022 WL 17904246 (W.D. Pa. Dec. 23, 2022), where Judge

Ranjan stated the issue not as a job location, but as Klingensmith's preference, which the court said was not a term or condition of employment. Therefore the court granted defendant's Rule 12(b)(6) motion to dismiss.

In *Klingensmith*, the court set forth the underlying facts:

> Plaintiff Michelle Klingensmith worked as a substitute teacher for the Armstrong School District through the company Source4Teachers. In April 2017, she took on shifts at Shannock Valley Elementary School, the same school attended by her two daughters, both of whom have physical and developmental disabilities. But after her first day teaching there, she learned that her shifts at the school were canceled, and she would not be permitted to teach at Shannock. The reason: the school determined that her presence in the same building as her children would be "detrimental" to their learning and development. For the remainder of the 2016-17 school-year and the 2017-18 school-year, Ms. Klingensmith worked substitute teaching shifts at other schools, including West Shamokin Junior High. But when she enrolled her now-older daughters at West Shamokin, her shifts at that school were canceled. She learned from Source4Teachers that the reason for the canceled shifts was a determination by the District that her presence at the same school as her daughters created a "conflict of interest," and that she would not be permitted to teach there until her children graduated. Ms. Klingensmith did not teach at all from September 2018 to November 2018, when the District permitted her to resume substitute teaching at West Shamokin.

Plaintiff filed an action *pro se* for violations of the ADA and Pennsylvania Human Relations Act. Aside from various procedural deficiencies (including failure to exhaust administrative remedies), the court found Kligensmith had not established a *prima facie* case because she could not show she suffered an adverse employment action.

The court said that Kligensmith's argument "is tantamount to an undesirable transfer or relocation" which is insufficient to show adverse employment action. Plaintiff alleged she would suffer harm by not being able to work at the particular school, including emotional harm, economic harm, reputational harm and attorneys' fees. But the court said those describe damages rather than adverse action, and "there is a difference between an adverse action taken by an employer, constituting a change in employment status, and damages that flow from that action."

Plaintiff also argued that the relocation or opportunity to work at the particular schools was inferior by virtue of the fact she would no longer have the opportunity to work in the same school

as her children. The court stated, "The benefit to Ms. Klingensmith of working at the same school as her children is not a term or condition of her employment, or a benefit afforded by virtue of her position." The court also noted, "Thus, while the opportunity to work at the same school as her children may have been preferred or desirable, the loss of this preference was just that—a lost preference. Moreover, it wasn't a preference that was a term of her employment and that was taken from her by her employer."

2. Murray v. UBS Securities, LLC. No 22-660, 143 S.Ct. 2023 (2023)

Under the burden-shifting framework that governs Sarbanes-Oxley Act of 2002, cases, must a whistleblower prove his employer acted with a "retaliatory intent" as part of his case in chief, or is the lack of "retaliatory intent" part of the affirmative defense on which the employer bears the burden of proof?

Oral Argument Oct. 10, 2023

3. Lindke v. Freed, 143 S.Ct. 1780 (2023)

Oral Argument, Oct. 31, 2023

Whether a public official's social media activity can constitute state action only if the official used the account to perform a governmental duty or under the authority of his or her office.

4. Acheson Hotels, LLC v. Laufer No. 22-429, 143 S.Ct. 1053 (2023)

Does a self-appointed Americans with Disabilities Act "tester" have Article III standing to challenge a place of public accommodation's failure to provide disability accessibility information on its website, even if she lacks any intention of visiting that place. In light of what has been written about the gay couple who allegedly wanted to purchase one of Lorie Smith's wedding website designs in the *303 Creative LLC* case, the question of tester standing may take on particular significance regarding the enduring quality of the Court's decision *303 Creative LLC* case.

Oral Argument Oct. 4, 2023

Tea Leaves

Kincaid v. Williams, 143 S.Ct. 2414 (June 30, 2023) (dissent from denial of cert)

Denied cert on whether ADA covers gender dysphoria in a dispute involving transgender woman).

> (Justice Alito, joined by Thomas, dissented from Court's denial of certiorari on question of whether gender dysphora (i.e. psychological distress caused by conflict between person's gender identity and their

assigned sex at birth) is covered by definition of disability in ADA, 42 U.S.C. §12211(b).

> *See* ***Guthrie v. Noel***, 2023 U.S. Dist. LEXIS 161325 (M.D. Pa. Sept. 11, 2023)(gender dysphora is not condition excluded from statutory definition of disability).

City of Ocala, Fla v. Rojas, 143 S.Ct. 764 (2023)

Court denied cert on question of whether atheists who attend a prayer vigil organized by a municipal police department had standing to contest religious speech they found offensive

Justices Gorsuch and Thomas expressed strong disagreement with notion that an offended observer has standing to bring an Establishment Clause claim. *Interesting contrast to religious objection to hiring gays, etc.*

Third Circuit Cases

1. ***O'Brien v. Middle East Forum*, 57 F.4th 110 (3d Cir, 2023)**

The evidence could support a finding that the director was the employer's proxy or alter ego, and the district court erred in overruling the employee's objection to instructing the jury on the availability of an affirmative defense under Faragher/Ellerth; [2]-The district court erred in failing to instruct the jury that the Faragher/Ellerth defense would be unavailable if it found that the director was a proxy for the employer; -The failure to instruct on proxy liability was harmless because the jury did not find that the employee had been sexually harassed by the director, and the affirmative defense under Faragher/Ellerth was irrelevant.

2. ***Nitkin v. Main Line Health*, 67 F.4th 565 (3d Cir. 2023)**

Analysis of severe or pervasive conduct sufficient to support hostile environment claim.

In *Nitkin*, the Court held the employee pointed to no concrete evidence to support her statement that her Lead Doctor made harassing comments on twenty-one occasions and the District Court properly excluded the employee's general, unsubstantiated allegations that the alleged conduct occurred regularly or all the time; Although the Lead Doctor's remarks were obnoxious, unprofessional, and inappropriate, he never threatened the employee, touched her, or propositioned her for a date or sex; The identified incidents did not rise to a level that could fairly be called severe or pervasive and thus did not alter the conditions of the employee's employment and create an abusive working environment.

The facts included the following: During meetings the lead doctor would stray from work-related topics and digress into sexually inappropriate territory. While the Plaintiff could not describe every sexual comment the Lead Doctor made during those group meetings, "because there were so many," she did recount five specific examples that occurred. First, Nitkin testified that, during a meeting after the holidays, the Lead Doctor mentioned that his wife, who also worked for MLH, had gifted him a candle, which he said was his "favorite, because it really sets the scene for sex." He went on to say, "I believe she gave it to me to insinuate that we were going to have sex. And that's the best gift." Second, she stated the Lead Doctor claimed women can get "anything they want from their husbands or any man, because they can just withhold sex," and he further said that his wife did so. Third, Nitkin testified the Lead Doctor would complain about his prostatitis, which he claimed "was due to having sex with loose women," and that "his wife ... was a loose woman, and that he had sex with loose women," Fourth, she testified that, during a meeting where a coworker disclosed trauma that she experienced as a young girl, the Lead Doctor told a story about how he "had a date with a woman, and she took all her clothes off and wanted to act like a tiger" but then later stated that the incident occurred "while he was baby-sitting" a young girl. The fifth event Nitkin recounted occurred when the Lead Doctor said that a hospital visitor had "big fake tits," and that

"women who have big tits either show them off or hide them." Nitkin also testified about two incidents in which the Lead Doctor made her feel uncomfortable in private. Around July 2018, in the early morning, he had entered her office "look[ing] terrible." When Nitkin asked him if he was okay, he responded "that he was up all night the night before struggling with his sex addiction ... and masturbation addiction, and that he was watching pornography all night." Nitkin then, out of fear for her personal safety, locked herself in her office bathroom for several minutes until other coworkers arrived. On a separate occasion, the Lead Doctor told her that a male patient "would like to be alone with her patient would probably really like that." Nitkin interpreted this comment as the Lead Doctor "talking about a patient who basically wants me alone because [the Lead Doctor's] thinking about having sex with me." Nitkin admitted, however, that the Lead Doctor never propositioned her for a date or stated that he wanted to have sexual relations with her. While the Court explicitly noted that it was not suggesting that touching, threats, propositions of sex, or requests for dates, are necessary to demonstrate a hostile work environment; and that other verbal comments can suffice where they are sufficiently severe or pervasive, and that a fact finder could look to conduct directed at individuals other than the plaintiff in determining whether a hostile work environment exists, held that the above conduct was not sufficient to create a factual issue concerning the existence of a sexually hostile work environment.

3. *Kairys v. S. Pines Trucking, Inc.*, 75 F.4th 153 (3d Cir. 2023)

Facts sufficient to show pretext; liability under Section 510 of ERISA. Collateral Estoppel not created by advisory jury findings

District court did not err in finding pretext as to an employee's 29 U.S.C.S. § 1140 claim because the CEO considered no documents and consulted no one before firing the employee, the employee was high-performing, and the company borrowed a sister company employee to perform duties that overlapped with the employee's; The district court did not err by finding the employee's past and anticipated future use of his ERISA benefits motivated the company's termination decision because the many highlights on the company's healthcare invoices corresponded to the employee's surgery, and the proximity between the end of the benefits year and the employee's termination was probative of the company's discriminatory intent.

4. ***Fenico v. City of Philadelphia*, 70 F.4th 151 (3d Cir. 2023)**.

First amendment retaliation

Where the City of Philadelphia took disciplinary action against twelve police officers for using Facebook to openly denigrate minority groups and glorify the use of violence, the district court erred by dismissing the officers' First Amendment retaliation claim because more tailored factual development and analysis was needed to resolve public concerns and the potential disruption posed

by these statements; Because no concrete support for the City's actions had been properly put forth, the district court erred in resolving this dispute in the City's favor at the motion to dismiss stage.

5. *Associated Builders & Contrs. Western Pa. v. CCAC*, 81 F.4th 279 (3d Cir. Aug. 29, 2023)

Standing

A construction industry group argued that a project labor agreement with the Community College of Allegheny County was unlawful because it violated the First and Fourteenth Amendments, and the NLRA. The Third Circuit disagreed because the construction industry group admitted it did not experience harm from the project labor agreement. The Court left open the door for the construction industry group to sue in the future if it experienced harm.

6. *Greenberg v. Lehocky*, 81 F.4th 376 (3d Cir. Aug. 29, 2023)

Standing to challenge Pa. R. Prof, Conduct 8.4(g).

An attorney who gives continuing legal education presentations about First Amendment protections for offensive speech lacked standing to challenge Pa. R. Prof. Conduct 8.4(g), because the Rule did not generally prohibit him from quoting offensive words or expressing controversial ideas; nor would he be disciplined for his planned speech. He lacked standing to maintain his pre-enforcement challenge of Rule 8.4(g). He failed to establish an imminent future injury because his planned course of conduct was not arguably proscribed by Rule 8.4(g) and he faced no credible threat of prosecution for engaging in such conduct. To the extent he asserted standing based on an ongoing chill to his speech, he could not show this chill was objectively reasonable or fairly traceable to the challenged Rule.

***7.* Clemens v ExecuPharm Inc., 48 F.4th 146 (3d Cir. 2022)**

Clemens had standing to assert her contract, tort, and secondary contract claims arising from her employer's data breach. . For all claims, she had alleged a future injury—the risk of identity theft or fraud—that was sufficiently imminent. The breach was conducted by a known hacking group, which intentionally stole the information, held it for ransom, and published it to the Dark Web, thereby making it accessible to criminals worldwide. The nature of the information—a combination of personal and financial data—was the type that could be used to perpetrate identity theft or fraud. Given that intangible harms like the publication of personal information can qualify as concrete, and because she cannot be forced to wait until she has sustained the threatened harm before she can sue, the risk of identity theft or fraud constituted an injury-in-fact necessary for U.S. Const. art. III standing.

8. *Higgins v. Bayada Home Health Care Inc.*, 62 F.4th 755 (3d Cir. 2023).

PTO is Fringe Benefit, Not Salary or Wage under FLSA

In Fair Labor Standards and Pa. Minimum Wage case, the employee argued that due to her employer deducting from her PTO balance, she was not paid on a salary basis and was therefore non-exempt under the FLSA. The Third Circuit disagreed and held under the FLSA, a PTO is a fringe benefit that is not a part of an exempt employee's salary. In granting summary judgment for Bayada, the District Court did not separately consider Higgins's PMWA claim because it determined that she had not disputed Bayada's assertion that the PMWA's protections were coextensive with those of the FLSA. Higgins did reference her PMWA claim in the proceedings below, but only in a lone footnote in her brief in opposition to Bayada's motion for summary judgment. In that footnote, Higgins asserted that Pennsylvania law provides broader protection than the FLSA because it defines wages to include fringe benefits. The footnote also cited a 1985 Superior Court of Pennsylvania case, Ressler v. Jones Motor Co., 337 Pa. Super. 602, 487 A.2d 424, 425 (Pa. Super. Ct. 1985), in support of the proposition that an employer must compensate a recently separated employee for earned but unused PTO. Regardless, the District Court was not required to consider Higgins's Pennsylvania law claim because "arguments raised in passing (such as, in a footnote), but not squarely argued, are considered forfeited."

9. *Tyger v. Precision Drilling Corp.*, 78 F.4th 587 (3d Cir. 2023)

FLSA Compensable Activities for donning and doffing

Not all work clothes are alike. Some are simply aesthetic, reflecting the worker's own preference or an employer's fashion choice. But when the clothing is crucial to the work they do, workers ordinarily have a right to be paid for the time they spend changing. The Third Circuit held an employer should consider multiple factors when determining whether changing into and out of protective gear is compensable. It is not enough for an employer to assess risks when determining whether changing into and out of protective gear is compensable. Factors to consider include the location where donning and doffing occurs, pertinent regulations; and the type of gear at issue.

10. **Crozer Chester Med. Ctr. v. NLRB, 2023 WL 3018280 (3d Cir. April 23, 2023)**

The Union requested information concerning the sale of the employer's assets because they believed this was relevant to bargaining. The employer, Crozer, disagreed. The NLRB found that much of the information requested by the Union was presumptively relevant to bargaining. The Third Circuit affirmed the NLRB's findings.

11. *Doe v. Scalia*, 58 F.4th 708 (3d Cir. 2023)

Meatpacking plant employees requested OSHA conduct an inspection of the plant due to their belief that their employer had not done enough to protect employees from COVID-19 exposure. OSHA conducted an inspection and concluded the conditions at the plant did not constitute an imminent workplace danger. Nevertheless, the employees sued their employer in federal court claiming that conditions at the plant constituted an imminent workplace danger. The Third Circuit held that once OSHA has concluded that workplace conditions do not constitute an imminent workplace danger an individual cannot maintain a private cause of action.

West. Dist. Of Pa. (And significant Third Circuit district court cases)

1. *Doe v. Pittsburgh Reg'l Transit*, 2023 U.S. Dist. LEXIS 132278 W.D. Pa. July 31, 2023)

Failure to accommodate religious belief is not itself an adverse employment action, if employee complies with employer's work requirement

Plaintiffs brought religious discrimination case under Title VII alleging that PRT "failed to provide Plaintiffs with religious exemptions and reasonable accommodations in the form of exempting them from COVID-19 vaccination requirements. Interpreting *Groff v. DeJoy*, 143 S.Ct. 2279 (2023), the Court denied Defendant's motion to dismiss. However a sub-class of plaintiffs also argued that although objecting to the vaccine on sincerely held religious grounds, they complied with employer's orders to avoid discharge. Thus, they argued that the employer violated Title VII by failing to accommodate their religious beliefs, and put them to the cruel choice of deciding between their job and their God. The Court agreed, and held that a plaintiff who complied with the employer's vaccine requirement had no claim because he or she suffered no adverse employment consequence as a result of PRT's alleged discrimination.

The Court rejected the Plaintiffs argument that a failure to accommodate is itself not an adverse employment action. The Plaintiffs also argued that forcing them to receive the vaccine caused the mental anguish of being coerced into violating their religious beliefs and incurred an "increased risk for death, blood clots, heart attacks, strokes, myocarditis and other severe injuries or illnesses known and unknown that are now being attributed to the vaccine." The Court held that while such injuries may exist, they are not related to Plaintiffs' "compensation, terms, conditions, or privileges of employment[.]" 42 U.S.C. § 2000e-2(a)(1). Thus, the vaccinated Plaintiffs have not established that they suffered an "adverse employment action." *Id.*, *but see Storey v. Burns Int'l Sec. Servs*, 390 F.3d 760 (3d Cir. 2004) (Employer's failure to reasonably accommodate employee's sincerely held religious belief that conflicts with a job requirement can also amount to an adverse employment action unless the employer can demonstrate that such an accommodation would result in "undue hardship."); *Shelton v. University of Med. & Dentistry*, 223 F.3d 220, 224 (3d Cir. 2000)(same) *see also* 42 U.S.C. § 2000e(j).

3. *Laymon v. Honeywell Int'l Inc*., 645 F. Supp.3d 443 (W.D. Pa. Dec. 9, 2022)

Evidence of pretext must be offered in response to summary judgment attack. If Plaintiff suspected his purported replacement was in fact not performing the same duties that he was, or that there was something improper about the process of selecting his purported replacement, he could have sought information regarding those claims in discovery, put relevant evidence into the record, and incorporated it into his response in opposition to the summary judgment Motion. In other words, Plaintiff could have used actual factual information gained through discovery to argue that, although he was replaced by a male who is his senior and the rough contemporary of the decision-makers that he is accusing of age discrimination, nonetheless the circumstances somehow support the inference

that he was treated differently than he otherwise would have been due to his age. Although, at the summary judgment stage, the court resolves doubts as to the existence of a genuine issue of fact in the non-moving party's favor, Plaintiff cannot survive a summary judgment motion, as he attempts to do here, by "relying merely upon bare assertions, conclusory allegations, or suspicions," Similarly, as to Plaintiff's Title VII claim, he fails to carry his burden to show that members of the opposite sex were treated more favorably—either in selecting his replacement or in any other capacity. For instance, his duties were assumed by another, male employee who is his senior. Plaintiff offers no argument beyond broad, conclusory statements that he was targeted due to his gender. Even if Plaintiff had made out a prima facie case of age discrimination, the Defendant has provided a legitimate, nondiscriminatory reason for Plaintiff's discharge: Plaintiff's performance. Plaintiff argues that this explanation is pretextual, as evidenced by the following facts: he had been working with Feuell and Niehaus for less than six weeks before he was placed on a PIP, "in that time" he did not receive a performance evaluation and was not provided with a job description or list of performance metrics despite having requested them, which is itself insufficient.

4. *Tatel v. Mt. Lebanon Sch. Dist.*, 637 F. Supp. 3d 295 (W.D. Pa., May 31, 2023)

Transgender rights)

Students' parents' substantive and procedural due process, Free Exercise and equal protection claims would proceed against the school district, the teacher, the principal, the superintendent and assistant superintendent of the district, and the president of school board as the complaint presented plausible claims that the parents had fundamental constitutional rights that were violated by a public school teacher, over the parents' objections and without notice and opt out rights, when the teacher promoted her own agenda to their first grade children about gender dysphoria and transgender transitioning; The parents' right to familial privacy claim would proceed against the district and the teacher as the complaint plausibly alleged an agenda that the parents could be wrong about the children's gender and an intrusion into the values being conveyed within the family.

***5. Guthrie v. Noel*, 2023 U.S. Dist. LEXIS 161325 (M.D. Pa. Sept. 11, 2023)**

Gender dysphora is not condition excluded from statutory definition of disability under Americans with Disabilities Act.

6. *Doe v. Pittsburgh Reg'l Transit*, W.D. Pa., No. 2:22-cv-01736

Plaintiff alleged that the Pittsburgh Regional Transit refused to grant exemptions to a mandatory covid-19 vaccination policy. The court dismissed plaintiff's claims of fraudulent inducement and religion-based disparate treatment. However, plaintiff's remaining claims such discrimination on the basis of disability and religion were allowed to proceed.

7. *Ference v. Roman Catholic Diocese of Greensburg*, 2023 U.S. Dist. Lexis 183161 (W.D. Pa. Oct. 11, 2023).

***Ference v. Roman Catholic Diocese of Greensburg*, 2023 U.S. Dist. Lexis 8416 (W.D. Pa. Jan. 18, 2023)**

Lutheran teacher hired by Aquinas Academy was prohibited from providing religious education to his students. His job responsibilities were entirely secular, with all matters of religious education and rituals for sixth grade students handled by Acquinas' other sixth grade teacher. School learned teacher was gay when he completed new employee health insurance forms. Superintendent of Diocese Catholic Schools fired Ference because he was in a same-sex relationship, which the Diocese learned from the insurance forms.

Defendant moved to dismiss twice, first arguing that Title VII textual exemption for religious employment decisions, the "church autonomy doctrine" under the First Amendment, (3) the ministerial exemption to Title VII and (4) the bar against burdening the free exercise of religion. After these were rejected, the Defendant, relying on *303 Creative v. LLC v. Elenis*, 143 S.Ct. 2298 (2023), argued that by retaining a gay man in a same-sex relationship, it was forced to speak in derogation of its First Amendment speech rights. Court, again denied motion to dismiss in light of undeveloped factual record.

IV. Executive Orders and Agency Action

NLRB

NLRB DISALLOWS CONFIDENTIALITY And Non-Disparagement Provisions in Settlement Agreements. In February 2023 the NLRB issued its decision in *McLaren Macomb and Local 40 RN Staff Council,* 372 NLRB No. 58 (N.L.R.B.), 2023 WL 2158775 (Case 07-CA-263041, Feb. 21, 2023).

The primary issue presented in *McLaren Macomb* was whether the employer violated the employees' Section 7 and 8(a) rights of the National Labor Relations Act by offering a severance agreement to eleven employees containing broad language prohibiting disclosure of the terms of the agreement and preventing the employees' making statements that could disparage or harm the image of the employer. Because of these broad prohibitions, the severance agreements at issue were found to be unlawful by the NLRB.

The NLRB's decision in *McLaren Macomb* reversed two Trump era decisions permitting use of confidentiality and non-disparagement clauses jeopardizing any agreements with such provisions with broad language or application.

NATIONWIDE BAN ON NON-COMPETITION PROVISIONS

On January 5, 2023, the Federal Trade Commission proposed a rule that would ban essentially all noncompete agreements for all public and private employers of any size throughout the entire United States, including non-competes that are currently in force.

The notice of proposed rulemaking, which has gone out for public comment, would declare noncompete clauses to be an unfair method of competition. Employers would be required to rescind non-compete provisions in currently active contracts and notify the employees and former employees that they will not, or have stopped, enforcement of those non-competes.

On February 1, 2023, a bipartisan group of U.S. senators proposed the Workforce Mobility Act, proposed legislation that would also curtail the rights of employers to enforce noncompete agreements with most employees. If passed into law, like the FTC Rule, it would invalidate nearly every non-compete in the country, which narrow exceptions.

The exceptions of the both the FTC Rule and the proposed legislation would be owners or senior executives of businesses, although there would be restrictions on the breadth of the geographic and temporal scope of the non-compete.

The proposed legislation also gives the FTC and DOL authority to investigate violations and creates a four-year statute of limitations period, as well as providing employees with a private right of action which includes the recovery of attorneys' fees.

NLRB EXPANDS REMEDIES FOR UNFAIR LABOR PRACTICES

On December 13, 2022, the NLRB decided ***Thryv, Inc. and International Brotherhood of Electrical Workers, Local 1269***, **372 NLRB No. 22 (N.L.R.B.), 2022 WL 17974951 (20-CA-250250 and 20-CA-251105, Dec. 13, 2022)**. In *Thryv*, the NLRB by a 3-2 decision expanded the available remedies for union members bringing an unfair labor practice against employers. The ruling requires employers to compensate workers for "all direct or foreseeable" harm resulting from a violation of the National Labor Relations Act or other labor law violation.

Although the NLRB is limited to awarding remedies that make employees "whole," the NLRB will now order relief that compensates employees beyond, for example, back pay. The decision gives the example of providing compensation for medical expenses and credit card debt as possible damages a worker may recover, saying an employee could not be made whole without recovering those costs if they were the "direct or foreseeable" result of a ULP.

The decision did not call these types of "make whole" damages "consequential damages" and in fact does not provide any name, saying the phrase "consequential damages" refers to "a specific type of legal damages awarded in other areas of the law" and does not necessarily describe the remedies at issue in the decision. The new remedies will specifically not include "pain and suffering" or emotional distress damages.

***Noah's Ark Noah's Ark Processors, LLC,* 372 NLRB No. 80 (2023)**

In *Noah's Ark*, the NLRB introduced a non-exhaustive list of remedies for cases where an employer egregiously or repeatedly commits unfair labor practices. According to the NLRB, remedies may include:

> ✓Adding an Explanation of Rights to the remedial order that informs employees of their rights in a more comprehensive manner;
>
> ✓Requiring a reading and distribution of the Notice and any Explanation of Rights to employees, including potentially requiring supervisors or particular officials involved in the violations to participate in or be present for the reading and/or allowing presence of a union agent during the reading;
>
> ✓Mailing the Notice and any Explanation of Rights to the employees' homes;
>
> ✓Requiring a person who bears significant responsibility in the Respondent's organization to sign the Notice;

✓Publication of the Notice in local publications of broad circulation and local appeal;

✓Requiring that the Notice/Explanation be posted for an extended period of time;

✓Visitation requirement, permitting representatives of the Board to inspect the Respondent's bulletin boards and records to determine and secure compliance with the Board's order;

✓Reimbursement of Union's bargaining expenses, including making whole any employees who lost wages by attending bargaining sessions.

***Lion Elastomers LLC*, 372 NLRB No. 83 (2023)**

NLRB held that before issuing discipline, employers must consider two different categories of misconduct. The first category is employee misconduct that is done during activities related to their working conditions, hours, or wages. The second category of employee misconduct is misconduct done during ordinary work. Having these two different categories of employee misconduct will impact whether employer discipline violates the NLRA.

Atlanta Opera Inc. 372 NLRB No. 95 (2023)

NLRB changed the standard used to determine if someone is an employee or independent contractor by reversing the *SuperShuttle* standard and reinstating the *FedEx II* standard. By changing the standard, the NLRB held that a group of hairstylists, makeup artists, and wig artists were employees and not independent contractors, which meant they were covered by the NLRA.

ERISA RULES CHANGES TO ALLOW ESG INVESTMENTS IN RETIREMENT PLANS

Effective January 30, 2023, the Department of Labor adopted a final rule under ERISA that changes prior guidance on using environmental, social and governance factors (ESG) investments in retirement plans. The new rule removes the short-lived (and controversial) prohibition on including a fund that has any non-pecuniary factor among its investment objectives. It also acknowledges the potential relevance of ESG factors in risk-return analysis of investments. This move restores authority for plan investment decisions to fiduciaries and their investment advisors, subject to the fiduciary duties of prudence and loyalty**.**

LACTATION ROOMS, THE PWFA AND THE PUMP ACT

On December 22, 2022, Congress passed the new Pregnant Workers Fairness Act ("PWFA"); and expanded rights for nursing mothers under the Providing Urgent Maternal Protections for Nursing Mothers Act ("the PUMP Act").

PWFA: Like the ADA, the PWFA applies to employers with 15 or more employees, and requires the employer to provide reasonable accommodations to known limitations related to pregnancy, childbirth, or related conditions. Also like the ADA, employers must (1) engage in the interactive process regarding the accommodation and (2) actually provide a reasonable accommodation unless to do so would cause an undue hardship.

The PUMP Act: Since 2010, *non-exempt* nursing mothers had protections under the FLSA. The PUMP Act now expands those protections to all employees, exempt and non-exempt employees alike.

With only a few exceptions (crew members of air carriers, train crews of rail carriers and motorcoach services operators who are involved in the movement of a motorcoach), the PUMP Act applies to all employers, except that if an employer has less than 50, the employer has an opportunity to demonstrate undue hardship.

Under the Fair Labor Standards Act ("FLSA"), when an employee is using break time at work to express breast milk, they either must be completely relieved from duty; or must be paid for the break time.

Note the following requirements and protections for lactating mothers:

- Employers do not need to (but can) create a permanent, dedicated space for use by nursing mother employees. A space temporarily created or converted is sufficient provided the space is shielded from view, and free from any intrusion from co-workers and the public.

- The location provided must be functional as a space for expressing breast milk.

- If the space is not dedicated to the nursing mothers' use, it must be available when needed.

- The statute specifically states that the space provided for employees to express breast milk cannot be a bathroom. It doesn't matter if the only space available at a work site is a bathroom.

- ➢ The statute requires employers to provide a space for a nursing employee "each time such employee has need to express the milk."

- ➢ If any employee does not ask, there is no obligation for the employer to provide a space.

- ➢ In some states, there are requirements to provide refrigeration, running water, electricity, countertop

Beginning April 28, 2023, remedies for violations include:

- ➢ Employment
- ➢ Reinstatement
- ➢ Promotion
- ➢ Payment of wages lost
- ➢ Additional equal amount as liquidated damages
- ➢ Compensatory damages
- ➢ Actual damages
- ➢ Punitive damages

B. NO FORCED ARBITRATION OF SEXUAL HARASSMENT CLAIMS

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, 9 U.S.C. §401-02, an amendment to the Federal Arbitration Act, renders unenforceable arbitration agreements compelling arbitration of sexual harassment claims.

The Southern District of New York denied a defendant's motion to compel arbitration when a plaintiff brought multiple claims, only one of which involved sexual harassment. The court was persuaded by the statutory language which disallows compelled arbitration in sexual harassment "cases," not "claims." Since the "case" included plausible sexual harassment claims (as well as other discrimination claims), the court held that the entire case would not be subject to arbitration. *Johnson v. Everyrealm, Inc.*, 2023 U.S. Dist. LEXIS 31242 (S.D. N.Y, Feb. 24, 2023).

Practice tip: A plausible sexual harassment allegation may avoid compelled arbitration. Employee's counsel must plead the sexual harassment claim in detail to avoid a motion to dismiss under *Iqbal* and *Twombly* (and, of course, the claim must be brought in good faith to avoid Rule 11 sanctions).

FIRST DOJ CRIMINAL PROSECUTION OF NO-POACH AGREEMENT[1]

On January 23, 2023, in *United States v. Hee*, Case No. 21-cr-00098 (D. Nev. Jan. 23, 2023), the U.S. Department of Justice completed its first ever successful criminal Sherman Act anti-trust case with the filing of a Pretrial Diversion Agreement in the District of Nevada.

Ryan Hee was the regional manager for VCA OC LLC. After initial proceedings, VDA pled guilty to forming an agreement with a competitor in 2016 and 2017 not to raise the wages of nurses working in the Clark County School District. The two companies also agreed not to hire nurses away from one another.

[1] On a related topic, the Pennsylvania Supreme Court in *Pittsburgh Logistics Sys., Inc. v. Beemac Trucking, LLC*, 249 A.3d 918 (Pa. 2021) affirmed a Superior Court ruling holding that these no-hire clauses are unenforceable under Pennsylvania law.

Pennsylvania

***Javitz v. Luzerne County*, 293 A.3d 570 (Pa. May 5, 2023)**

Pa. Whistleblower Law plaintiff need only show a causal connection by circumstantial evidence.

In Javitz, the Supreme Court of Pennsylvania held that a plaintiff in a whistleblower claim need only show causation by circumstantial evidence, for example, the fact that she received positive performance evaluations prior to her report and then negative changes in her treatment is itself sufficient to show causation.

***Franczyk v. The Home Depot Inc. et al.,* 292 A.3d 852 (Pa. 2023)**

Workers compensation immunity if claims intertwined with injury sustained and received compensation benefits for.

Plaintiff was at work when she was bitten by a customer's dog. Plaintiff informed her employer and her employer attempted to investigate the matter. After being injured, plaintiff applied for and received workers' compensation benefits. Plaintiff later sued her employer for not conducting a proper investigation which prevented her from filing a third-party suit against the dog owner. The Court held that the plaintiff's claims were prevented by the Pennsylvania Workers' Compensation Act because her claims were intertwined with the injury she sustained and received workers' compensation benefits for.

***Hicks v. Glob Data Consultants, LLC*., 288 A.3d 876 (Pa. Super. 2022)**

Commission payment and changes in commission plan for at will employee

Employer can change compensation formula of at-will employee for all prospective work and employee accepts this compensation change by continuing to work after notice.

***Marion v. Bryn Mawr Trust Co.*, 288 A.3d 76 (Pa. 2023).**

Aiding and abetting fraud is a cognizable claim under PA law; Required state of mind is actual knowledge of fraud

***Toppy v. Passage Bio, Inc.*, 285 A.3d 672 (Pa. Super. 2022).**

Settlement Agreement Enforceable Even Without All Terms Being Resolved.

Superior Court reversed trial court's granting of preliminary objections dismissing a claim for breach of settlement agreement. Issue revolved around refusal of defendant to transfer

150,000 shares of its common stock in violation of the Pennsylvania Wage Payment & Collection Law, 43 Pa. Cons. Stat.Ann. §§260.1-260.12.

In reversing the trial court's finding as to the WPCL claim, the Superior Court found the complaint established a meeting of the minds on all material terms of the settlement agreement and the 150,000 shares of common stock, despite an email saying the defendant agreed to pay 150,000 shares of common stock but with "two small tweaks" that regarded a company to be added to a non-compete, and a limit on the letter of reference**.**

In short, this was a dispute about whether the parties had a meeting of the minds to the extent a settlement could be enforced. The court held they had, and stated, "[i]f the parties have agreed on the essential terms, the contract is enforceable even though it is an informal memorandum requiring future approval or negotiations of incidental terms." *Id.*at 1155. Indeed, courts also will enforce informal agreements that are missing "material" terms so long as the parties agree on the essential terms. *See Field v. Golden Triangle Broad., Inc.*, 305 A.2d 689, 694 (Pa. 1973); *Bredt v. Bredt*, 326 A.2d 446, 449 (Pa. 1974); *Toppy*, 285 A.3d at 682.

Shevchik v. Allegheny Health Network, No. GD-17-012463 (C.P. Allegheny 2023)

WORKPLACE POLICIES: DEFENDANT FAILED TO FOLLOW ITS OWN POLICIES REGARDING TERMINATION WARNING

In *Shevchik*, the Court of Common Pleas for Allegheny County, a jury awarded plaintiff more than $1 million finding that defendant employer breached plaintiff's contract when it fired him in 2016. In September 2016, plaintiff was called into a meeting and abruptly terminated because he allegedly touched the thigh of a female physician in June of that year. But in the three months that passed from the incident, plaintiff was never notified there was a complaint. By not notifying plaintiff, the employer failed to adhere to its own policies and procedures contained in the Human Resources policies and the Medical Staff bylaws

Pennsylvania Statutes and Regulations

16 Pa. Code § 41 Protected Classes under the Pa. Human Relations Act, and Pa. Fair Education Opportunity Act.

This regulation clarifies the definition of "sex" to include:

(1) Pregnancy;

(2) Sex assigned at birth;

(3) Gender, including a person's gender identity or gender expression.

(4) Affectional or sexual orientation, including heterosexuality, homosexuality, bisexuality and asexuality;

(5) Differences of sex development, variations of sex characteristics or other intersex characteristics."

16 PA. CODE CH. 41.

The regulation also expanded the definition of race to include:

"(1) Ancestry, national origin or ethnic characteristics

(2) Interracial marriage or association

(3) Traits associated with race

(4) Hispanic ancestry, national origin or ethnic characteristics, including, but not limited to, persons of Mexican, Puerto Rican, Central or South American or other Spanish origin or culture

(5) Persons of any other national origin or ancestry as specified by a complainant in a complaint."

Finally, the regulation expanded the definition of religious creed to include:

"(a) The term "religious creed" as used in the PHRA and the PFEOA includes all aspects of religious observance, practice or belief;

(b) The term "religious creed" as used in the PHRA and the PFEOA includes the failure to provide a reasonable accommodation for a religious observance or practice;

(c) An employer, housing provider, public accommodation or person covered under the PHRA and the PFEOA may assert an undue hardship defense to the request for a reasonable accommodation."