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The Crystal Ball Says...?!?!? Trends and Challenges Ahead in Employment Litigation

THE CRYSTAL BALL SAYS...?!?!? TRENDS AND CHALLENGES AHEAD IN EMPLOYMENT LITIGATION

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Recent Case Law and Legal Guidance

I. Discrimination and Harassment

A. Title IX

Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020). The Court of Appeals for the Fourth Circuit held that school board policy requiring students to use bathrooms that correspond to their biological sex violated transgender male student's rights under Title IX and the Equal Protection Clause. This case was in the school and student context but may have general implications for public employers as well.

Charlton-Perkins v. Univ. of Cincinnati, No. 21-3840, 2022 WL 1819628 (6th Cir. June 3, 2022). A male research scientist filed claims against the University and two individuals for failure to hire in violation of Title IX and gender discrimination in violation of section 1983. The professor alleged that he applied for a professorship and despite the fact that he was the most qualified candidate out of sixty-two applicants, he was denied the position based on his gender, when the University preferred to hire two lower ranked female finalists and the University canceled the job search to prevent hiring him.

[1] With special thanks to Sophie Plott, Higher Education Legal Fellow, and Kristen Lewis, Assistant University Counsel, at The University of North Carolina at Chapel Hill.

The district court dismissed the complaint for lack of subject matter jurisdiction holding that the case was not ripe because the position was never filled and there was no adverse employment action. The Sixth Circuit reversed and held that the scientist had plausibly alleged an employment discrimination claim. Specifically, the Court held that once the scientist was denied the position based on his gender, he suffered a non-speculative injury and had standing to sue. The Court further held that the scientist plausibly pled an adverse employment action for a discrimination claim based on his assertion that the University discriminatorily cancelled the job search to avoid hiring him based on his gender, which eliminated the need to allege that someone outside his class filled the position.

Vengalattore v. Cornell Univ., No. 20-1514, 2022 WL 1788705 (2d Cir. June 2, 2022). A former male professor of Indian descent filed claims against the University and the Department of Education for gender and national origin discrimination in violation of Title IX and Title VI, along with Section 1983, APA, and state law defamation claims. The professor alleged that the University denied tenure, disciplined him, and harmed his academic appointments in response to a female student assistant's allegations of an inappropriate relationship. The district court granted judgment on the pleadings for the University, holding in relevant part that Title IX did not authorize a private right of action for employment discrimination. The Second Circuit vacated the dismissal of the Title IX claim, holding that Title IX did allow employees to pursue claims for intentional gender-based discrimination, in accord with five other federal appeals courts, and that the professor's allegations were sufficiently specific.

Doe v. Purdue Univ., No. 4:18-CV-89-JEM, 2022 WL 124645 (N.D. Ind. Jan. 13, 2022). Female students filed an eight-count complaint against the University and several administrators alleging they were wrongfully suspended for filing sexual assault complaints against male students. The students alleged that the University failed to inform them that any determination of negative credibility of their own statements during the investigation could result in sanctions, failed to conduct an independent investigation into the alleged false statements, and expelled them in retaliation for complaining about the assault. In denying summary judgment, the Court found that material disputes remained. Specifically, the Court held that alleged procedural flaws in the investigation, including failure to notify the female students that the panel was investigating their conduct and asking certain "objectively offensive" questions of possible victims could constitute deliberate indifference on the part of the University, and whether a sexual assault report could constitute protected activity to support a retaliation claim under Title IX.

Feminist Majority Foundation v. Hurley, 911 F.3d 674 (4th Cir. 2018). The Court of Appeals for the Fourth Circuit affirmed the dismissal of Feminist United's section 1983 claim and the Title IX retaliation claim against President Hurley and vacated and remanded the Title IX sex discrimination and the Title IX retaliation claims against the University. The Feminist United organization at the University of Mary Washington's (UMW) questioned a decision by the student senate that authorized male-only fraternities and were met with backlash to their opposition on the social media app, Yik Yak. UMW students began harassing Feminist United members via Yik Yak for opposing the creation of fraternities at UMW. On November 21, 2014, Paige McKinsey, an executive board member for Feminists United at UMW, notified UMW's Title IX coordinator, Dr. Leah Cox, of concerns about UMW's response to campus sexual assault complaints. McKinsey and fellow executive board member, Julia Michels, also reported the ongoing safety concerns to UMW President Hurley on behalf of themselves and other Feminist United members.

Following this, Hurley made a March 19 announcement that suspended the rugby team and resulted in more harassing and threatening statements on Yik Yak towards Feminist United members, such as threatening to "euthanize," "kill, and [g]rape" Feminist United members, and reporting McKinsey's locations with the goal of confronting her. By the end of March 2015, there were more than 700 harassing and threatening posts towards the organization's members. Feminist United notified UMW administrators, including President Hurley, Dr. Cox, and UMW Vice President Douglas Searcy, about their concerns, and Dr. Cox said the University "has no recourse" for online harassment. The offending Yik Yak posts continued throughout the summer 2015, and the University did not ask law enforcement agencies to investigate.

The district court below found that the sexual harassment of the Feminist United "took place in a context over which UMW had limited, if any, control" and that UMW was not deliberately indifferent because they "t[ook] some action, such as holding listening circles and sending a campus police officer to attend two student events." The district court found that "Title IX does not require [a university] to meet the particular remedial demands of its students" and that they did not have to expose themselves to potential First Amendment liability as one of their demands. The district court granted the defendant's motion to dismiss under 12(b)(6).

The plaintiffs appealed the district court's grant of the motion to dismiss for their Title IX sex discrimination and retaliation claims and their Equal Protection Clause claim under section 1983. The Fourth Circuit found there was substantial control and deliberate indifference sufficient to meet Title IX sex discrimination and retaliation claims because the harassment occurred within the vicinity of the campus, UMW's network was used to make posts on the app, and there were sufficient actions that UMW could have taken to redress the harassment. In assessing whether UMW, under the complaint, had sufficient control over the harassers and context of the harassment, the Court held that "we cannot conclude that UMW could turn a blind eye to the sexual harassment that pervaded and disrupted its campus solely because the offending conduct took place through cyberspace." While the Court acknowledged the availability of an Equal Protection claim under section 1983, qualified immunity applied and the Court affirmed that claim.

Cummings v. Premier Rehab Keller, P.L.L.C. , 596 U. S. ____, 14 S. Ct. 1562 (2022).In a 6-3 decision, the U.S. Supreme Court held that individuals suing under the antidiscrimination provisions of either the Rehabilitation Act or the Patient Protection and Affordable Care Act are not entitled to damages for emotional harm suffered. The Court found that the same was true for private actions under either of the other two statutes that prohibit recipients of federal funds from discriminating on the basis of race, color, national origin, sex, disability, or age: i.e., Title VI and Title IX. (Note: A petition for rehearing has been submitted in this case. While infrequently granted, please note the current status of this case.)

The plaintiff is a deaf and legally blind woman who sought treatment from a physical therapy clinic, Premier Rehab, that receives federal funds. After Premier Rehab refused Cummings' request that she be provided an ASL interpreter, she sued for disability discrimination under the Rehabilitation Act and ACA, seeking, among other things, compensation for her emotional distress stemming from the alleged discrimination. The district court dismissed Cummings' complaint, finding that the only injuries that Cummings alleged were humiliation, frustration, and emotional distress, and that none of those entitled her to damages under either the Rehabilitation Act or the

ACA. The Fifth Circuit Court of Appeals affirmed, and the decision was appealed to the Supreme Court.

In the opinion written by Chief Justice Roberts, the Supreme Court addressed all four statutes that prohibit recipients of federal financial assistance from discriminating based on protected characteristics: The Rehabilitation Act, the ACA, Title VI, and Title IX (referred to as the "Spending Clause statutes"). The Court followed its reasoning from an earlier case, Barnes (see below), in which the Court described the agreement to accept federal funding on the promise not to discriminate as essentially a contract between the Government and the recipient of funds. The Court held that only the two remedies that are normally available under contract law are available when a recipient of federal funds breaches its "contractual" agreement not to discriminate: compensatory damages and injunctions. Remedies such as punitive damages and emotional distress damages are typically not available under contract law, and thus may not be awarded for violations of the antidiscrimination provisions in the Spending Clause statutes.

In his concurrence, Justice Kavanaugh (joined by Justice Gorsuch) wrote that he would reorient the focus on background interpretive principle rooted in the separation of powers and that it is for Congress to create new causes of action and expand available remedies.

In dissent, Justice Breyer (joined by Justices Sotomayor and Kagan) began with the same question of whether a prospective funding recipient, at the time it was deciding whether to accept federal funds, would have been aware it would face such liability. They agree that these Spending Clause statutes will all be impacted and that recipients of federal funding must be "on notice" that they are exposing themselves to liability and certain damages. They note that the Spending Clause statutes prohibit intentional invidious discrimination that is particularly likely to cause serious emotional disturbance and that emotional damages are a remedy that is traditionally available in these circumstances. The dissent distinguished emotional damages from punitive damages, stating that emotional damages serve the purpose of "compensating the injured party" whereas punitive damages, as noted in Barnes (see below) aimed to penalize the party's conduct.

Barnes v. Gorman, 536 U.S. 181 (2002). The Supreme Court held that punitive damages may not be awarded in private suits under section 202 of the Americans with Disabilities Act and section 504 of the Rehabilitation Act. This case set the precedent, utilized in Cummings, that Congress's Spending Clause powers placed conditions on the grant of federal funds and that the Court regularly applied a contract-law analogy in defining the scope of conduct for which funding recipients may be held liable for money damages and available remedies.

Gorman was a paraplegic who was arrested in May 1992. During the process he was denied permission to use the restroom to empty his urine bag and the van used to transport him was not equipped for his wheelchair. During transport, his urine bag was damaged, and he hurt his shoulder and back because he was not properly buckled into his seat. A jury found the petitioners in Barnes, members of the city board of police, chief of police, and the officer driving the van, liable and awarded more than $1 million in compensatory damages and $1.2 million in punitive damages. The district court vacated the punitive damages award holding that punitive damages were unavailable under section 202 and section 504. The Court of Appeals for the Eighth Circuit reversed stating that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief" for violating a federal right. The Supreme Court

reversed and held that the contractual relationship between funding recipients extended not just to impose a condition and liability, but to impose remedies that the recipients are "on notice" of or that would be implied. In order to be "on notice" that a recipient is subject to remedies, the funding recipient may look to legislation and/or to remedies that are traditionally available in breach of contract litigation. Because Title VI does not mention remedies, and punitive damages are not typically an option for breach of contract, it is doubtful that a recipient would have accepted the funding if punitive damages were a required condition given that the unknown damages amount could far exceed the amount of federal funding received.

B. Title VII Sexual Harassment and Hostile Work Environment Claims

Lopez v. Whirlpool Corp., 989 F.2d 656 (8th Cir. 2021). The Court of Appeals for the Eighth Circuit affirmed the grant of summary judgment to an employer on claims of hostile work environment and retaliation. The district court found that the alleged conduct of a co-worker, which included touching the employee on her back, invading her personal space, and blowing on her finger while calling her "baby," was not severe or pervasive enough to rise to a hostile work environment. The Court also affirmed summary judgment on the retaliation claim, finding although the employee complained about feeling unqualified for an assigned task, she did not tie that complaint to sex discrimination or harassment.

Demkovich v. St. Andrew the Apostle Par., Calumet City, 3 F.4th 968 (7th Cir. 2021). In 2012, Demkovich was hired as the music director at St. Andrew the Apostle Catholic Church. Demkovich claimed a Reverend subjected him to a hostile work environment based on his sexual orientation and his disabilities. The Seventh Circuit ordered the dismissal of all of Demkovich's claims, finding that the First Amendment ministerial exception protects a religious organization's employment relationship with its ministers, from hiring to firing and the supervising in between. Adjudicating a minister's hostile work environment claims based on the interaction between ministers would undermine this constitutionally protected relationship. It would also result in civil intrusion upon, and excessive entanglement with, the religious realm.

Ward v. AutoZoners, LLC, 958 F.3d 254 (4th Cir. 2020). A former employee brought a Title VII action against his former employer, an automobile parts business, and asserted a state law claim to recover on intentional infliction of emotional distress. This Court found that the store manager and district manager acted in a supervisory capacity, but held there was not sufficient conduct to meet the required showing of "willful and wanton conduct," or another aggravating factor required under North Carolina law to prevail on a state law claim on intentional infliction of emotional distress and recover punitive damages.

The district court granted the employer's motion for summary judgment on the constructive discharge claim, entered judgment on the jury verdict in favor of the employee, and awarded compensatory and punitive damages. Both parties appealed, and the Court of Appeals for the Fourth Circuit reversed the award of punitive damages for Ward's Title VII and state law claims, including the intentional infliction of emotional distress, and remanded to the district court.

For the punitive damages award, AutoZoners argued that the district court erred in denying its Renewed Motion for Judgment as a Matter of Law because no bases for punitive damages existed for either Ward's Title VII claim or his state law intentional infliction of emotional distress claim.

Title VII authorizes punitive damages only when a plaintiff can show (1) the employer "engaged in unlawful intentional discrimination" and (2) that the employer engaged in the discriminatory practice "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." The district manager and the store manager, two of the individuals to whom Ward reported the harassment, were held to be operating in a managerial capacity and liability could be imputed to the employer if the plaintiff can meet the requirements under Title VII. The Fourth Circuit then looked at whether they acted with malice or with reckless indifference and concluded that while they may have been negligent in their response to the reports of discrimination, they were not engaging in intentional discriminatory practices themselves, nor were they recklessly indifferent. The Court reversed the punitive damages under Title VII. North Carolina permits the recovery of punitive damages for intentional infliction of emotional distress "only if the claimant proves the defendant is liable for compensatory damages and that one of the following aggravating factors was present: (1) fraud; (2) malice; and (3) willful or wanton conduct." Distinguishing between careless or reckless conduct, the Court held that the managers' conduct at issue was not "willful or wanton conduct," defined as a conscious and intentional disregard of and indifference to the rights of safety and others and, therefore punitive damages could not be awarded. The Fourth Circuit reversed the award of punitive damages for intentional infliction of emotional distress and remanded to the district court.

C. Discrimination

Chambers v. District of Columbia, No. 19-7098, 2022 WL 1815522 (D.C. Cir. June 3, 2022). On June 3, 2022, the U.S. Court of Appeals for the District of Columbia overruled Circuit precedent, which held that the denial or forced acceptance of a job transfer was actionable under Title VII of the Civil Rights Act of 1964 only if the employee suffered "objectively tangible harm." The Court found the rule, established in the 1999 decision, Brown v. Brody, to be inconsistent with Title VII and intervening Supreme Court authority. In overruling Brown, the D.C. Circuit Court held that an employer that transfers an employee or denies an employee's transfer request because of the employee's race, color, religion, sex, or national origin violates Title VII by discriminating against the employee with respect to the terms, conditions, or privileges of employment.

In this case, plaintiff Mary Chambers worked in the District of Columbia's Office of the Attorney General for over twenty years. After several of her requests to transfer to different units in the Office were denied, she claimed sex discrimination, alleging that similarly situated male employees had been granted transfers they requested.

The District Court dismissed her claim on summary judgment, concluding that Chambers had proffered no evidence that the denial of her transfer requests, even if motivated by discriminatory animus, caused her "objectively tangible harm." Noting the Brown precedent, a Circuit Court panel affirmed the decision. Given concerns that the precedent contravenes Title VII, the full court granted rehearing *en banc* to reconsider the rule set by Brown. Finding no footing in either the text of Title VII, which makes no reference to "objectively tangible harm," or Supreme Court precedent, the Court found no sound basis for maintaining Brown as circuit law.

Daniel v. Bd. of Supervisors for Louisiana State Univ. Agric. & Mech. Coll., No. 21-30555, 2022 WL 1055578 (5th Cir. Apr. 8, 2022). An African American professor and director filed claims for race discrimination, harassment, and retaliation against the Board for the University in violation of Title VI and Title VII. The professor alleged that during her employment her supervisor made disparaging comments and remarks about her and African American students on campus which she found racist. The professor further alleged that after reporting her concerns internally and filing an EEOC charge, the University retaliated against her when it removed her core duties and forced her to perform clerical tasks, excluded her from training opportunities, moved her to a smaller office, and gave her two negative performance reviews. The district court granted summary judgment for the University and the Court of Appeals affirmed. The Court found the professor failed to show harassment that was severe or pervasive when the evidence only contained one alleged racial comment during her interview, which she initially ignored, and the comments concerning lack of diversity on campus were not made six years prior to her complaint, but were focused on African American applicants to the school and not the professor. The Court further found that the professor failed to show an adverse or materially employment action to support a discrimination or retaliation claim because the professor requested to move to a different office and there was no evidence to support that the size was as small as she described, the alleged training opportunity was for individuals in a role she was not in, and a low performance evaluation by itself is not an adverse action.

Serir v. Cmty. Coll. Dist. No. 514, No. 21-2696, 2022 WL 807864 (7th Cir. Mar. 16, 2022). A fifty-four-year-old Muslim adjunct professor filed claims for discrimination on the basis of age and religion, and retaliation against the College in violation of Title VII and the ADEA. The professor alleged that the College denied his application for a tenure-track position and his prior request for a private office for prayer, based on his age and religion, and the College retaliated against him when it failed to rehire him as an adjunct after he filed a complaint for discrimination with human resources. The district court entered summary judgment for the College holding that two of his claims were untimely and that he failed to present evidence to show that the College's decisions were discriminatory or retaliatory. The Court of Appeals affirmed. The Court found the professor failed to assert or show that the applicant who was hired for the tenure role was non-Muslim, substantially younger than the professor, or had never filed a complaint for discrimination. While the applicant was three years younger the age gap was not sufficient for an age discrimination claim. The Court found the evidence was insufficient to show a denial in the tenure role based on age where the alleged faculty member comments were not made from someone with a role in his application process and there was no evidence to infer a refusal to hire due to age. The Court further found that the evidence was insufficient to show that without the internal complaint he would have received the tenure role or rehired as adjunct, especially where there was evidence of issues with his work performance and responsiveness and complaints from his students for gender bias.

Hale v. Emporia State Univ., No. 21-3007, 2022 WL 364085 (10th Cir. Feb. 8, 2022). An African American administrative assistant filed a claim for retaliation in violation of Title VII against the University after it declined to renew her reappointment for a fourth term after she reported race discrimination to the provost. The assistant further alleged that the University declined to post her vacant position in retaliation and that an internal investigation revealed that the dean cancelled the posting in part because of her complaint to the provost and the University had previously decided to select the assistant for the role. The district court found that the assistant failed to show she

would have been offered a reappointment but for the race complaint; however, she did establish that but for her complaint the University would have posted the vacant position and selected her for the role. The district court awarded the assistant nine months of back pay, from the date her third appointment expired, and nominal compensatory damages. The Court of Appeals found that based on the allegations in her EEOC Charge, a reasonable investigation would have uncovered and assessed the dean's alleged behavior and therefore she exhausted her administrative remedy. The Court found that the University failed to offer evidence that the dean was not the decision maker concerning the position and that the provost had sole authority. The Court affirmed the denial of reconsideration on the owed back pay based on evidence that she would not have remained at the University even if given the permanent position.

D. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

On March 3, 2022, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act which amends the FAA and invalidates pre-dispute arbitration agreements and waivers regarding sexual assault or sexual harassment that arise after March 3, 2022. The Act gives the complaining party the option to pursue the claims in court as opposed to arbitration and allows the complaining party to choose to proceed via class or collective action even if previously waived. Employers are not required to amend or replace existing agreements or remove those claims from the agreement; however, employers should keep in mind that as to those claims, complaining parties will be able to elect to use the arbitration process or proceed to court should a sexual assault or harassment issue arise in addition choose to proceed as a part of a class action.

- Text - H.R.4445 - 117th Congress (2021-2022): Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 | Congress.gov | Library of Congress

E. Pay Equity

Chew v. Syracuse University, Supreme Court of N.Y. (Oct. 1, 2021). Five female faculty members filed a class action lawsuit against the University alleging sex and gender discrimination in violation of the EPA, and applicable state law. The faculty members alleged that the University's compensation and promotion policies and procedures had an adverse impact on female employees. Specifically, the faculty alleged that female faculty members earned less in base compensation and stipends than similarly situated males in certain positions and certain schools and female faculty members were underrated in evaluations and their contributions were undervalued during promotion consideration for males with comparable or less than comparable qualifications. The faculty members sought to certify a class and obtain back pay, emotional distress damages, exemplary and punitive damages and attorneys' fees. The case was dismissed following a settlement in which the University agreed to pay $3.7 million.

Sempowich v. Tactile Sys. Tech., Inc., 19 F.4th 643 (4th Cir. 2021). A female employee filed several claims including discrimination and retaliation under Title VII and a violation of the Equal Pay Act. The employee claimed that she was terminated for failing to accept a demotion. The company claimed that the employee was not meeting performance goals over several years and,

therefore, warranted reassignment. The district court granted summary judgment in favor of the employer on all claims finding that the employee failed to show that the employer paid different wages and that, when combining her commissions and salary, she earned more compensation than her male counterpart. On appeal, the Fourth Circuit vacated and remanded the matter on several issues including the EPA violation. The Court held, as to the EPA claim, that there was no dispute that for three years the employee received a lower pay than her male counterpart and held that the proper metric for determining whether an employer violated the EPA is wage rate and not total wages received. (Note: The case was voluntarily dismissed following settlement.)

Hitesman v. Univ. of Utah, 499 P.3d 167 (Utah 2021). After nine years of working for the University, a female project manager resigned and brought claims against the University for wage discrimination based on sex in violation of the EPA. The University moved for summary judgment arguing that the project manager was paid less than her male colleagues based on factors outside of her sex, including the quantity and quality of her work, complaints about her performance and lower productivity. The district court granted the University's motion for summary judgment. The Court of Appeals reversed and remanded holding that the University failed to show evidence establishing there were set standards or means to measure employees' quantity or quality of production. The Court also held that while evidence of complaints about her performance, less experience, or less output could explain a wage disparity, the evidence failed to help meet that conclusion as the University never disciplined the project manager for the alleged complaints, there was a lack of performance evaluations to confirm the alleged performance issues, and there was no evidence that productivity or seniority played a role in setting the salaries at the University. In reversing, the Court concluded that factual issues existed concerning pay disparity and if the lower wage was justified.

Andrews v. Bd. of Regents of the Univ. Sys. of Ga., 565 F. Supp. 1343 (M.D. Ga. Oct. 4, 2021). An African American cooperative extension service agent at Fort Valley State University filed claims for discrimination on the basis of race against the Board for paying him less than white service agents at the University of Georgia. The agent alleged that the service agents at FVSU, who were all Black, received lower pay than the agents at UGA, who were mostly white, although they were within the same system and performed the same tasks. The Board moved for summary judgement, which the Court granted finding that while the agent's expert showed that FVSU agents were paid $9,000 less, there was no evidence linking the difference in pay to race, and even if there was, the Board showed a legitimate business necessity for the different pay scales. The Court further held that the agent failed to identify a similarly situated comparator and failed to rebut the Board's legitimate nondiscriminatory reason for the disparity.

American Ass'n of Univ. Professors v. Rutgers Univ., (Super. Ct. N.J. October 14, 2020). Several female faculty members, joined by their union, alleged compensation discrimination on the basis of sex in violation of the New Jersey EPA. The faculty members alleged that after complaints of pay inequity between male and female faculty, the union and the University reached an agreement in which the University committed to make pay equity adjustments based on several factors. The faculty members alleged that since the agreement, several female faculty members have requested a salary increase after demonstrating a pay inequity but the University failed to make any adjustments and the current pay inequities range from $1,000-$100,000.

Since the filing of the complaint, the University issued the first round of salary adjustments in September 2021 and the Union claimed that the University shortchanged over 100 faculty members by $750,000 and all faculty in the first round by at least $1 million. In May 2022, the Union claimed that another 90 employees of the University either did not have their salary raised to match their peers and some were fully denied adjustments, alleging manipulation of the statistical analysis for determining the requisite pay increases.

Equal Emp't Opportunity Comm'n v. Verona Area Sch. Dist., Case No. 3:22-cv-00039 (W.D. Wis. Jan. 25, 2022). The EEOC alleged violations of the EPA against a Wisconsin school district. The EEOC alleged that the school district violated federal law when it paid nine female special education teachers and one female school psychologist lower wages than their male counterparts performing the same work with comparable experience anywhere between $3,000 to $17,000 less. The EEOC is seeking back pay, liquidated damages, the elimination of the pay disparities, and other injunctive relief to correct and prevent future pay discrimination.

F. Diversity, Equity, and Inclusion

EEOC Guidance: The COVID-19 Pandemic and Caregiver Discrimination Under Federal Employment Discrimination Laws (March 14, 2022) (available at https://www.eeoc.gov/laws/guidance/covid-19-pandemic-and-caregiver-discrimination-under-federal-employment). States, among other things: "Under Title VII, if employers provide light duty, modified assignments or work schedules, or leave to employees who are temporarily unable to perform job duties, they must provide these options to employees who are temporarily unable to perform job duties because of pregnancy, childbirth, or a related medical condition."

EEOC Guidance: Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity (June 15, 2021) (available at https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender).

Highlights:

- "The Commission has taken the position that employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity. In other words, if an employer has separate bathrooms, locker rooms, or showers for men and women, all men (including transgender men) should be allowed to use the men's facilities and all women (including transgender women) should be allowed to use the women's facilities."
- "[A]lthough accidental misuse of a transgender employee's preferred name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment."

Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157 (1st Cir. 2020), cert. granted, 142 S. Ct. 895, 211 L. Ed. 2d 604 (2022). A nonprofit association filed claims against the University challenging the constitutionality of its undergraduate admissions process under Title VI. The association alleged that the University intentionally discriminated

against Asian American applicants in favor of white applicants as its undergraduate admissions process used race as "more than a 'plus' factor" in its decisions and failed to utilize available race-neutral alternatives. The district court found that while the association had "associational standing to sue," the University's use of race in its admissions process was limited and narrowly tailored to increase diversity within the student body, satisfying strict scrutiny, and the Court found no evidence of workable race neutral alternatives.

The Court of Appeals upheld the decision and found that the University did not intentionally discriminate against Asian American applicants in violation of Title VI. The Court held that the University demonstrated a compelling interest in increasing diversity within the student body based on "specific, measurable goals" and that the consideration of race was in an effort to achieve those goals. The Court held that the use of race was narrowly tailored as there was no evidence that the University used racial quotas, its use of "one-pagers" to assess its recruitment efforts was permissible, the University's consideration of race was one 'plus' factor in its holistic review of applicants, and the University's failure to identify a "specific level of diversity" needed to end its consideration of race was not "fatal" to the process. The Court further held that there were no workable race neutral alternatives that would achieve the diverse student body the University sought while maintaining its high academic standards and that prior implementation of alternatives, which the association proposed in its complaint, were insufficient.

Students for Fair Admissions, Inc. v. Univ. of N. Carolina, No. 1:14CV954, 2021 WL 7628155 (M.D.N.C. Oct. 18, 2021), cert. granted, 142 S. Ct. 896 (2022). A nonprofit association filed claims against UNC-Chapel Hill challenging the constitutionality of its undergraduate admissions process under the Fourteenth Amendment and Title VI. The association alleged that the University intentionally discriminated against certain applicants based on race, color, or ethnicity as its undergraduate admissions process (i) "does not merely use race as a 'plus' factor" in its decisions, and (ii) used racial preferences when there were race-neutral alternatives available that would have achieved diversity within the student body. The Court entered judgment in favor of the University as the undergraduate admissions process withstood strict scrutiny and was constitutionally permissible. Specifically, the Court held that the University demonstrated a "genuine and compelling interest" in the use of race in its admissions process to achieve its goal of increasing diversity within the student body, a goal that was "concrete and measurable" and regularly assessed by the University. The Court held that the use of race within the admissions process was narrowly tailored as the University's decisions were based on an "individualized holistic review" of each application, race was one of many "plus factor(s)," there was no evidence that demonstrated race was a "defining feature of any application," and while race may "tip the scale" for a percentage of applicants it did not "transform UNC's admittedly holistic process into a constitutionally impermissible one." The Court further held that the evidence demonstrated that the University engaged in "ongoing, serious, and good faith consideration" of race neutral alternatives and implemented several alternatives; however, there were no sufficient alternatives available that would achieve the goal of increasing diversity as well as or at "tolerable administrative expense" as the current undergraduate admissions process.

Note: Both the Harvard and UNC-Chapel Hill cases will be heard by the U.S. Supreme Court during its next term.

II. Accommodations

A. Religion

Gordon Coll. v. DeWeese-Boyd, 142 S. Ct. 952, 212 L. Ed. 2d 227 (2022). A social work professor filed claims against a Christian college alleging associational and gender discrimination and retaliation in violation of state law. The professor alleged that the College denied her promotion to full professor, despite student evaluations and a unanimous recommendation from the Faculty Senate, because of her opposition to the College's policies and support for LGBTQ+ individuals. The parties cross moved for summary judgment on the issue of whether the ministerial exception barred her claims. The trial court ruled in favor of the professor and the Massachusetts Supreme Court affirmed and remanded the matter, finding that the professor was not a minister, she had not undergone formal religious training, did not pray with her students, lead religious services, or teach religious courses. The College petitioned for a writ of certiorari on the ministerial exception and the U.S. Supreme Court denied the petition because the decision was not final. The U.S. Supreme Court found that the state court's view on religious education was "troubling and narrow" but that "the preliminary posture of the litigation would complicate our review. But in an appropriate future case, this Court may be required to resolve this important question of religious liberty." This leaves an open question as to whether religious colleges may rely on the ministerial exception in the employment of professors teaching secular subjects.

B. Disability

EEOC Guidance: The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees (May 12, 2022) (available https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence). Notes that an employer's use of algorithmic decision-making tools in hiring process could violate ADA if: (i) an employer does not provide a "reasonable accommodation" that is necessary for a job applicant or employee to be rated fairly and accurately by the algorithm; (ii) an employer relies on an algorithmic decision-making tool that intentionally or unintentionally "screens out" an individual with a disability; or (iii) an employer adopts an algorithmic decision-making tool for use with its job applicants or employees that violates the ADA's restrictions on disability-related inquiries and medical examinations.

III. Speech, Academic Freedom, and Religion

Byron Tanner Cross v. Loudoun Cnty. Sch. Bd, CL 21-3254 (Va. Aug. 30, 2021). The Virginia Supreme Court upheld a preliminary injunction ordering reinstatement of teacher who was suspended after speaking at school board meeting against proposal that would require teachers to address transgender students with their preferred names and pronouns.

Kluge v. Brownsburg Cmty. Sch. Corp., 548 F. Supp. 3d 814 (S.D. Ind. 2021). A teacher alleged that he was discriminated against and ultimately forced to resign because his sincerely-held religious beliefs as an Evangelical Christian prevented him from following a school policy that required him to address transgender students by their preferred names and pronouns. He notified the school that referring to transgender students by their preferred names conflicted with his religious objections to affirming transgenderism. The school first accepted the teacher's proposed

accommodation allowing him to address students by their last names, similar to a practice used by sports coaches. However, the school received complaints from students and several other teachers that his use of last names only was causing harm to students. The Court agreed that the last-names-only accommodation resulted in an undue hardship to the school based on the complaints from students and teachers and also noted that such complaints could potentially subject the school to a Title IX lawsuit. The teacher's Title VII claim for religious discrimination based on his religious objection to using transgender students' preferred pronouns was ultimately dismissed.

Goydos v. Rutgers, State Univ., No. 19-08966, 2021 WL 5041248 (D. N.J. Oct. 29, 2021). A former tenured professor filed several claims against the University challenging the constitutionality of an internal investigation alleging he was falsely implicated criminally in retaliation for whistleblowing. The professor alleged that after raising concerns over funding discrepancies in grant applications, the University placed a written notice in his file concerning alleged disparagement, decreased his annual bonus, and launched an investigation into the professor without informing him of the nature of the investigation and by "secretly obtaining" images from his computer, which ended his employment. The professor asserted several claims against the University, including: (i) the University violated his First Amendment right to engage in speech regarding the apparent illegal conduct by the defendants; (ii) the search and imaging of the professor's computer were done by individuals "deputized for the purpose of pursing evidence in furtherance of a criminal investigation," and thus were warrantless searches and seizures that violated his rights under the Fourth Amendment; (iii) defendants' demands that the professor appear for a deposition-like interview as part of an internal investigation, under the threat of employer discipline and possible criminal implications, deprived him of his right against self-incrimination under the Fifth Amendment; and (iv) plaintiff had a protected property right and interest in his employment and a liberty right and interest in his professional reputation that was deprived by the defendants. On Defendant's Motion to Dismiss, the Court dismissed the First Amendment claim, in part on the grounds that because the concerns he raised pertained only to conduct affecting his own employment, he was not addressing a matter of public concern protected by the First Amendment. The Court also dismissed the Fourteenth Amendment claim, in part because the paid administrative leave he was placed on did not implicate his due process rights nor did he suffer a public stigma as to implicate his liberty interest. The Court denied dismissal of the Fourth Amendment claim finding that, although the search and seizure were part of a typically permissible investigation into workplace misconduct, the professor sufficiently alleged that there were no reasonable grounds to suspect workplace misconduct to support imaging the professor's computer. The Court further denied dismissal of the Fifth Amendment, on the grounds that the professor should not have been compelled to answer questions that required him to waive any privileges or rights under the threat of termination.

Meriwether v. Shawnee State Univ., 992 F.3d 492 (6th Cir. 2021). A philosophy professor filed claims against officials challenging the constitutionality of the public University's gender identity policy under the Fourteenth Amendment and for violating his First Amendment rights. The professor alleged that the University restricted his speech when he received a formal written warning after his refusal to use female pronouns for a transgender student, against his sincerely held religious beliefs. Despite his efforts to obtain a religious accommodation and his effort to appeal the discipline, the University upheld its decision and the professor filed this lawsuit. The University moved to dismiss the claims and the lower court granted the motion.

On appeal, the Sixth Circuit reversed, finding the professor stated valid claims. Specifically, the Court held that the professor's First Amendment rights may have been violated as professors at public universities have First Amendment protection when teaching and the use of gender pronouns is a matter of public concern and one that is a hot topic in political and social debates currently. The Court found that the University's attempt to lean on Title IX was erroneous, as there was no evidence at this point to show that the professor's decision to refer to the student by last name instead of pronouns impacted the student's education or ability to succeed. The Court further held that the professor plausibly alleged that the University violated the Fourteenth Amendment when it disciplined him for not following its policy. The Court found that the University's gender identity policy was not neutral based on evidence that the professor did not receive a "neutral decision maker who would give full and fair considerations to his religious objection" rather officials "exhibited hostility to his religious beliefs" and based on several "irregularities in the university's adjudication and investigation processes" including changes in the basis for the professor's discipline and the application of the University's policy. (Subsequently, the University and the professor settled the matter for $400,000 in damages and legal fees and a removal of the written warning from his personnel file.)

Shurtleff v. City of Boston, 596 U. S. ____, 142 S. Ct. 1583 (2022).

In a unanimous decision, the US Supreme Court held that the city of Boston violated the First Amendment's Free Speech Clause when it rejected an application to fly a Christian flag on one of three flagpoles in front of City Hall.

For years, Boston had a program allowing groups to hold ceremonies on the plaza and permitting them to hoist a flag of their choosing on one of the three flagpoles. In 2017, Harold Shurtleff, the director of an organization called Camp Constitution, asked to hold an event on the plaza to celebrate the civic and social contributions of the Christian community and to raise what he described as the "Christian flag." Boston's Property Management Department allowed Shurtleff to hold the event but denied the request to raise his flag, fearing that permitting Shurtleff to do so would violate the Establishment Clause.

Shurtleff and Camp Constitution sued the City, claiming that Boston's refusal to let them raise their flag violated, among other things, the First Amendment's Free Speech Clause. The Supreme Court agreed. The Court explained that when the government is speaking for itself, it is generally free to decide what to say and what not to say. But when the government does not speak for itself, it may not exclude private speech based on "religious viewpoint" as doing so constitutes impermissible viewpoint discrimination under the First Amendment. The Court acknowledged that those lines are somewhat blurred when the government invites the people to participate in a program like the flag-raising program implemented by Boston.

The Court considered the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression.

History of flag flying: The Court found that this portion supported Boston's position. The Court found that flags symbolize civilizations and reflect state and local communities. They convey messages about the government through their presence and position (e.g., half-staff for paying

respect, presence of foreign flags at Blair House). This factor indicates that the flags usually convey the government's message.

Whether the public would view the speech at issue as the government's: This analysis was not dispositive. Boston allowed its flag to be lowered and others raised with regularity and in connection with ceremonies at the base. A passerby may see a flag and then see a group of private citizens conducting a ceremony without the city's presence and associate it with the citizens, not with Boston.

The extent to which Boston shaped or controlled the messages the flags sent: Here, the Court found there was no control by Boston and that this was the most salient factor. Boston maintained control over an event's dates and times to avoid conflict in schedules, the premises, and a hand crank to raise the flag. There was a thin record to show other control over the messages sent by the flags. Boston stated that most or all of the fifty unique flags they approved reflected a particular City-approved view or value. The application form to fly a flag asked for contact information and a brief description of the event, and a Boston city employee testified that he never requested to review a flag's design or required changes to a flag prior to approving flags. The Court compared this to Summum, where the City always selected which monuments it would place in the park and they typically took ownership over the monuments. Similarly, in Walker (see below) the state board "maintained direct control" over license plate designs and actively reviewed every proposal and rejected at least a dozen. The Court found this more akin to Matal v. Tam where the Patent and Trademark Office registered all manner of marks and normally did not consider their viewpoint except to turn away those that were "offensive."

While the Court found evidence weighing on both sides, ultimately, Boston's lack of meaningful involvement in the selection of flags or the crafting of their messages led the Court to classify the third-party flag raisings as private, not government, speech. Therefore, Boston's refusal to let petitioners fly their flag violated the Free Speech Clause of the First Amendment.

Concurrences:
Justice Kavanaugh made the distinction that "government does not violate the Establishment Clause merely because it treats religious persons, organizations, and speech equally with secular persons, organizations, and speech in public programs, benefits, and facilities, and the like."

Justice Alito (with whom Justices Thomas and Gorsuch joined) agreed that Boston violated the Free Speech Clause, but disagreed with analyzing the case using the triad of factors. Instead, they believed that the proper analysis is to look at whether the government is *speaking* instead of regulating private expression.

Justice Gorsuch (with whom Justice Thomas joined) discussed the troubled history of the *Lemon* test and how it transitioned to the endorsement test.

Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200 (2015). A nonprofit organization, the Sons of Confederate Veterans, brought a section 1983 claim alleging that the Texas Department of Motor Vehicles Board violated its First Amendment free speech rights when it denied the organization's application for specialty license plates featuring the Confederate battle flag. The Court held that the specialty license plates were government speech and therefore no

First Amendment violation existed. The Court relied on the test set out in Summum to analyze whether speech is categorized as private speech or government speech. This analysis included looking at: (1) history; (2) whether the public's perception would be that the government is conveying a message; and (3) whether the city maintains control over the selection of monuments. Here, the license plates communicated messages from the states; they are often identified in the public's mind with the state and a form of identification; and Texas maintained direct control over the messages because they had sole approval control.

Speech First Inc. v. Cartwright, 32 F.4th 1110 (11th Cir. 2022). Speech First brought suit in the Middle District of Florida contending that the discriminatory harassment and bias-related incident policies of the University of Central Florida (UCF) violate the First Amendment as overbroad and impermissibly restricting speech based on content and viewpoint. The Court found UCF's discrimination and harassment policy overbroad because it chilled more speech than necessary and also constituted impermissible content and viewpoint-based speech restrictions.

Sasser v. Bd. of Regents of Univ. Sys. of Georgia, No. 1:20-CV-4022-SDG, 2021 WL 4478743 (N.D. Ga 2021). The Court reviewed the Board's renewed motion to dismiss the amended complaint. Sasser attended a University of Georgia (UGA) football game and while spectating with other students, admittedly used a racial slur to refer to a student football player. Sasser was a member of the baseball team and, following meetings with officials at the University, was later released from the baseball team. At the same time as the events, the University conducted an investigation and held a hearing regarding the use of the racial slur, resulting in Sasser being suspended from campus for the remainder of the semester. Sasser appealed to the president of UGA; however, the sanctions were upheld.

Sasser filed suit alleging violations of his right to freedom of speech and substantive and due process violations, seeking relief under section 1983. After assessing the issue of sovereign immunity, the only remaining claims were against the individual defendants for violations of the First Amendment right to freedom of speech, the rights to substantive and procedural due process, and breach of contract. Sasser alleged that defendants violated his First Amendment right to freedom of speech by disciplining him after he used the racial slur. He asserted a First Amendment retaliation claims which required a plaintiff to show: (1) constitutionally protected speech; (2) retaliatory conduct that adversely affected the protected speech; and (3) a causal connection between the retaliatory action and the adverse effect on speech. For the first prong, Sasser argued the speech was protected because he was neither harassing nor threatening anyone. Under Tinker v. Des Moines, it is correct that students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." However, quoting Morse v. Frederick, the Court explained that these rights are "necessarily circumscribed 'in light of the special characteristics of the school environment.'" This means that the constitutional rights of students in public schools are not necessarily the same as the rights of adults in other settings (citing Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)). In Fraser, the Court held it was constitutionally permissible to prohibit the use of vulgar and offensive terms in public discourse and to discipline a student. The Court recognized the precedent in Tinker and Fraser to set the boundary of a school or university to balance the speech interests, and stated "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration

for the personal sensibilities of the other participants and audiences." The Court held that the facts were more akin to those in Fraser, which prohibited the offensive terms without requiring a showing of harassment or threats, than the facts in Tinker, where students were held to be able to freely express themselves. As such, the Court held that the University's discipline of Sasser was not a constitutional violation, or one that was so clearly established so that "every reasonable school official in the same circumstances would have known in light of the preexisting law that his actions violated First Amendment rights." The Court recognized that qualified immunity applies, however, and granted the motion for failure to state a claim.

Gibson Bros., Inc. v. Oberlin College, 187 N.E.3d 629 (Ohio Ct. App. 2022).
This case is on appeal to the Ohio Supreme Court. Oberlin College seeks to reverse a jury verdict finding the college and its Dean of Students liable for libel, intentional interference with business relationship, and intentional infliction of emotional distress, stemming from statements made about a local bakery's involvement in the arrest of three African American students accused of shoplifting and assault.

In 2016, three African American Oberlin students (one male and two females) were in plaintiff's bakery. An employee of the bakery confronted the male student because he believed that the student was shoplifting wine and using a fake I.D. to purchase more alcohol. According to the employee, the male student fled the store, and the employee chased him across the street to apprehend and detain him for the police to arrive. When a police officer arrived, he observed that the three students were involved in a physical altercation with the employee. The police arrested the three students, each of whom eventually entered guilty pleas and were convicted for their roles in the incident.

Viewing the incident as racial profiling, faculty and students of Oberlin College protested the next day across the street from the Bakery. At the protest, individuals distributed flyers that called Gibson's Bakery a racist establishment and asked people to boycott. The Student Senate also passed a resolution stating that the bakery had a history of racial profiling and discriminatory treatment, and called for all students to stop supporting the bakery and for the College President to publicly condemn the bakery. The resolution was posted in the student center for nearly one year.

Gibson's Bakery filed a civil complaint against Oberlin for libel, slander, interference with business relationships, and interference with contracts. A jury awarded the bakery $33.2 million in compensatory and punitive damages, which was subsequently reduced by the Court to $25 million due to state caps on punitive damages. The Court also ordered Oberlin to pay $6.3 million in attorney's fees to the bakery. On appeal, an Ohio Court of Appeals upheld the jury verdict. The Court made sure to distinguish student protests about the Bakery owners' alleged racist behavior, which were protected by the First Amendment, with the Bakery's libel claims against Oberlin, focused solely on whether the College had disseminated false, written statements of fact (i.e., the distributed flyers and the Student Senate Resolution), which were actionable. The Court acknowledged that there was no evidence that Oberlin participated in drafting either of the two defamatory documents. But the Court found Oberlin liable on the theory that one who republishes a libel, or who aids and abets the publication of a libelous statement, can be liable along with the original publisher. As to the flyer, the Court noted that Oberlin's Dean of Students attended the protests as part of her job responsibilities, handed a copy of the flyer to a journalist, and asked

students to make more copies of the flyer for her. As to the student senate resolution, the Court noted that the senate was an organization approved by the College, and authorized by the College to adopt, circulate, and display the resolution. It also noted that despite having knowledge of the content of the resolution, neither the President nor the Dean of Students took any steps to require or encourage the student senate to revoke the resolution or to remove it from the bulletin board.

Oberlin has asked the Ohio Supreme Court to review the matter and reverse judgment. The Court's decision on whether to do so is pending.

Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 857, 211 L. Ed. 2d 533 (2022). On April 25, 2022, the U.S. Supreme Court heard arguments in a case that asks: (1) Whether a public-school employee who says a brief, quiet prayer by himself while at school and visible to students is engaged in government speech that lacks any First Amendment protection; and (2) whether, assuming that such religious expression is private and protected by the free speech and free exercise clauses, the establishment clause nevertheless compels public schools to prohibit it.

The employee, Joseph A. Kennedy is a practicing Christian who served as a football coach at a high school in Washington State. Since the start of his employment, Kennedy would kneel and recite a prayer at midfield at the end of each game, in full view of all students, parents, and other community members attending the game. At first, Kennedy prayed alone. But players started to join him from time to time. After the school district looked into Kennedy's activity, a superintendent wrote him a letter to clarify that he was free to engage in such religious activity, as long as it did not interfere with his job responsibilities. The superintendent further specified that the activity must be physically separate from any student activity, and students may not be allowed to join in. Kennedy temporarily stopped praying after football games, but later told the district that he would resume praying after games on the 50-yard line and that he would allow students to join him if they so wished.

The next time Kennedy prayed, a large gathering of coaches, players, a state representative, as well as members of the public joined him, stampeding over others to get to the field. The school district sent Kennedy another letter stating that he was in violation of the school district's policy, and offered accommodations that Kennedy declined. Kennedy was eventually placed on paid administrative leave, and not recommended for rehire for the next season.

Kennedy filed suit against the school district in the Western District of Washington. The District Court granted the district's motion for summary judgment, while noting the "tension in the First Amendment between a public-school educator's right to free religious expression and their school's right to restrict that expression when it violates the Establishment Clause." The Court found that Kennedy's prayers were delivered in his capacity as a public employee, and thus were not Constitutionally protected private speech. It also held that Kennedy was suspended by the district due to the risk of Constitutional liability arising out of Kennedy's actions, and that the district's decisions were justified due to the risk of violating the Establishment Clause if it allowed Kennedy to continue his religious activities. A Ninth Circuit panel affirmed the District Court's ruling (see Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004 (9th Cir. 2021)).

IV. Students as Employees - Insights from Athletics

In **Johnson v. Nat'l Collegiate Athletic Ass'n** (multiple citations), student-athletes sued the NCAA and multiple named schools alleging violations of the Fair Labor Standards Act ("FLSA") and corresponding state laws in Pennsylvania, New York, and Connecticut, along with state law unjust enrichment claims, predicated on the theory that student-athletes are providing services for the "big business of NCAA sports" as "employees" under the various laws. Plaintiffs alleged attending some of the named defendant schools (the "attended school defendants" or "ASD") and further alleged that the other named defendant schools (the "non-attended school defendants or "NASD"), along with the NCAA, were all joint employers due to conference and NCAA affiliations.

> **Johnson v. Nat'l Collegiate Athletic Ass'n**, 561 F. Supp. 3d 490 (E.D. Pa. 2021). The district court granted the NASD motion to dismiss, finding that the complaint did not "plausibly allege that the NASD are joint employers" for purposes of the FLSA and corresponding state laws (although the respective state-law unjust enrichment claims survived against the defendants from the respective states). Specifically, the complaint did not plausibly allege that the NASD had control over hiring and firing of ASD student-athletes, that the NASD promulgated work rules and assignments or set the conditions for participation of ASD student-athletes, that the NASD had day-to-day supervision over ASD student-athletes, or that the NASD controlled the records of ASD student-athletes.
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> While dismissing the claims against the NASD, the district court denied the NCAA's motion to dismiss, finding that the complaint did plausibly allege that the NCAA was a joint employer because the NCAA had control over hiring and firing of ASD student-athletes, the NCAA promulgated work rules and assignments or set the conditions for participation of ASD student-athletes, the NCAA had day-to-day supervision over ASD student-athletes, and the NCAA controlled the records of ASD student-athletes.
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> **Johnson v. Nat'l Collegiate Athletic Ass'n**, 556 F. Supp. 3d 491 (E.D. Pa. 2021). The district court denied the ASD motion to dismiss on three grounds. First, the Court rejected the argument that the long history of amateurism in collegiate sports meant that student-athletes are categorically not covered by the FLSA, criticizing the reasoning as circular: student-athletes are not entitled to pay under the FLSA because they are amateurs, but they are amateurs simply because the defendants have a long history of not paying them (citing the Alston concurrence (infra) favorably). Second, the Court rejected the argument that the Department of Labor has determined that student-athletes are not FLSA employees as a matter of law, in part because of an insufficient record on the applicability of a key exception, and in part because the complaint plausibly alleged that "NCAA D1 interscholastic athletics are not conducted primarily for the benefit of the student athletes who participate in them, but for the monetary benefit of the NCAA and the colleges and universities those student athletes attend," thus alleging activities that fall outside the Department of Labor guidance. Third, in looking at the economic realities of the relationship, and applying the Second Circuit's seven-factor Glatt test (Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528 (2d Cir. 2016), the district court found that, on balance, the allegations were sufficient to support a conclusion that student-athletes are employees: while student-athletes have no expectation of compensation [Glatt factor 1] or

of a paid job at the end of their participation [7], intercollegiate athletics has no tie to the formal education program [3], it interferes with the student-athletes' academic pursuits [4], and provides no educational benefits [6]. (The other two Glatt factors [2 and 5] were neutral on the facts alleged.)

Johnson v. Nat'l Collegiate Athletic Ass'n, No. 19-5230, 2021 WL 6125095 (E.D. Pa. Dec. 28, 2021). The district court certified a question for interlocutory appeal: "Whether NCAA Division I student athletes can be employees of the colleges and universities they attend for purposes of the Fair Labor Standards Act solely by virtue of their participation in interscholastic athletics." The Third Circuit Court of Appeals granted permission to appeal (Case 22-8003, February 3, 2022), and the matter is currently being briefed.

Berger v. Nat'l Collegiate Athletic Ass'n, 843 F.3d 285 (7th Cir. 2016). Not that long ago, addressing arguments similar to those in Johnson v. Nat'l Collegiate Athletic Ass'n, supra, the Seventh Circuit focused on the language of the FLSA (particularly the use of the word "work"), rejected the use of a multi-factor test, examined the "totality of circumstances" and the "economic reality of the relationship," and concluded as follows: "Appellants in this case have not, and quite frankly cannot, allege that the activities they pursued as student athletes qualify as 'work' sufficient to trigger the minimum wage requirements of the FLSA. Student participation in collegiate athletics is entirely voluntary. Moreover, the long tradition of amateurism in college sports, by definition, shows that student athletes – like all amateur athletes – participate in their sports for reasons wholly unrelated to immediate compensation. Although we do not doubt that student athletes spend a tremendous amount of time playing for their respective schools, they do so – and have done so for over a hundred years under the NCAA – without any real expectation of earning an income. Simply put, student-athletic 'play' is not 'work,' at least as the term is used in the FLSA. We therefore hold, as a matter of law, that student athletes are not employees and are not entitled to a minimum wage under the FLSA."

Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021). Ruling in an antitrust case regarding NCAA rules pertaining to educational benefits, the Court made the following two observations in the unanimous decision. First, "While the NCAA asks us to defer to its conception of amateurism, the district court found that the NCAA had not adopted any consistent definition." Second, "For our part, though, we can only agree with the Ninth Circuit: 'The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of antitrust law.'" In concurrence, Justice Kavanaugh added that "Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate."

Nat'l Lab. Rel. Bd. Memorandum GC 21-08, 2021 WL 4502333 (Sept. 29, 2021) ("Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act"). The National Labor Relations Board General Counsel set out in her memorandum "updated guidance regarding [her] prosecutorial position that certain Players at Academic Institutions are employees under the [National Labor Relations] Act." The memorandum "also discusses developments in the case law and National Collegiate Athletic Association ("NCAA") rules related to Players at Academic Institutions, and contemporaneous societal shifts, including a dramatic

increase in collective action among Players at Academic Institutions, all of which reinforce my position that they are protected by the Act." Here are a few pertinent excerpts:

- "The definition of 'employee' in Section 2(3) of the NLRA is broadly defined to include 'any employee,' subject to only a few, enumerated exceptions. Those exceptions do not include university employees, football players, or students."
- "[The common law] fully supports a finding that scholarship football players at Division I FBS private colleges and universities, and other similarly situated Players at Academic Institutions, are employees under the NLRA."
- "Indeed, Players at Academic Institutions perform services for their colleges and the NCAA, in return for compensation, and subject to their control."
- "[Scholarship football players] and other similarly situated Players at Academic Institutions, should be protected by Section 7 when they act concertedly to speak out about their terms and conditions of employment, or to self-organize, regardless of whether the Board ultimately certifies a bargaining unit."
- "[M]isclassifying them as 'student-athletes,' and leading them to believe that they are not entitled to the Act's protection, has a chilling effect on Section 7 activity. Therefore, in appropriate cases, I will pursue an independent violation of Section 8(a)(1) of the Act where an employer misclassifies Players at Academic Institutions as student-athletes."
- "[Since 2017] there have been significant developments in the law, NCAA regulations, and the societal landscape, that demonstrate that traditional notions that all Players at Academic Institutions are amateurs have changed."
- "Although the [Alston] Court did not disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance, it recognized that amateurism in college sports has changed significantly in recent decades and rejected the notion that NCAA compensation restrictions are 'forevermore' lawful. The [Alston] decision is likely a precursor to more changes to come in college athletics."
- "Players at Academic Institutions now may collect payment for use of their name, image, and likeness [NIL], thereby opening the door for them to profit from endorsements, autograph sales, and public appearances, among other ventures. . . . The freedom to engage in far-reaching and lucrative business enterprises makes Players at Academic Institutions much more similar to professional athletes who are employed by a team to play a sport, while simultaneously pursuing business ventures to capitalize on their fame and increase their income."
- "Finally, those changes have taken place at a time when Players at Academic Institutions have been engaging in collective action at unprecedented levels [regarding social justice, play during the pandemic, and improved working conditions."
- "In sum, it is my position that the scholarship football players . . . and similarly situated Players at Academic Institutions, are employees under the Act."

V. COVID's Enduring Impact on Law and Employment

A. Vaccines and Religious Gatherings

Does 1-3 v. Mills, 142 S. Ct. 17 (2021) (Mem.) On October 29, 2021, the Supreme Court denied without opinion a request to enjoin a regulation adopted by the State of Maine that required certain healthcare workers to receive COVID–19 vaccines.

The plaintiffs included healthcare workers at certain impacted facilities. Does 1-6 v. Mills, No. 1:21-CV-00242-JDL, 2021 WL 4783626 (D. Me. 2021). They argued that that the vaccine requirement violated their First Amendment and other federal constitutional and statutory rights because it did not exempt individuals with sincerely held religious beliefs against the vaccine. At the trial court level, the U.S. District Court for the District of Maine found, with respect to the plaintiffs' First Amendment claims, that Maine's vaccine mandate was facially neutral and did not target religious beliefs. The Court found that the regulation's elimination of religious exemptions was to further crucial public health goals and nothing more. It cited data that the state legislature had considered about how permitting such exemptions for prior mandatory vaccines had prevented the state from achieving herd immunity as to several other infectious diseases, including measles. The Court concluded that even if the Court applied the most stringent standard of review (i.e., strict scrutiny), the vaccine mandate was narrowly tailored to serve the compelling interest of containing the spread of a serious communicable disease. The district court thus declined to grant the requested injunction and the First Circuit affirmed. Does 1-6 v. Mills, 16 F.4th 20 (1st Cir. 2021).

Justice Barrett filed a concurring opinion, joined by Justice Kavanaugh, addressing the likelihood of success on the merits when considering "whether the Court should grant review in the case" "without benefit of full briefing and oral argument." Otherwise, "applicants could use the emergency docket to force the Court to give a merits preview in cases it was unlikely to take."

Justice Gorsuch filed a dissenting opinion, joined by Justices Thomas and Alito, analyzing the case under the Court's "current jurisprudence." First, the dissenters found the Maine law not to be generally applicable because of "individualized exemptions" for "certain preferred (nonreligious) justifications." The Maine law treated "comparable secular activity more favorably than religious exercise" by permitting alternate measures (e.g., masking, testing) for medical exemptions but not for religious exemptions. Second, the dissenters criticized the First Circuit's affirmation "due to an error this Court has long warned against – restating the State's interests on its behalf, and doing so at an artificially high level of generality." Broad statements of health and safety minimize the apparent magnitude of the individual interest. Third, because vaccination rates, and the concomitant "herd immunity" level, were high in Maine, the dissenters found that "Maine's decision to deny a religious exemption in these circumstances doesn't just fail the least restrictive means test, it borders on the irrational."

Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam). In a 5-4 decision, the Supreme Court preliminarily enjoined an Executive Order by the Governor of New York that limited gatherings in houses of worship as a way to reduce the spread of COVID-19. The Executive Order had imposed restrictions on attendance at religious services in areas classified

as "red" or "orange" zones. In red zones, no more than ten persons were permitted to attend each religious service; in orange zones, attendance was capped at twenty-five.

The Roman Catholic Diocese of Brooklyn and the Agudath Israel of America Synagogue claimed that these restrictions violated the Free Exercise Clause of the First Amendment, and asked the Court to enjoin enforcement of the restrictions. Both the Diocese and Agudath Israel argued that the regulations treated houses of worship much more harshly than comparable secular facilities. The record below showed that local stores, factories, and schools did not have such striking limits.

In siding with the houses of worship, the Supreme Court agreed that the Executive Order singled out houses of worship for especially harsh treatment. Because the challenged restrictions were not neutral, they needed to have been narrowly tailored to serve a compelling state interest. While acknowledging that stemming the spread of COVID–19 was unquestionably a compelling interest, the Court found that the Executive Order was far more restrictive than any COVID–related regulations that had previously come before the Court, much tighter than those adopted by many other jurisdictions, and far more severe than had been shown to be necessary. The Court further noted that there were other less restrictive rules that could have been adopted to minimize the risk to those attending religious services (while simultaneously acknowledging that the Justices are not public health experts). "But even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure."

Justices Gorsuch and Kavanaugh filed concurring opinions. Of note, Justice Gorsuch wrote "Government is not free to disregard the First Amendment in times of crisis. At a minimum, that Amendment prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available." Justice Kavanaugh wrote, "The State argues that it has not impermissibly discriminated against religion because some secular businesses such as movie theaters must remain closed and are thus treated less favorably than houses of worship. But under this Court's precedents, it does not suffice for a State to point out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe or even more severe restrictions. Rather, once a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class."

Chief Justice Roberts filed a dissenting opinion, stating that injunctive relief was not necessary at the moment because the governor had recently allowed capacity increases.

Justice Breyer filed a dissenting opinion, joined by Justices Sotomayor and Kagan. Among other things, Justice Breyer favorably cited precedent about deferring to elected officials where there are issues of "medical and scientific uncertainty," pointing out that the district court had found that the regulations treated houses of worship more favorably than "'similar gatherings' with comparable risks" (e.g., lectures, concerts, theatre, which were all closed) while deferring to the State's judgment to further distinguish houses of worship from essential businesses.

Justice Sotomayor filed a dissenting opinion, joined by Justice Kagan. Focused on the rational distinctions between activities, Justice Sotomayor wrote "Free religious exercise is one of our most

treasured and jealously guarded constitutional rights. States may not discriminate against religious institutions, even when faced with a crisis as deadly as this one. But those principles are not at stake today. The Constitution does not forbid States from responding to public health crises through regulations that treat religious institutions *equally or more favorably than comparable secular institutions*, particularly when those regulations save lives." (Emphasis added.)

Dr. A. v. Hochul, 142 S. Ct. 552 (2021) (Mem.). An application for injunctive relief was denied on December 13, 2021. Plaintiffs in two cases challenged an emergency rule issued by New York State's Department of Health mandating that certain healthcare employers require COVID-19 vaccinations for certain healthcare personnel. In separate decisions, the Northern District of New York (the "Dr. A" case) granted a preliminary injunction while the Southern District of New York (the "We the Patriots" case) denied a preliminary injunction. Both cases were appealed to the Second Circuit and jointly decided. The Northern District's preliminary injunction was vacated, and the Southern District's denial of a preliminary injunction was affirmed. We The Patriots USA, Inc, v. Hochul, 17 F.4th 266 (2d Cir. 2021), *opinion clarified by* We The Patriots USA, Inc, v. Hochul, 17 F.4th 368 (2d Cir. 2021).

At the heart of the dispute was the existence of a medical exemption without a corresponding religious exemption. The Second Circuit held that the plaintiffs had not developed a sufficient record to meet their burden to show a likelihood of success on the merits with respect to neutrality or general applicability. Thus, rational basis review applied, and the state's rule was clearly rational. "Although Plaintiffs undoubtedly face a difficult choice if their employers deny religious accommodations – whether to be vaccinated despite their religious beliefs or whether to risk termination of their jobs – such hardships are outweighed by the State's interest in maintaining the safety within healthcare facilities during the pandemic." 17 F.4th at 296.

Justice Thomas indicated that he would have granted the application but wrote no opinion. Justice Gorsuch, joined by Justice Alito, wrote a dissenting opinion. Justice Gorsuch cited extensively to his concurrence in Does 1-3 v. Mills, *supra*, but focused mostly on the unique fact in this case that the new governor had made repeated public statements about what she saw as flaws in the reasoning of those asserting religious objections to COVID-19 vaccination: "This record practically exudes suspicion of those who hold unpopular religious beliefs. That alone is sufficient to render the mandate unconstitutional as applied to these applicants." Thus, questions of neutrality and general applicability would not even be reached.

Austin v. U.S. Navy Seals 1-26, 142 S. Ct. 1301 (2022) (Mem.). The Court granted the Navy's request for a stay of a district court's preliminary injunction barring the Navy from considering the plaintiffs' COVID-19 vaccination status when making deployment, assignment, and other operation decisions.

Justice Thomas noted that he would have denied the application for a stay, without opinion. Justice Kavanaugh wrote a concurring opinion. Noting the Court's history of substantial deference to the President's command of the armed forces, he wrote that "the Navy has an extraordinarily compelling interest in maintaining strategic and operational control over the assignment and deployment of all Special Warfare personnel—including control over decisions about military readiness. And no less restrictive means would satisfy that interest in this context."

Justice Alito, joined by Justice Gorsuch, wrote a dissenting opinion. Justice Alito would not have been overly deferential to the Navy, noting that the "Government would bear the burden of showing that mandatory vaccination is the least restrictive means of furthering the interest it asserts in light of the present nature of the pandemic, what is known about the spread of the virus and the effectiveness of the vaccines, prevalent practices, and the physical characteristics of Navy Seals and others in the Special Warfare community." Justice Alito asserted that there were less restrictive options that were still deferential. Justice Alito also discussed comparability, noting that the risk presented from an unvaccinated individual did not depend on the reasoning behind the lack of vaccination, echoing Justice Gorsuch's dissenting opinion in Does 1-3 v. Mills, *supra*.

Dahl v. Bd. of Tr. of W. Mich. Univ., 15 F.4th 728 (6th Cir. 2021). Western Michigan University requires student athletes to be vaccinated against COVID-19 but considers medical and religious exemptions on an individual basis. Sixteen members of the University soccer team were denied a religious exemption to COVID-19 vaccination requirement. The Court found that the members were likely to succeed on Free Exercise claims.

B. Teleworking as an ADA Reasonable Accommodation

Equal Emp't Opportunity Comm'n v. ISS Facility Services, Inc., 1:21CV03708 (N.D. Ga. 2021). On September 7, 2021, the Equal Employment Opportunity Commission (EEOC) filed, for the first time, a lawsuit alleging that an employer had discriminated against a disabled employee by refusing her request to work from home due to her increased risk of COVID-19.

Plaintiff alleged that, shortly after the onset of the COVID-19 pandemic, defendant ISS Facility Services placed its staff on a modified work schedule, whereby employees worked from home four days per week. After the company required all staff to return to in-person, plaintiff requested that she be allowed to work from home two days per week as an accommodation under the Americans with Disabilities Act (ADA). She claimed to have a heart condition that increased her COVID-19 risk. In support, the Complaint alleges that the employee's job duties generally required her to be in close contact with other employees. It also alleged that other employees had been allowed to work from home following the company's return-to-work directive.

The EEOC is seeking injunctive relief and damages, including punitive damages, against ISS. The case remains pending in the Northern District of Georgia.

U.S. Equal Employment Opportunity Commission, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (Updated March 14, 2022) (available at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws).

The EEOC has provided wide-ranging guidance on the impact of COVID-19 on the Americans with Disabilities Act, and other equal employment opportunity laws. One notable position taken by the EEOC in its guidance is that the fact that an employer allowed employees to telework during the pandemic does not necessarily bind that employer to that arrangement going forward. The EEOC recognizes that employers might have excused the performance of essential functions of a job in permitting employees to telework during the pandemic. But it reiterates that "[t]he employer has no obligation under the ADA to refrain from restoring all of an employee's essential duties at

such time as it chooses to restore the prior work arrangement, and then evaluating any requests for continued or new accommodations under the usual ADA rules."

C. Subject Matter Jurisdiction

Shiber v. Centerview Partners LLC, No. 21 CIV. 3649 (ER), 2022 WL 1173433 (S.D.N.Y. Apr. 20, 2022). On April 20, 2022, the Southern District of New York held that a remote employee working in New Jersey during the COVID-19 pandemic could not assert claims under New York State and New York City anti-discrimination laws against her employer.

Plaintiff was a New Jersey resident who was hired to work at Centerview Partners, LLC New York City office. However, she began her employment remotely due to the intervening pandemic. Ultimately, her employment was terminated before the NYC office reopened. Thus, for her entire tenure, Plaintiff worked remotely out of her home in New Jersey.

The Court noted the intent of both statutes to protect those who live or work within New York State or New York City. It explained that under long-standing precedent, a plaintiff must allege that the impact of any alleged discriminatory conduct must be felt by the plaintiff in New York State and New York City to assert claims under the relevant statutes. Notwithstanding the fact that the intention was for plaintiff to eventually work in defendant's New York City office, the Court found that since she never did, it lacked subject matter jurisdiction to hear her claims.

D. Personal Jurisdiction

Perry v. Nat'l Ass'n of Home Builders of United States, No. CV TDC-20-0454, 2020 WL 5759766 (D. Md. Sept. 28, 2020). The U.S. District Court for the District of Maryland held that an employee's unilateral decision to work from her home in Maryland did not constitute purposeful availment by her nonresident employer, so as to grant personal jurisdiction in the state.

Plaintiff worked for the National Association of Home Builders (NAHB), a Nevada nonprofit corporation with its principal place of business in Washington, D.C. Plaintiff conducted a majority of her work from her home in Prince George's County, Maryland because (according to Plaintiff) she was required to work after regular business hours and on weekends. She also estimates that her employer derived 70% to 80% of its business from the work she performed in Maryland. After her termination, Plaintiff brought suit in the District of Maryland.

In finding that it lacked personal jurisdiction over the nonresident employer, the Court explained that in remote-work cases, "a defendant's mere knowledge that an employee happens to reside in the forum state and conduct some work from home does not constitute purposeful availment." The Court explained that courts may find purposeful availment where the employer intentionally directed contact with the forum state, such as through some combination of affirmatively recruiting the employee while a resident of the forum state, contracting to have the employee work from the forum state, having the employee attend meetings with business prospects within the forum state, and supplying the employee with equipment to do work there.

The Court noted that Plaintiff had not alleged that NAHB recruited her for her job because she resided in Maryland, or that it even had knowledge of that fact. The Court stated that even if the

employer did have such knowledge, Plaintiff did not allege that she executed an employment contract in Maryland; that any such contract provided that she would work from Maryland; or that she was directed to, or actually did, conduct any work targeting Maryland, such as attending business meetings in Maryland. Thus, under those circumstances, Plaintiff's decision to conduct most of her work from Maryland, even if known to and supported in some way by NAHB, constituted "unilateral activity" that did not establish purposeful availment by NAHB.

Gonzalez v. US Hum. Rts. Network, 512 F. Supp. 3d 944 (D. Ariz. 2021). A former executive director for human rights organization based in Georgia brought action in Arizona against the organization and four members of the board of directors for wrongful termination. The Court granted motion to dismiss by three of the board members on the grounds that it lacked personal jurisdiction over them.

The Court reasoned that it was significant that Plaintiff had not alleged that the Board Members affirmatively reached out to her to recruit her for the Executive Director position while she was living in Arizona. The Court cited several cases in which courts evaluating whether an employer is subject to personal jurisdiction for workplace-related claims in the state where a telecommuting employee resides, have identified the presence or absence of affirmative recruitment efforts within the forum state as a relevant factor.

E. Workers Compensation

Capraro v. Matrix Absence Mgmt., 187 A.D.3d 1395, 132 N.Y.S.3d 456 (2020). In this appeal from the New York Workers' Compensation Board, the Claimant was hired to work from home as a claims examiner and was allegedly injured as he carried boxes containing his new office equipment upstairs to his home office. Claimant thereafter stopped working and applied for workers' compensation benefits. The claim was originally denied on the grounds that the injuries did not arise out of and in the course of his employment and denied the claim.

The New York Court disagreed with the denial, finding it based on a "rigid new standard for employees working from home." The Court reiterated that "[a] regular pattern of work at home renders the employee's residence a 'place of employment' as much as any traditional workplace maintained by the employer." Thus, to the extent the claimant was injured during his regular work shift, the compensability of his injury should have been determined using long-standing workers compensation standards." The Court directed the Board to determine whether claimant, when moving the boxes, was engaged in a "purely personal" activity that was not "reasonable and sufficiently work related under the circumstances." In doing so, the Board was instructed to bear in mind that a short break or some similar momentary deviation from the work routine for a customary and accepted purpose would not constitute an interruption in employment sufficient to bar a claim for benefits. Nor did the fact that claimant was injured during his lunch hour, in and of itself, render injuries noncompensable.

Sedgwick CMS v. Valcourt-Williams, 271 So. 3d 1133 (Fla. Dist. Ct. App. 2019). While working from home, and during work hours, Tammitha Valcourt-Williams, tripped over her dog while reaching for a coffee cup in her kitchen. Valcourt-Williams thereafter sought workers' compensation benefits. The Judge of Compensation Claims determined the injury was compensable, concluding that the work-from-home arrangement meant the employer "imported

the work environment into the claimant's home and the claimant's home into the work environment." But on appeal, the Court found the relevant question to be whether the employment—wherever it is—necessarily exposes a claimant to conditions which substantially contribute to the risk of injury. In this case, the relevant risk was that Valcourt-Williams might trip over her dog while reaching for a coffee cup in her kitchen. The Court found that this particular risk existed whether Valcourt-Williams was at home working or whether she was at home not working. The Court explained that "[w]hether the accident is a fall—or anything else—a claimant cannot prevail unless there was occupational causation, a risk not existent in the claimant's 'non-employment life.'" Because the risk did not arise out of Valcourt-Williams' employment, the Court held that the employer was not required to cover the cost of her injury.

F. Posting Requirements

United States Department of Labor, Wage and Hour division, Field Assistance Bulletin No. 2020-7. On December 23, 2020 the Wage and Hour Division of the US Department of Labor released a Field Assistance Bulletin on the electronic posting of required notices under certain laws, including the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), Section 14(c) of the FLSA (Section 14(c)), the Employee Polygraph Protection Act (EPPA), and the Service Contract Act (SCA). As noted in the Bulletin, in most cases, these electronic notices may supplement but do not replace the statutory and regulatory requirements that employers post a hard-copy notice.

According to the Department of Labor (DOL), if a statute and its regulations require a notice to be continuously posted at a worksite, in most cases, the Department will only consider electronic posting an acceptable substitute for the continuous posting requirement where (1) all of the employer's employees exclusively work remotely, (2) all employees customarily receive information from the employer via electronic means, and (3) all employees have readily available access to the electronic posting at all times. But where, for example, an employer has both employees on-site and other employees teleworking full-time, the employer may supplement a hard-copy posting requirement with electronic posting. In such cases, the DOL encourages both methods of posting.

G. Time Tracking

U.S. Department of Labor, Wage and Hour Division, Field Assistance Bulletin No. 2020-5 (August 24, 2020). On August 24, 2020, the Department of Labor issued a Field Assistance Bulletin providing guidance regarding employers' obligations under the Fair Labor Standards Act (FLSA) to track the work hours of employees who are teleworking or otherwise working remotely.

The Bulletin states that employers must use reasonable diligence in tracking nonexempt telecommuters' work hours and may do this by providing a reporting procedure for unscheduled time. The workers then must be compensated for all reported work hours, even those not requested by the employer. Moreover, an employer cannot avoid payment obligations for unapproved work by simply issuing a rule banning it; instead, the employer "must make every effort to enforce" that rule. However, the Bulletin also notes that an employer's obligation to prevent unscheduled work is not "boundless," and that an employer may not be obligated to compensate non-exempt

employees for hours worked that it had no actual or constructive knowledge of and thus no opportunity to prevent.

H. The Great Resignation

The pandemic and its ubiquitous impact on higher education have left institutions grappling with unexpected and significant changes throughout their communities, at all levels. Ranging from failed presidential searches to shortages in office staff, institutions are reviewing data and reimagining ways to reinvigorate and retain their existing workforces while trying to attract new talent. At the same time, many institutions are managing taxed resources and changes in enrollment. Below are a few articles that evaluate the circumstances from different perspectives:

- "Back to School: How the Great Resignation is Changing Education" (*Forbes* May 4, 2022). The article discussed the impact of COVID-19 and online education on the workforce, including the fact that NEA reported 55% of educators are more likely to resign to pursue other careers or early retirement and HigheredJobs reported a 16.5% increase in education job openings. Several factors impact these numbers including stress and high levels of burnout, lack of flexibility in the workplace, and unhealthy work environments. Higher education institutions should consider creating hybrid work environments when possible or offering job sharing, implement new virtual means for recruitment, gather employee feedback often, increase employee engagement, and prioritize communication within the organization.
    - Back To School: How The Great Resignation Is Changing Education (forbes.com)
- "From Great Resignation to Great Reimagination – Higher Education" (*Deloitte* 2022). Deloitte produced a publication on the impact of the great resignation and implications for higher education institutions. It discussed the three main reasons that drive staff resignations including challenging work conditions (including a heavier burden on a small workforce to meet student needs), rigid work schedules, and compensation and valuation. The guide suggested that in the short term, the Great Resignation implies that institutions should invest in efforts long term that allow the current leaner workforce to function better and remote to prevent burnout, pay attention to student experience and invest in ways to improve if possible, and in the long term, institutions should find ways to evolve and increase enrollment. Several suggestions were presented for institutions including rebuilding relationships with employees including with improved communication, embracing technology and reconfiguring work arrangements, investing in professional development for all faculty and staff, and increasing compensation by reconsidering the business model and finding ways to cut costs.
    - gx-tgr-higher-education-sector.pdf (deloitte.com)
- "Reimagining Employee Engagement in the Great Resignation Era" (*Forbes* June 8, 2022). With 75% of employees reporting they want to have fun at work and 91% reporting they want to be more connected to their colleagues, the article highlights how companies can achieve these goals within their workplace. Recommendations include offering remote and hybrid work options, improving technology to create means to engage and interact virtually, setting specific goals on wats to improve the culture, and incorporating strategies that allow employees to be their authentic selves in the workplace, including game-based learning.

- Reimagining Employee Engagement In The Great Resignation Era (forbes.com)

- "Higher Education's Role in the Era of Great Resignation" (*Inside Higher Ed.* Nov. 3, 2021). The article discussed the reasons for the Great Resignation and potential impact on higher education. Specifically, the article mentions the importance of time, money, an "empathetic and supportive working culture" and importance on well-being, inclusion, innovation and entrepreneurship. The article discusses higher education's role in educating the evolving workforce and recommends that higher education institutions design online short courses, stackable certificates, and programs that lead to degrees to support adults in this resignation era. These programs should be flexible, affordable, online, relevant to opportunities in the market, and supported by faculty, staff and advisors.
  - Higher Education's Role in the Era of the Great Resignation (insidehighered.com)