



New Jersey Labor and Employment Law Quarterly

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Message From the Chair

by Stephanie Wilson



As we step into 2025, I want to take a moment to reflect on the incredible achievements of our Labor and Employment Law Section throughout 2024. It was a year marked by significant legal developments and I am proud to report that our

Section has not only stayed at the forefront of these developments but has also expanded in membership and influence. Thanks to your active engagement, we have seen an increase in both participation and meaningful discussions, all of which have enriched our understanding of the evolving landscape in labor and employment law.

In the past year, we made great strides in our educational and professional outreach efforts. Our CLEs, scholarly articles, open houses, and presentations received widespread praise for their depth and relevance, bringing together experts and practitioners to dissect the most pressing issues in the field. From private and public sector labor law issues to the expansion of workplace discrimination theories, our members engaged in conversations that shape the

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Message From the Editor

by Lisa Barré-Quick



Welcome to a new year and a new volume of the *Quarterly*!

In our Director's Corner, we welcome the new Chair for the New Jersey Public Employment Relations Commission, Mary Beth Hennessy-Shotter, who shares her insight on the next chapter of PERC now that she is at the helm. The issue then turns to a fascinating and extremely timely issue, generative artificial intelligence, and explores its wide-ranging impact on and implications for the practice of law.

Next we tackle issues surrounding employer and employee speech in the workplace in the context of two recent National Labor Relations Board decisions, *Amazon.com Services LLC* and *Siren Retail Corp.*, wherein the NLRB scaled back what employers are permitted to say to employees about union organizing and formation and the contexts in which they may say it.

Finally, this issue turns to the U.S. Supreme Court's recent decision in *Muldrow v. City of St. Louis Police Department*, which redefined "adverse action" in the context of Title VII claims. In response to this deci-

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future of our profession. The *Quarterly* is just one of the many ways we continue to provide insights and knowledge that benefit our entire membership.

Looking further into 2025, we are entering a year that promises to bring even more transformative legal events. From shifting regulatory environments to new case law developments that will impact the public and private sectors, the challenges and opportunities in labor and employment law will continue to evolve. Our Section is well-positioned to lead the charge in analyzing and responding to any new developments and I encourage each of you to contribute your expertise to our discussions and initiatives. Together, we will continue to set the agenda for the future of labor and employment law.

Finally, as we build on the successes of 2024, one of our primary objectives for 2025 remains the continued growth of our membership. Toward that end, we invite you to join the Section if you aren't a member and to become more involved if you're already a member. I am sure you agree that every member can benefit from the wealth of knowledge and experience within our own ranks. I look forward to working alongside all of you in 2025 to strengthen our collective efforts and to ensure that the Section remains a vibrant and essential resource for all professionals in the field.

Warmest wishes for a prosperous and fulfilling 2025!



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sion, we look at the impact of the decision in the context of the employment law landscape. The issue then closes with a commentary addressing whether the *Muldrow* standard has a place in PERC proceedings.

This issue offers insight, information, and commentary which the editorial board hopes will bring thought and perspective to your practice and will serve you well as you represent clients in what is sure to be a rapidly changing and developing space in 2025.

Finally, I would be remiss if I did not express my ongoing gratitude for our many valued readers and the substantial efforts of our editors and authors who make this publication possible. ■

We want to hear from you...

As always, we welcome new authors and editors. Please contact the Editor-in-Chief, Lisa Barré-Quick (lbarrerequick@ammm.com), or the Managing Editor, Hop Wechsler (hwechsler@selikoffcohen.com), with content ideas or if you would like to write or edit for, or otherwise become more involved with, the *Quarterly*!

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The opinions of the various authors contained within this issue should not be viewed as those of the *Labor and Employment Law Quarterly* or the New Jersey State Bar Association.

Endings and New Beginnings at PERC

by Mary Beth Hennessy-Shotter

Assuming the role of Chair for the New Jersey Public Employment Relations Commission (PERC) is an honor and a privilege. The labor relations process has always thrived when PERC is led by experienced labor relations neutrals, and I am eager to guide PERC through this period of transition from former Chair Joel Weisblatt.

When I joined PERC in 2007, the agency was participating in the Neutrality Project. The project was an endeavor of the Association of Labor Relations Agencies (ALRA) to pool the knowledge and experience of labor relations agencies in the United States and Canada regarding neutrality and agency integrity. In 2008, the final report was issued.¹ Joel was involved in the project. The core message of the report is that agencies should prioritize impartiality, independence, and adherence to high ethical standards.

Joel was the perfect fit to lead PERC. He was a career neutral and came to PERC from a 35-year successful arbitration practice. Joel had a clear mission to gain the confidence of management, labor, and PERC staff by reinforcing the agency's neutrality and reestablishing PERC as a model labor relations agency. After serving a five-year term from 2018–2023, which included successfully navigating the agency through the pandemic, he accomplished his mission. We are all grateful to him and wish him continued success as he has now returned to his arbitration practice.

Looking ahead, I am excited to continue working with our current team of dedicated labor relations neutrals. Each member shares my enthusiasm for maintaining neutrality and independence, which are central to PERC's statutory mission. Our staff's goal is to issue decisions that offer predictability and to provide services

that foster harmonious labor relations. I am also eager to collaborate with my fellow commissioners (two employee organization members, two employee members, and two public members). As a tripartite commission, we are uniquely positioned to provide balanced guidance through our diverse expertise in labor relations.

I am thrilled to announce that PERC is upgrading our aging case management system. The new system will integrate our case files with our email system, allowing us to process a higher volume of files each day. Additionally, we will introduce an e-filing process for most case types. Stay up to date with announcements regarding changes to agency operations by visiting our website at nj.gov/perc.

For those new to practicing before PERC or who want to become more familiar with the work we do, I encourage you to attend our Public Sector Labor Relations Certificate classes, offered in partnership with Rutgers University's School of Management and Labor Relations. These classes cover topics such as the History of Collective Negotiations, PERC Policies and Procedures, and the Scope of Negotiations.²

Also, please join me in attending the Public Sector Labor Conference (otherwise known as the PERC Conference) on April 3, 2025. Details regarding the program and registration information are available on the agency website. ■

Mary E. (Mary Beth) Hennessy-Shotter is Chair and Director of Conciliation & Arbitration at PERC in Trenton. She was previously a Staff Mediator and Deputy General Counsel for PERC.

Endnotes

1. Available at alra.org/wp-content/uploads/2019/03/NeutralityProject-FinalReport.pdf.
2. For more information, visit smlr.rutgers.edu.

Generative Artificial Intelligence in Legal Practice: The Good, the Bad, and the Sanctionable

by Stephanie Wilson, Hon. Ronald J. Hedges (Ret.), Joshua R. Sallmen, and Margaret Dunlap

Consider this hypothetical:

- You heard how generative artificial intelligence (Gen AI) platforms such as ChatGPT can enhance your legal practice and use a platform for legal research in an important brief. In response to your requests for on-point case law, the platform provides you with case citations and quotes from decisions provided by the platform. Because you believe the platform provides accurate information, you incorporate the information into your brief without independently checking the decisions or quotes. You file and serve your brief and feel very good about your chances of success.
- However, shortly thereafter, you are hauled into court and informed that the case citations and quotes in your brief do not exist. For the first time, you hear the term “hallucinations” and learn that Gen AI platforms do not always provide accurate information.
- The made-up decisions and quotes torpedo your client’s case and your conduct leads to sanctions and the threat of a professional ethics inquiry against you and your firm.

This hypothetical draws from real court cases that provide both cautionary tales and best practices guidance for attorneys who use or are contemplating using Gen AI.¹ In response to Gen AI’s increasing and evolving uses in the legal field, New Jersey, like other jurisdictions, provides practitioners with guidance on what constitutes the good, the bad, and the sanctionable uses of Gen AI in their practices.²

I. Gen AI And the Practice of Law

Increasingly, attorneys are considering whether some form of Gen AI is right for their practices by, among other things, weighing the pros and cons of its use.³ Proponents argue that attorneys who do not deploy Gen AI, or at least understand its uses, will be at a competitive disadvantage.⁴

Some researchers predict that Gen AI’s largest impact on the ways lawyers work will be its ability to complete certain routine or repetitive tasks quickly and efficiently such as:

- Drafting and reviewing contracts;
- Brainstorming potential outcomes of legal arguments;
- Streamlining marketing and business development functions; and
- Summarizing legal documents.⁵

In general, proponents argue that use of Gen AI tools for certain tasks will positively impact attorneys’ practices by, among other things, allowing them more time to perform strategic and nuanced work.⁶

II. Potential Issues Arising from Gen AI’s Use

While Gen AI holds great innovative promise across most business sectors, potential legal and regulatory claims surrounding Gen AI’s use include:

- Copyright violations and intellectual property infringement;⁷
- Deepfakes or misinformation;⁸
- Breach of privacy;⁹
- Cybersecurity and data breach claims;¹⁰
- Bias and discrimination;¹¹ and
- Worker displacements.¹²

There are additional issues presented by the use of Gen AI, including professional conduct responsibilities, creation of and reliance on fake case citations and decisions (called “hallucinations”), rejection of fee petitions created by or relying on Gen AI, claims of ineffective assistance of counsel, and the unauthorized practice of law, each of which is addressed in turn.

A. Attorneys Must Comply with Applicable Rules of Professional Conduct

Attorneys are not immune to the above claims and must be aware of additional ethical and client considerations that may arise from their use of Gen AI platforms. Accordingly, attorneys must ensure compliance with the

applicable New Jersey Rules of Professional Conduct,¹³ such as:

- Duties of competence (RPC 1.1) and diligence (RPC 1.3);
- Duties of confidentiality of information (RPC 1.6) and safekeeping property (RPC 1.15);
- Prohibition on assisting clients with illegal, criminal, or fraudulent conduct (RPC 1.2(d));
- Responsibilities of partners, supervisory lawyers, and law firms (RPC 5.1);
- Duty to communicate with clients regarding representation (RPC 1.4);
- Duty to charge clients reasonable fees (RPC 1.5(a));
- Duty to bring meritorious claims and contentions (RPC 3.1) and duty of candor toward the tribunal (RPC 3.3); and
- Prohibition on discrimination (RPC 8.4(g)).¹⁴

B. Hallucinations

1. *Hallucinations Present Risk of Harming Case Position and Sanctions*¹⁵

Compliance with the RPCs encompasses, among other things, being knowledgeable about the technology that is being used and confirming the accuracy of information provided. As previewed in the opening hypothetical, a Gen AI platform can be prone to hallucinations where it provides fabricated decisions or incorrect data.

*Mata v. Avianca*¹⁶ is the first decision that considered Gen AI's fallibilities and the risks of relying solely on Gen AI for legal research without reasonably checking the outputs a Gen AI platform provides. In *Mata*, the court found that the plaintiff's attorneys "submitted non-existent judicial opinions with fake quotes and citations created by ChatGPT...then continued to stand by the fake opinions after judicial orders called their existence into question."¹⁷ Upon concluding that the attorneys acted with subjective bad faith and violated the Federal Rules of Civil Procedure,¹⁸ the court leveled sanctions that included holding the attorneys' firm jointly and severally liable for the actions of the attorneys,¹⁹ imposing a \$5,000 monetary penalty, and requiring the attorneys to "inform their client and the judges whose names were wrongfully invoked of the sanctions imposed."²⁰

Unfortunately, *Mata* is not the only case in which attorneys relied on ChatGPT to their detriment. See, e.g., *People v. Crabill*;²¹ *Ex parte Lee*;²² *Berman v. Matteucci*;²³ and *Park v. Kim*.²⁴

2. *Hallucinations Trigger Defamation Claim*

Walters v. OpenAI LLC,²⁵ a defamation lawsuit filed in Georgia Superior Court in June 2023, is touted as the first defamation lawsuit stemming from ChatGPT's use.²⁶ In *Walters*, a reporter submitted an inquiry to ChatGPT asking the Gen AI chatbot to provide a summary of a complaint filed by the Second Amendment Foundation (SAF). In response, ChatGPT stated, among other things, that "[the SAF complaint is] filed...against Mark Walters, who is accused of defrauding and embezzling funds from the SAF[.]"²⁷ However, Walters never worked for SAF and was not a defendant to a lawsuit by SAF. Walters sued OpenAI, ChatGPT's developer, asserting that, by generating the fabricated information, OpenAI published libelous matter.²⁸

C. Court Rejects Fee Application That Was "Cross-Checked" By ChatGPT

In *J.G. v. New York City Department of Education*,²⁹ plaintiffs in an Individuals with Disabilities Education Act (IDEA) lawsuit prevailed in two proceedings. As prevailing parties, the firm representing the plaintiffs moved for an award of attorneys' fees in accordance with the IDEA's fee-shifting provision.

In support of its argument that its hourly rates were "reasonable," the firm relied on four independent published sources.³⁰ However, the court labeled each source as "problematic" and did not give the sources "substantial weight" in its analyses.³¹ The court noted that the firm had claimed in its submissions that ChatGPT-4 (an "improved" version of ChatGPT) supported its hourly rates argument and that the firm had purportedly "cross-check[ed]" the information provided by the sources by using ChatGPT-4.³² However, the court characterized the firm's reliance on ChatGPT as "utterly and unusually unpersuasive" and "reject[ed] out of hand" ChatGPT's conclusions concerning appropriate billing rates, raising several red flags:

- "[T]reating ChatGPT's conclusions as a useful gauge of the reasonable billing rate for the work of a lawyer with a particular background carrying out a bespoke assignment for a client in a niche practice area was misbegotten at the jump";
- Prior Second Circuit decisions, including *Mata* and *Park*, had highlighted ChatGPT's unreliability; and
- The firm failed to identify the training data and the prompts on which ChatGPT relied for its conclusions or whether any of its outputs were "imaginary."³³

The court concluded: “Barring a paradigm shift in the reliability of this tool, the [firm] is well advised to excise references to ChatGPT from future fee applications.”³⁴

D. Ineffective Assistance of Counsel

In *US v. Michel*,³⁵ a jury convicted the defendant of criminal conduct in April 2023. The defendant moved for a new trial based in relevant part on a claim that his attorney’s reliance on Gen AI for his closing argument constituted ineffective assistance of counsel. The defendant specifically claimed that the “proprietary prototype AI program” used by his attorney to write the closing argument “made frivolous arguments, misapprehended the required elements, conflated the schemes, and ignored critical weaknesses in the [g]overnment’s case.”³⁶ After holding an evidentiary hearing, the court denied the defendant’s motion for a new trial, concluding in relevant part that the defendant was not sufficiently prejudiced by the use of the AI program to prove ineffective assistance of counsel.³⁷

E. Unauthorized Practice of Law

Questions arise as to whether, or to what extent, reliance on Gen AI for “legal advice” constitutes the unauthorized practice of law (UPL). DoNotPay (DNP), which claims to provide consumers with “the world’s first robot lawyer,” is a noteworthy example of the potential for UPL in its representation of consumers contesting parking tickets and pursuing other legal matters without retaining an attorney.³⁸ Several lawsuits have been filed against DNP for UPL and other claims.³⁹ See, e.g., *Faridian v. DoNotPay, Inc.*;⁴⁰ *MillerKing, LLC v. DoNotPay, Inc.*;⁴¹ *Tewson v. DoNotPay, Inc., et al.*⁴²

III. Attorneys Must Gatekeep to Ensure Gen AI Does Not Infringe on Ethic Rules, Court Orders, and Other Directives

As the *Mata* court stated, “Technological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance”; however, attorneys are not free from “existing rules [that] impose a gatekeeping role on attorneys to ensure the accuracy of their filings.”⁴³ The ABA has affirmed that gatekeeping role through resolutions⁴⁴ and its Model Rules of Professional Conduct,⁴⁵ as have state bar associations⁴⁶ and courts through judicial orders.⁴⁷

On Jan. 25, 2024, the New Jersey Supreme Court issued a Notice with Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers.⁴⁸ The guidelines acknowledge that use of Gen AI will be “unavoidable” while confirming that attorneys’ existing ethical duties are not changed and that attorneys are expected to remain compliant with relevant ethics rules.⁴⁹

Judge Evelyn Padin of the United States District Court for the District of New Jersey similarly addressed the use of Gen AI in a standing order requiring that litigants provide a certification identifying work product that was generated by Gen AI and which program was used and affirming “that the [Gen AI] work product was diligently reviewed by a human being for accuracy and applicability.”⁵⁰

IV. Conclusion

It appears inevitable that attorneys practicing in the coming years will have to work with Gen AI, whether that be through their own use, their clients’ use, or their opponents’ use. As it becomes more reliable and trustworthy, Gen AI likely stands to change the legal industry; however, attorneys must always follow applicable rules and guidance to avoid becoming the next cautionary tale. ■

Stephanie Wilson is retired Senior Counsel in Reed Smith LLP’s Financial Industries Group, Chair of the NJSBA’s Labor and Employment Law Section, and Co-Chair of the Section’s Technology Subcommittee. She also is a member of the NJSBA’s AI Task Force. Hon. Ronald J. Hedges is the Principal of Ronald J. Hedges LLC, a former United States Magistrate Judge in the District of New Jersey, and the Chair of the Court Technology Committee of the American Bar Association’s Judicial Division. He is also a member of the NJSBA’s and New York State Bar Association’s AI Task Forces and the Founders Circle of the Georgetown Law Advanced eDiscovery Institute. Joshua R. Sallmen is an associate in Reed Smith’s Labor and Employment Group. He represents employers in litigation in federal and state court and administrative agencies including the EEOC and NLRB. Margaret Dunlap is a senior paralegal in Reed Smith’s Life Sciences Group.

Endnotes

1. See *infra* Section II.B.
2. See Notice – Legal Practice: Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers (Jan. 25, 2024), *available at* njcourts.gov/notices/notice-legal-practice-preliminary-guidelines-use-of-artificial-intelligence-new-jersey. The New Jersey Judiciary also issued a survey to attorneys that was designed to gauge their knowledge and attitudes about Gen AI. See Notice – Legal Practice: Judiciary Survey of Attorneys’ Knowledge, Perception, and Use of Artificial Intelligence (Mar. 25, 2024), *available at* njcourts.gov/notices/notice-legal-practice-judiciary-survey-of-attorneys-knowledge-perception-and-use-of. The results showed that a significant number of attorneys lacked knowledge and training concerning Gen AI. In response, the Judiciary plans to, among other things, offer continuing legal education concerning Gen AI technology. See Andrea Keckley, NJ Attys Flag Ethics Concerns, Lack of Training with AI, *Law360*[®] (June 12, 2024), *available at* law360.com/pulse/articles/1847052/nj-attys-flag-ethics-concerns-lack-of-training-with-ai. See also Jake Maher, NJ Bar Task Force Aims to ‘Get in on the Ground Floor’ of AI, *Law360*[®] (Sept. 27, 2023), *available at* law360.com/pulse/articles/1726323/nj-bar-taskforce-aims-to-get-in-on-the-ground-floor-of-ai (discussing New Jersey State Bar Association’s formation of an AI Taskforce to provide guidance and training to its attorneys). In May 2024, the NJSBA’s AI Taskforce published Task Force of Artificial Intelligence (AI) and the Law: Report, Requests, Recommendations and Findings, *available at* njsba.com/wp-content/uploads/2024/05/NJSBA-TASK-FORCE-ON-AI-AND-THE-LAW-REPORT-final.pdf.
3. See, e.g., How law firms can use AI to level up their business, Thomson Reuters (Sept. 25, 2023), *available at* legal.thomsonreuters.com/blog/how-law-firms-can-use-ai-to-level-up-their-business/; Sam Skolnik, Big Law’s AI Jobs Lay Foundation for Tech’s Wider Use at Firms, *Bloomberg Law* (Nov. 7, 2023), *available at* news.bloomberglaw.com/business-and-practice/big-laws-ai-jobs-lay-foundation-for-techs-wider-use-at-firms.
4. See, e.g., Natalie Pierce and Stephanie Goutos, Why Lawyers Must Responsibly Embrace Generative AI, 21 *Berkeley Bus. L.J.*, No. 2 (2024), *available at* papers.ssrn.com/sol3/papers.cfm?abstract_id=4477704.
5. See, e.g., Cat Casey, From Gavel to Gigabytes: ChatGPT’s Groundbreaking Year in Law (Nov. 30, 2023), *available at* revealddata.com/blog/from-gavel-to-gigabytes-chatgpts-groundbreaking-year-in-law; Ilona Logvinova, Legal innovation and generative AI: Lawyers emerging as ‘pilots,’ content creators, and legal designers, McKinsey & Company (May 11, 2023), *available at* mckinsey.com/featured-insights/in-the-balance/legal-innovation-and-generative-ai-lawyers-emerging-as-pilots-content-creators-and-legal-designers; Lauri Donahue, A Primer on Using AI in the Legal Profession, *Jolt Digest* (Jan. 3, 2018), *available at* jolt.law.harvard.edu/digest/a-primer-on-using-artificial-intelligence-in-the-legal-profession; 7 Ways AI can benefit your law firm, American Bar Association (Sept. 2017), *available at* americanbar.org/news/abanews/publications/youraba/2017/september-2017/7-ways-artificial-intelligence-can-benefit-your-law-firm/; Skolnik, *supra* n.3; White Paper: Generative Artificial Intelligence: Benefits and Risks to Law Firms, Association of Legal Administrators (Sept. 2023), at 4, *available at* alanet.org/publications/white-papers/generative-artificial-intelligence-benefits-and-risks-to-law-firm.
6. See, e.g., Isabel Parker and Michael Morrison, *From legal documents to code: how generative AI is reshaping legal departments*, Deloitte (Apr. 6, 2024), *available at* legalbriefs.deloitte.com/post/102ipum/from-legal-documents-to-code-how-generative-ai-is-reshaping-legal-departments.
7. See, e.g., White Paper: GAI, *supra* n.5, at 7; NJSBA AI Task Force Report, *supra* n.2, at 18.
8. See, e.g., Stephanie Wilson, Joshua Sallmen, Saranne Weimer, Mark Goldstein, and Ronald Hedges, Deepfakes and the Admissibility of Evidence, Practicing Law Institute (Feb. 28, 2024), *available at* [plus.pli.edu/Details/Details?fq=id:\(402143-ATL7\)](https://plus.pli.edu/Details/Details?fq=id:(402143-ATL7)).
9. See, e.g., Dr. Suresh Rajappa, An Introduction to the Privacy and Legal Concerns of Generative AI, *Forbes* (Jan. 29, 2024), *available at* forbes.com/sites/forbestechcouncil/2024/01/29/an-introduction-to-the-privacy-and-legal-concerns-of-generative-ai/?sh=33b6405c3923; Brian Eastwood, It’s time for everyone in your company to understand generative AI, MIT Management Sloan School (Dec. 5, 2023), *available at* mitsloan.mit.edu/ideas-made-to-matter/its-time-everyone-your-company-to-understand-generative-ai.
10. See, e.g., White Paper: GAI, *supra* n.5, at 7, 10; NJSBA AI Task Force Report, *supra* n.2, at 18.
11. See, e.g., White Paper: GAI, *supra* n.5, at 7, 9-10; NJSBA AI Task Force Report, *supra* n.2, at 22-23.

12. See, e.g., Rakesh Kochhar, Which U.S. Workers Are the Most Exposed to AI on Their Jobs?, Pew Research Center (July 2023), *available at* pewresearch.org/social-trends/wp-content/uploads/sites/3/2023/07/st_2023.07.26_ai-and-jobs.pdf.
13. This article focuses on New Jersey's Rules of Professional Conduct. While there is significant overlap in states' rules, attorneys must look to the rules of professional conduct applicable to the state(s) in which they are admitted and/or practicing for specific language and requirements.
14. See also Preliminary Guidelines on the Use of AI (Jan. 25, 2024), *supra* n.2; The State Bar of California Standing Committee on Professional Responsibility and Conduct, Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law Executive Summary (Nov. 16, 2023), *available at* calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf; New York State Bar Association Report and Recommendations of New York State Bar Association Task Force on Artificial Intelligence (Apr. 2024), at 29-39, *available at* nysba.org/app/uploads/2022/03/2024-April-Report-and-Recommendations-of-the-Task-Force-on-Artificial-Intelligence.pdf; Pierce and Goutos, *supra* n.4 (addressing extent to which Gen AI use triggers disclosure obligations to clients and/or courts); Leon Yin, Davey Alba, and Leonardo Nicoletti, OpenAI's GPT is a recruiter's dream tool. Tests show there's racial bias, *Bloomberg* (Mar. 7, 2024), *available at* bloomberg.com/graphics/2024-openai-gpt-hiring-racial-discrimination.
15. See Ronald J. Hedges, Artificial Intelligence Discovery & Admissibility Case Law, New Jersey State Bar Association, 2023 Employment Law Roundtable (Dec. 14, 2023), at 40-42, 54-55, *available at* prd.uscourts.gov/sites/default/files/20231206-CLE-Prof-Hedges-AI-Case-Law.pdf.
16. 678 F. Supp. 3d 443 (S.D.N.Y. 2023).
17. *Id.* at 448.
18. See specifically Fed. R. Civ. P. 11(b)(2) (stating in relevant part that "[b]y presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances...the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law").
19. *Id.* at 465. The court also noted it could order sanctions "alternatively" pursuant to its inherent power but rejected the imposition of sanctions under 28 U.S.C. § 1927 because "[r]eliance on fake cases has caused several harms but dilatory tactics and delay were not among them." *Id.*
20. *Id.* at 466.
21. No. 23PDJ067, 2023 Colo. Discipl. LEXIS 64 (Colo. Discipl. Nov. 22, 2023). The attorney in this matter used ChatGPT to assist with the motion and cited cases that the chatbot provided without reading the cases. It was discovered subsequently that the cases were either incorrect or fictitious and a disciplinary hearing was conducted. At the end of the proceeding, it was determined that Crabill violated Colorado Rules of Professional Conduct 1.1 (a lawyer must competently represent a client), 1.3 (a lawyer must act with reasonable diligence and promptness when representing a client), 3.3(a)(1) (a lawyer must not knowingly make a false statement of material fact or law to a tribunal), and 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). The Presiding Disciplinary Judge approved the parties' stipulation to discipline and suspend Crabill for one year and one day, with ninety days to be served and the remainder to be stayed upon Crabill's successful completion of a two-year period of probation, with conditions. Crabill was also ordered to pay \$224.00 in administrative fees. See also Thy Vo, Colorado Attorney Suspended For Using "Sham" ChatGPT Case Law, *Law360* (Nov. 27, 2023), *available at* law360.com/articles/1770085/colo-atty-suspended-for-using-sham-chatgpt-case-law.
22. 673 S.W. 3d 755 (Tex. Ct. App. 2023). The petitioner, represented by counsel, argued that the trial court

- inappropriately set his bail amount and appealed, seeking a bail/bond reduction. In reviewing the brief, the appellate court noted that “none of the three published cases cited [in the petitioner’s brief that was drafted by an attorney] actually exist. Each citation provides the reader a jump-cite into the body of a different case that has nothing to do with the propositions cited[.] Two of the citations take the reader to cases from [another jurisdiction].” *Id.* at 756. The court further observed that “[i]t appears that at least the ‘Argument’ portion of the brief may have been prepared by artificial intelligence[.]” *Id.* at n2. The appellate court denied the petitioner’s request because he inadequately briefed the issue but did not sanction the attorney or report the attorney to the ethics board.
23. No. 6:23-cv-00660-MO (D. Ore. July 10, 2023). The pro se petitioner in this habeas proceeding responded to an order to show cause why the matter should not be dismissed as untimely by asserting that, in April 2023, “an artificial intelligence chatbot provided him with insights that helped him discover his claims” that the policy under which he had been sentenced violated several constitutional provisions and, prior to April 2023, “artificial intelligence technology was not sufficiently advanced to impart this knowledge to him.” The district court held that the petitioner’s understanding of his legal claim was not a “factual predicate” under habeas law and that his lack of understanding of “the legal significance of known facts” was insufficient to avoid dismissal.
 24. 91 F.4th 610, 613-616 (2d Cir. 2024). The Second Circuit found that an attorney filed a false statement with the court and violated Rule 11 by submitting a brief relying on non-existent case law that was generated by ChatGPT and by failing to check the case law’s accuracy. The court referred the attorney to the court’s grievance panel pursuant to Local Rule 46.2 (Attorney Discipline) for further investigation and for consideration of a referral to the state bar’s Committee on Admissions and Grievances.
 25. Docket No. 23-A-04860-2 (Ga. Super. Ct. June 5, 2023), *available at* courthousenews.com/wp-content/uploads/2023/06/walters-openai-complaint-gwinnett-county.pdf.
 26. *See, e.g.*, Isaiah Poritz, OpenAI Fails to Escape First Defamation Suit from Radio Host, *Bloomberg Law* (Jan. 16, 2024), *available at* news.bloomberglaw.com/ip-law/openai-fails-to-escape-first-defamation-suit-from-radio-host.
 27. *See supra* n.25, at ¶ 16.
 28. *See, e.g.*, Poritz, *supra* n.26.
 29. 2024 U.S. Dist. LEXIS 30403, at *1 (S.D.N.Y. Feb. 22, 2024). *See also, e.g.*, Chris Dolmetsch, Lawyers Use ChatGPT to Add Up Fees, Judge Faults Their Math, *Bloomberg Law* (Feb. 22, 2024), *available at* news.bloomberglaw.com/business-and-practice/lawyers-use-chatgpt-to-add-up-fees-judge-faults-their-math.
 30. *J.G., supra* n.29, at *16-17.
 31. *Id.* at *17.
 32. *Id.* at *21.
 33. *Id.* at *22.
 34. *Id.* at *23.
 35. *See* Docket No. 1:19-cr-00148 (D.D.C. May 2, 2019) (Indictment); Docket No. ECF-310 (D.D.C. Oct. 16, 2023) (Defendant’s Motion for New Trial).
 36. *Id.* *See also* Alison Frankel, Convicted Fugees rapper says ex-lawyer bungled defense with AI closing argument, *Reuters* (Oct. 17, 2023), *available at* reuters.com/legal/transactional/convicted-fugees-rapper-says-ex-lawyer-bungled-defense-with-ai-closing-argument-2023-10-17/.
 37. *Id.* (concluding in relevant part that “[the defendant] does not explain how...the mistaken attribution of a Puff Daddy song in the closing argument...resulted in prejudice[.] Specifically, [the defendant] has not shown that there is a reasonable probability that the result of his trial would have differed had [his attorney] correctly attributed a lyric to him. Notably, the content derived from the AI program did not relate to any evidence in the case, only general sympathetic statements and one lyrical quote. Because [the defendant] has not shown sufficient prejudice resulting from the defense team’s use of the AI program (and the subsequent inclusion of Puff Daddy lyrics), the Court concludes that Michel has not demonstrated ineffective assistance of counsel on this basis”).
 38. *See, e.g.*, Lawyer Bot Short-Circuited by Class Action Alleging Unauthorized Practice of Law, Wilson Elser

- (Mar. 17, 2023), *available at* wilsonelser.com/publications/lawyer-bot-short-circuited-by-class-action-alleging-unauthorized-practice-of-law.
39. See, e.g., Stephanie Pacheco, ANALYSIS: DoNotPay Lawsuits: A Setback for Justice Initiatives? *Bloomberg Law* (Mar. 28, 2023), *available at* news.bloomberglaw.com/bloomberg-law-analysis/analysis-donotpay-lawsuits-a-setback-for-justice-initiatives; Olga V. Mack, Unauthorized Practice Of Law Risk Mitigation Strategies For Legal Tech Entrepreneurs, *Above the Law* (Jan. 2, 2024), *available at* abovethelaw.com/2024/01/unauthorized-practice-of-law-risk-mitigation-strategies-for-legal-tech-entrepreneurs/.
40. Docket No. 3:23cv1692 (N.D. Cal. Apr. 7, 2023). This matter was a putative consumer class action in which the plaintiff alleged that DNP violated California's unfair competition law by holding itself out as a lawyer and engaged in the unauthorized practice of law by providing legal services without a law license. The parties eventually reached a settlement, stipulating that the matter be dismissed with prejudice. See, e.g., Sara Merken, Legal AI Startup DoNotPay reaches settlement in customer class action, *Reuters* (June 6, 2024), *available at* reuters.com/legal/legalindustry/legal-ai-startup-donotpay-reaches-settlement-customer-class-action-2024-06-06.
41. Docket No. 3:23-cv-00863-NJR (S.D. Ill. Mar. 15, 2023). Illinois-based law firm MillerKing filed a putative class action alleging DNP violated federal and state laws including the Lanham Act and Illinois's deceptive trade practices law by, among other things, advertising and providing legal services without a license to practice law. On November 17, 2023, the court dismissed the lawsuit without prejudice on the grounds that plaintiff lacked Article III standing.
42. Docket No. 151427/2023 (N.Y. Sup. Ct. Feb. 13, 2023). Kathryn Tewson, a paralegal at a New York law firm, filed a petition seeking to compel DNP to produce pre-action discovery under a New York law that allows a party to seek disclosures prior to the commencement of an action. Tewson's petition alleged that DoNotPay defrauds consumers because the company does not use AI-backed technology, despite claims to the contrary, and that DNP's products produced documents containing legal errors. On March 22, 2023, the court denied Tewson's petition for discovery prior to filing of the complaint. See also, e.g., Matt Reynolds, Inside the claims against DoNotPay's Joshua Browder and the 'World's First Robot Lawyer,' *ABA Journal*, (Dec. 1, 2023), *available at* abajournal.com/magazine/article/inside-the-claims-against-donotpays-joshua-browder-and-the-worlds-first-robot-lawyer.
43. *Mata*, *supra* n.16, at 448.
44. See, e.g., ABA Resolution 112 (adopted Aug. 12-13, 2019), *available at* americanbar.org/content/dam/aba/directories/policy/annual-2019/112-annual-2019.pdf; ABA Resolution 604 (adopted Feb. 6, 2023), *available at* americanbar.org/news/reporter_resources/annual-meeting-2023/house-of-delegates-resolutions/610/.
45. Formal Opinion 512, issued on July 29, 2024 by the ABA's Standing Committee on Ethics and Professional Responsibility, identifies attorneys' ethical obligations when using Gen AI. These obligations include, among other things, compliance with Model Rules of Professional Conduct 1.1 (competence), 1.4 (communication), 1.5 (fees), and 1.6 (confidentiality). See americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-512.pdf.
46. See, e.g., California Practical Guideline, *supra* n.14; The State Bar of California and ABA Pave the Way for Generative AI Guidelines for Law Firms, *9Sail* (Dec. 11, 2023), *available at* 9sail.com/the-state-bar-of-california-and-aba-pave-the-way-for-generative-ai-guidelines-for-law-firms/.
47. Jessiah Hulle, AI Standing Orders Proliferate as Federal Courts Forge Own Paths, *Bloomberg Law* (Nov. 8, 2023), *available at* news.bloomberglaw.com/us-law-week/ai-standing-orders-proliferate-as-federal-courts-forge-own-paths (noting that as of November 8, 2023, there were approximately 14 federal courts that had published guidance concerning the use of AI in court filings).
48. See Preliminary Guidelines on the Use of AI by New Jersey Lawyers, *supra* n.2.
49. See *id.*
50. Judge Evelyn Padin's General Pretrial and Trial Procedures (rev. Nov. 13, 2023) at § I.B., *available at* njdc.uscourts.gov/sites/njd/files/EPProcedures.pdf.

Say What?! The Uneven Dichotomy of Employer/Employee Speech in the Workplace

by Kenneth A. Rosenberg and Francis G. Tiongson

Over the past four years, the National Labor Relations Board predictably strengthened and expanded employees' rights under the National Labor Relations Act while restricting employers' rights to manage their employees and operate their businesses. It did so not only by issuing various rules and policies to expand employees' rights to self-organize; to form, join, or assist labor organizations; to bargain collectively; and to engage in other concerted activities¹ but also by overturning longstanding precedent to limit the ability of employers to oppose union organizing and formation through anti-union campaigns.

These efforts were demonstrated in two decisions the NLRB recently issued in *Amazon.com Services LLC*² and *Siren Retail Corp.*³ In these two cases, the NLRB scaled back the ability of employers to express their views regarding union organization and set out restrictions on what they can say to employees when expressing those views. The impact of these two decisions is particularly significant given the NLRB's landmark decision in *Cemex Constr. Materials Pac., LLC* as now any unfair labor practice, including, but not limited to, statements that are deemed coercive or threats, that occurs during the run-up to a secret ballot election could result in the NLRB issuing a *Cemex* bargaining order mandating that the employer immediately bargain with the union.⁴

As such, the combined effect of these decisions will inevitably restrict the information that employers can provide to employees, thereby increasing the likelihood that employees will make less educated decisions as to whether to support a union organizing drive. The imbalance in information that can be provided to employees will undoubtedly benefit unions in their efforts to organize non-union employers, as partially informed or uninformed employees are arguably much easier to organize than fully educated ones. Accordingly, it seems likely that the incoming administration will take the first opportunity that presents itself to overturn these decisions to ensure that employees have all the available

information on the pros and cons of bringing a union into their workplace. Until that occurs, employers will have to exercise extreme caution as to what they say to their employees when faced with a union organizing campaign.

Background

The NLRA sets forth specific rights that employees have when it comes to union formation. Protected activities include the right to self-organize, form, join, or assist labor organizations; to collectively bargain; and to engage in concerted activities.⁵ Additionally, under § 8(a)(1) of the Act, it is unlawful for employers to interfere with, restrain, or coerce employees in exercising those rights.⁶

However, Congress never intended to create an uneven informational playing field in favor of unions, as evidenced by its passage of the Taft-Hartley Act in 1947 which amended the NLRA's unfair labor practice provisions to include § 8(c). This amendment allowed employers to express their views on union formation as long as the expression was not coercive and did not include the threat of reprisal or force or promise of benefit.⁷ Clearly, the purpose of § 8(c) was to ensure that employees could be exposed to the cons as well as the pros of forming a union. Thereafter, the NLRB issued a series of decisions defining the interplay of §§ 8(a)(1) and 8(c), addressing captive audience meetings, the impact of unionization on employees, and policies regarding dress code and pins, among other topics.⁸

For instance, in *Babcock*, the NLRB held that employers were permitted to require employees to attend meetings during working time and to communicate the employer's position on union-related matters as long as the communications were non-coercive and did not carry unlawful threats.⁹ This was decades-old precedent that allowed employers to hold "captive audience" meetings at which they were allowed to express their views on union formation and that such meetings were not a violation of § 8(a)(1).

Similarly, under *Tri-Cast*, employers were allowed to make any statement to employees touching upon the impact that unionization would have on the relationship between individual employees and their employers.¹⁰ Those statements could include not just statements about impact of unionization but also those about how employers would not be able to address individual grievances if there were a union. The established rule was that such statements were not an unlawful threat as long as the statements were truthful.

Employers have rights not only to express their views regarding unions to their employees but to regulate employee speech in the workplace during working hours. In *Walmart Stores*, the NLRB declined to apply the special circumstances test to evaluate the lawfulness of an employer's dress code policy that partially restricted employees from displaying union buttons and other insignia.¹¹ This decision overturned *Stabilus*, which had held that employees who wore clothing that had union insignia were protected in doing so unless the employer could show that there were special circumstances to justify a dress code policy restriction.¹² Likewise, in *General Motors*, employers were allowed to discipline employees even when they engaged in otherwise protected § 7 concerted activities where these concerted activities involved deeply offensive conduct.¹³ These decisions contemplated and balanced employees' right to free speech with the employers' right to regulate the workplace.

These cases and their respective progeny have been the controlling law on employers' rights to control the workplace and express their views on unions while also considering the employees' rights to engage in protected concerted activity.

The NLRB's Recent Decisions Limiting Employer Speech

In *Amazon.com Services LLC*, the NLRB rendered a decision that ended employers' prior right to hold mandatory captive audience meetings.¹⁴ The issue was whether Amazon's holding of a mandatory meeting with about 50 employees was a violation of § 8(a)(1) of the NLRA. The NLRB reasoned that the plain text and the legislative history of the act did not permit employers to compel an employee to attend such meetings if they were coercive in nature.¹⁵ The NLRB found captive audience meetings to be inherently coercive because of the imbalance of power between the employer and the

employees.¹⁶ It reasoned that these types of meetings are coercive in nature because of the threat of discipline or discharge if employees do not attend. The NLRB further noted that employers could physically remove dissenting employees from the meeting or observe who is and is not present at those meetings and take action against these employees accordingly.¹⁷

While this NLRB decision did not entirely remove an employers' ability to express their views under § 8(c), it substantially weakened them because although employers may still hold captive audience meetings, these meetings must now be voluntary and must be communicated as voluntary.¹⁸ The NLRB stated it will find meetings to be voluntary where an employee would not reasonably conclude that attending the meeting is required as part of their job duties nor could they reasonably conclude that failing to attend would subject them to discipline or discharge.¹⁹ Notably, NLRB Member Marvin Kaplan dissented in the decision, stating that captive audience meetings are supported by the free speech language in § 8(c) and that the majority's decision would unconstitutionally infringe on an employer's right to free speech.²⁰

Employers' right to speak was further restricted by the NLRB in *Siren Retail Corp.*²¹ There, the NLRB examined whether statements made by the employer at a mandatory meeting violated § 8(a)(1) when the employer informed employees that union formation would change the existing relationship with them. Specifically, the employer advised the employees that if the union was elected it would have to communicate with the union rather than the individual employee whenever an issue arose.²² The NLRB reasoned that those statements that indicate a change in how an employee can communicate with their employer after union formation would be inconsistent with § 9(a) of the NLRA, which the NLRB found allows an employee to speak directly with management, regardless of whether there is a union.²³ In its decision, the NLRB also overturned the standard established in *Tri-Cast*, holding that the decision was "poorly reasoned" and that the prior rule was too broad because it protected statements that the NLRB viewed to have a "reasonable tendency to coerce employees."²⁴

The new standard that the NLRB established in its decision is a return to its holding in *NLRB v. Gissel Packing Co.*, which held that an employer's statements should be evaluated on a case-by-case basis.²⁵ This new standard not only looks at what an employer tells an employee, but also the circumstances in which the state-

ments are made. Employers' statements must be "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond [their] control."²⁶ Thus, going forward, if an employer's statement is not based on objective fact or if it predicts negative consequences resulting from an employer's own actions, it will be a violation.

Employee Speech: Expansion and Lack of Guidance

While employers' rights to speak have been narrowed, the same cannot be said for employees. This juxtaposition between employers' and employees' rights to speak is notable in that the NLRB has consistently expanded the rights of employees who are engaging in speech or other forms of expression. This expansion is inherently unequal where the employees not only enjoy expanded speech rights but still benefit from a broad range of their activities being protected under § 7 such as the use of inflatable rats, banners, and pins.²⁷

Last November, the NLRB issued a decision that restricted employers' uniform policy as it relates to employee speech in another case involving *Siren Retail Corp.*²⁸ There, the issue was whether the dress code, which limited the number of pins that employees are permitted to wear during working hours, was a violation of § 8(a)(1) of the NLRA.²⁹ The NLRB reasoned that the employer failed to prove special circumstances justifying a one-pin policy and that the employer provided no evidence that wearing more than one pin would interfere with the employers' public image.³⁰ Notably, this decision not only restricted an employer's ability to regulate the speech in their workplace but actively *expanded* an employee's ability to express their views.

Moreover, employee protection under § 7 covers not only general statements supporting union formation but can even extend to deeply offensive words or conduct. For instance, last year, the NLRB issued *Lion Elastomers*, establishing distinct standards which employers must follow in order to respond to specific employee conduct, even if that conduct is considered offensive.³¹ There, the NLRB rejected its prior holding in *General Motors*, finding that the claim that setting specific standards would yield "unpredictable" results ran contrary to the NLRA's language allowing the NLRB to apply the statute's general prohibition on offensive words in light of an infinite combination of events that might be constitute a violation of the act.³² Instead, the NLRB identified three

different standards based upon the employees' conduct.

Where an employee engages in an outburst during management discussions, the NLRB considers 1) the place of the discussion; 2) the subject matter of the discussion; 3) the nature of the employee's outburst; and 4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.³³ Where an employee engages in inappropriate social media posts or conversations with coworkers, the NLRB applies a "totality of the circumstances" analysis.³⁴ Finally, where an employee engages in picket line misconduct, the NLRB applies a test determining whether "the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."³⁵ Notably, although the Fifth Circuit later vacated *Lion Elastomers*, it did not opine on the appropriate standard that should be applied when responding to employee statements but concluded only that *General Motors* should be applied to that particular case.³⁶ The NLRB may still analyze potential violations under setting-specific standards. Thus, employers should continue to use setting-specific standards unless and until the NLRB provides more explicit guidance.

Where do we go from here?

Despite the upheaval of decades long precedent, the NLRB in *Amazon* provided a "safe harbor" from liability for employers who wish to express their views in a workplace meeting during work hours. Specifically, an employer can avoid liability if, reasonably in advance of the meeting, it informs the employee that 1) it intends to express its views on unionization at a meeting at which attendance is voluntary; 2) the employee will not be subject to adverse consequences for failing to attend the meeting or for leaving the meeting; and 3) the employer will not keep a record of which employees attend, fail to attend, or leave the meeting.³⁷ Thus, going forward, employers should abide by the steps outlined above to communicate their views with employees regarding the potential detrimental consequences of forming a union in the workplace.

Additionally, to avoid violating the NLRB's standard in *Tri-Cast*, employers should exercise caution when choosing language, especially conditional language, and should rely on objective facts that are beyond their control when making statements to employees. As such, employers should not make statements like "if you want

to maintain a direct relationship with leadership, you will check off ‘no’ on forming a union.” In contrast to the NLRB’s guidance in *Amazon.com LLC*, there is no safe harbor verbiage that would shield an employer from liability for making these types of conditional statements. Moreover, employers should carefully review and revise any anti-union campaign instructional materials provided to managers before the *Siren Retail Corp.* decision to evaluate if they comply with the new standards.³⁸

The most significant potential impact of these decisions would be not only the restrictions on speech but the automatic recognition of unions under *Cemex*. Although neither decision directly discussed *Cemex*, those decisions’ collective impact on employer speech means that what was once previously accepted conduct may now constitute unfair labor practices. When a union requests recognition based on majority employee support, the employer must either recognize the union and begin bargaining or file an RM petition (petition for an election).³⁹ Under *Cemex*, if an employer engages in unfair labor practices during the run-up to election, the NLRB will dismiss the employer’s petition and *automatically order that a union be recognized*.⁴⁰ Thus, these new decisions require employers to be even more cautious in what they say.

Conclusion

Although the NLRB’s recent decisions have limited and restricted employers’ rights to speak to employees during organizing campaigns to provide them with a balanced perspective on whether joining and forming a union is right for them, it is likely that these decisions will be overturned under the current Trump administration. This is particularly true given that the current administration will be able to appoint new NLRB members. Despite this likely outcome, substantial changes may not happen for a few years as it may take some time for cases to percolate through the NLRB and court system. Until then, employers will need to exercise extreme caution as to not just what they say but how they say it in order to avoid committing inadvertent unfair practice charges and being subjected to a subsequent *Cemex* bargaining order. ■

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Endnotes

1. 29 U.S.C. § 157.
2. 373 NLRB 136 (2024).
3. 373 NLRB 135 (2024).
4. *Cemex Constr. Materials Pac. LLC*, 372 NLRB 130 (2023).
5. See *supra* n.1.
6. 29 U.S.C. § 158(a)(1).
7. 29 U.S.C. § 158(c).
8. See generally *Babcock & Wilcox Co.*, 77 NLRB 577 (1948); *Tri-Cast Inc.*, 274 NLRB 377 (1985); *Walmart Stores*, 368 NLRB 146 (2019).
9. *Babcock*, *supra* n.8.
10. *Tri-Cast Inc.*, *supra* n.8.
11. *Walmart Stores*, *supra* n.8.
12. 355 NLRB 836 (2010). See also *Republic Aviation v. NLRB*, 324 U.S. 793, 801-03 (1945) (holding that employees have a protected right to display union insignia under § 7 of the NLRA).
13. *General Motors LLC*, 369 NLRB 127 (2020) (concluding that setting-specific standards used in employee misconduct cases led to unwarranted protection of employees engaging in deeply offensive conduct).
14. See *supra* n.2.
15. *Id.*
16. *Id.*
17. *Id.*

18. *Id.*
19. *Id.*
20. *Id.*
21. *See supra* n.3.
22. *Id.*
23. *Id.*
24. *Id.*
25. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).
26. *Id.* at 618.
27. *See generally Int'l Union of Operating Eng'rs, Loc. Union No. 150*, 371 NLRB 8 (2021) (holding that displaying banners or an inflatable rat near the entrance of a neutral employer, without more, does not threaten coerce or restrain the neutral); *Starbucks Corporation*, 372 NLRB 93 (2023) (finding that employers violate the NLRA when instructing employees to refrain from handing out union buttons or pins at work during break periods).
28. *Siren Retail Corp.*, 373 NLRB 140 (2024).
29. *Id.*
30. *Id.*
31. 372 NLRB 83 (2023).
32. *Id.* (citing *General Motors*, *supra* n.13).
33. *Id.* *See also Atlantic Steel Co.*, 245 NLRB 814 (1970).
34. *Id.* *See also Desert Springs Hosp. Med. Ctr.*, 363 NLRB 1824 at 1 n.3 (2016); *Pier Sixty, LLC*, 362 NLRB 505, 506 (2015) (finding that relevant factors under this test include employer antiunion hostility, impulsivity, location, subject matter, nature of the post, whether employer maintained specific rules prohibiting the language at issue, and whether discipline was typical compared to similar offenses).
35. *Clear Pine Mouldings, Inc.*, 268 NLRB 1044, 1046 (1984).
36. *Lion Elastomers, LLC v. NLRB*, 108 F.4th 252 (5th Cir. 2024).
37. *See supra* n.2.
38. *See supra* n.3.
39. 29 U.S.C. § 159(c)(1)(B).
40. *Cemex*, *supra* n.4.

The Potential Impact of *Muldrow* on Employment Cases in New Jersey

by Beth P. Zoller, Natalie Hiott-Levine, and Katie Ann Insinga

On April 17, 2024, the U.S. Supreme Court effectively lowered the bar for plaintiffs to challenge adverse employment actions under Title VII of the Civil Rights Act of 1964.¹ In *Muldrow v. City of St. Louis*, an employee claimed that an involuntary job transfer constituted an adverse employment action based on her sex.² Relying on the plain language of Title VII as well as its remedial purpose, the Supreme Court resolved a split in the federal circuit courts and held that “[t]o make out a Title VII discrimination claim, a transferee must show ‘some harm’ respecting an identifiable term or condition of employment,” but they need not show “that the harm incurred was ‘significant’ or otherwise exceeded some heightened bar.”³ Writing for the Court, Justice Elena Kagan noted that “Title VII’s text nowhere establishes that high bar.”⁴

Although the Court’s decision in *Muldrow* is significant as it will favorably impact a plaintiff’s ability to plead a cause of action under Title VII with respect to the “adverse action” element of a discrimination claim, its potential impact in New Jersey, where courts already interpret “adverse actions” broadly under the liberally construed New Jersey Law Against Discrimination (LAD)⁵ is still unclear. While it is possible that courts elsewhere could more narrowly construe the Court’s holding in *Muldrow*, it is likely that in New Jersey, given the similar language and broad remedial purpose of the LAD, the *Muldrow* standard will be applied beyond the transfer context to various adverse actions across a range of employment cases, as is already beginning to occur in other jurisdictions.⁶

The Facts of *Muldrow*

In *Muldrow*, the plaintiff, a female plainclothes officer who served nine years in the specialized Intelligence Division of the City of St. Louis Police Department, alleged that in 2017, the defendant violated Title VII’s prohibition against sex discrimination when it transferred Sgt. Muldrow to another unit in the department

because she was a woman.⁷ The plaintiff claimed that the new Intelligence Division commander requested that the department transfer her out of his division in order to replace her with a male police officer, whom he believed “seemed a better fit for the Division’s ‘very dangerous’ work.”⁸ Against Muldrow’s wishes, the police department approved the commander’s transfer request and reassigned her to a uniformed job within the department.⁹

Subsequently, Muldrow filed a Title VII action claiming that “in ousting her from the Intelligence Division,” the city “had ‘discriminate[d] against’ her based on sex ‘with respect to’ the ‘terms [or] conditions’ of her employment.”¹⁰ Muldrow argued that the transfer constituted an adverse employment action because, while her rank and pay had remained the same, her job “responsibilities, perks, and schedule did not.”¹¹

Muldrow also alleged that her new position was not equivalent in stature or importance. Specifically, she argued that she had been transferred from “a ‘premier position’...into a less ‘prestigious’ and more ‘administrative’ uniformed role” in which “[s]he had fewer ‘opportunities’ to work on ‘important investigations,’ as well as to ‘network’ with commanding officers.”¹² While in the Intelligence Division, Muldrow had worked on high-profile organized crime investigations. By contrast, in her new position, “[i]nstead of working with high-ranking officials on the departmental priorities lodged in the Intelligence Division, Muldrow now supervised the day-to-day activities of neighborhood patrol officers.” Not only did her new duties include “approving their arrests, reviewing their reports, and handling other administrative matters,” but she also returned to doing “some patrol work herself.”¹³

Further, Muldrow complained that she had “lost material benefits—her weekday work schedule and take-home car.” Because she no longer served in the intelligence division, Muldrow’s transfer resulted in the loss of “her FBI status and the car that came with it”—a

valuable perk.¹⁴ Moreover, Muldrow's once consistent regular work schedule changed from "a traditional Monday-through-Friday week" to a less desirable "rotating schedule" that often involved weekend shifts.¹⁵

District Court Decision

The District Court for the Eastern District of Missouri granted the city's motion for summary judgment, finding that Muldrow had "experienced no change in salary or rank."¹⁶ The court further determined that the loss of networking opportunities did not harm her career prospects and that in her continued "supervisory role," she did not suffer "a significant alteration to her work responsibilities."¹⁷ Lastly, the district court concluded that the switch in the schedule and the loss of a take-home vehicle were only "minor alterations of employment, rather than *material* harms."¹⁸

Eighth Circuit Decision

The Eighth Circuit affirmed, holding that Muldrow had failed to show that the transfer caused her a "materially significant disadvantage" because it "did not result in a diminution to her title, salary, or benefits."¹⁹ The Eighth Circuit determined that the change in job responsibilities was "insufficient" to support a Title VII claim as the plaintiff maintained a "supervisory role" and participated in investigating serious crimes.²⁰ Muldrow's argument that her new job was "more administrative and less prestigious" did not persuade the court, which determined that the record did not support this conclusion, finding Muldrow had experienced "only minor changes in working conditions."²¹

U.S. Supreme Court Decision

The Court granted certiorari to resolve the split in the circuits and reversed the lower courts' decision in *Muldrow*, holding that under Title VII, an employee challenging a job transfer on the basis of discrimination only needs to show that the transfer brought about "some harm" with respect to an "identifiable term or condition of employment."²² Specifically, the Court ruled:

To make out a Title VII discrimination claim, a transferee must show some harm respecting an identifiable term or condition of employment. What the transferee does not have to show is that the harm incurred was "significant," or serious, or substantial, or any similar adjective suggesting that the disadvantage to the employ-

ee must exceed a heightened bar. "Discriminate against" means treat worse, here, based on sex. But neither that phrase nor any other says anything about how much worse. To demand "significance" is to add words—and significant words, as it were—to the statute Congress enacted. It is to impose a new requirement on a Title VII claimant, so that the law as applied demands something more of her than the law as written. And that difference can make a real difference for complaining transferees.²³

The Court reasoned that "[m]any forced transfers leave workers worse off" and measuring "whether the harm is significant" is often "in the eye of the beholder—and can disregard varied kinds of disadvantage."²⁴ To illustrate its point, the Court listed a few Title VII race and sex discrimination cases including *Boone v. Goldin* (ruling that engineering technician's reassignment to work at a 14-by-22-foot wind tunnel did not have a "significant detrimental effect");²⁵ *Daniels v. United Parcel Serv., Inc.* (finding that requiring a shipping worker to take a position involving only nighttime work did not "constitute a significant change in employment");²⁶ and *Cole v. Wake Cty. Bd. of Educ.* (finding school principal's transfer to a non-school-based administrative role supervising fewer employees was not a "significant" change in job duties).²⁷ Thus, the Court ruled that Title VII's text only requires a plaintiff "to show that her transfer brought about *some 'disadvantageous' change* in an employment term or condition."²⁸

The Court expressly rejected the city's argument that the heightened "significant harm" standard from its decision in *Burlington Northern & S. F. R. Co. v. White*,²⁹ a Title VII retaliation case, should apply in *Muldrow*, a Title VII discrimination case.³⁰ The Court distinguished *White*, explaining that applying the significant-harm standard in a Title VII discrimination case would "create a mismatch" because *White* adopted the significant-harm "standard for reasons peculiar to the retaliation context. The test was meant to capture those (and only those) employer actions serious enough to 'dissuade[] a reasonable worker from making or supporting a charge of discrimination.'"³¹ The Court stated "[i]f an action causes less serious harm..., it will not deter Title VII enforcement; and if it will not deter Title VII enforcement, it falls outside the purposes of the ban on retaliation. But no such (frankly extra-textual) reasoning is applicable to the discrimination bar."³²

Other Federal Courts Applying the *Muldrow* Standard

The impact and import of the *Muldrow* decision is now being reflected in federal court decisions where the new standard is being applied to determine whether challenged employment decisions, including but not limited to involuntary transfers, constitute adverse actions under the more relaxed *Muldrow* standard. In *Mitchell v. Planned Parenthood of Greater N.Y., Inc.*,³³ the District Court for the Southern District of New York expressly rejected the defendants' suggestion that *Muldrow* only applies to Title VII discrimination cases involving transfers holding:

While the Second Circuit has not yet addressed the issue, Defendants suggest that *Muldrow*'s holding should be limited to transfers. The Court disagrees. Although *Muldrow* directly concerned a transfer, its reasoning relies on the language of Title VII's anti-discrimination provision rather than anything special about transfers. Thus, the Court holds that *Muldrow* applies to Title VII discrimination cases not involving transfers.³⁴

Similarly, in *Anderson v. Amazon.com, Inc.*, the Southern District applied the *Muldrow* standard in another non-transfer case.³⁵ The district court determined that the plaintiff had established that a Performance Improvement Plan and her diminished role constituted adverse actions. The court noted that "these actions adversely affected Anderson's benefits, privileges, terms, or conditions of employment by saddling her with more and worse tasks, tarnishing her permanent record, dampening her prospects of a promotion or raise, temporarily preventing her from transferring, excluding her from certain meetings and projects, and so on."³⁶

In *Peifer v. Pennsylvania*, the Third Circuit also applied *Muldrow* in a non-transfer context in a pregnancy discrimination and retaliation case. The court remanded the case to the Pennsylvania district court "to consider in the first instance whether the employee had asserted harms sufficient to establish 'some' employment-related harm for her prima facie case under *Muldrow*" where the district court had previously determined that the defendant's denial of accommodation requests did not constitute an adverse employment action.³⁷

Some courts have expanded the application of the *Muldrow* standard beyond Title VII claims. In *Mitchell*, the Southern District also held that "*Muldrow* applies

to discrimination claims under the ADEA and the ADA, given that the pertinent language in those statutes is similar to the pertinent language in Title VII."³⁸ Furthermore, "[t]o the extent that pre-*Muldrow* decisions imposed a higher threshold for finding an adverse employment action, those decisions appear to no longer be good law."³⁹

In *Milczak v. General Motors, LLC*,⁴⁰ the Sixth Circuit applied *Muldrow* in an ADA claim. The court reasoned that the plaintiff's "loss of opportunity to make overtime pay plainly impacts compensation, terms, and conditions of employment."⁴¹ Furthermore, the court stated that "the lack of adequate training, the supervisory responsibilities over difficult trade employees, the evening hours he was expected to work, the position's failure to utilize his skills, and the fact he was forced to work by himself" all "created at least 'some harm' and left him 'worse off.'"⁴²

However, in *Phillips v. Baxter*,⁴³ the Seventh Circuit determined that the plaintiff had not suffered an adverse employment action supporting a discrimination claim. The court reasoned that Phillips's "reassignment from the processing hub to the local office was not an adverse action because there is no evidence that it left him 'worse off' with respect to the terms and conditions of his employment."⁴⁴ The court noted that "the reassignment did not change his position, job duties, salary, or benefits, and the new office was even in the same building."⁴⁵ The court characterized the changes as "temporary inconveniences" that did not affect the terms or conditions of his employment, stating:

The changes in his duties (all within the scope of his role), an inability to make long distance phone calls or access some computer applications, and a pre-disciplinary meeting that never happened—were mostly temporary inconveniences. None affected the terms or conditions of his employment so as to be an adverse employment action.⁴⁶

Muldrow's Limited Impact in New Jersey

As elsewhere under Title VII, under the LAD, adverse actions typically include, but are not limited to, discharges, demotions, refusals to hire, refusals to promote, and discipline.⁴⁷ The LAD, however, is very broad and an adverse employment action "encompasses economic actions, such as those affecting wages, and noneconomic actions 'that cause a significant, non-temporary adverse

change in employment status or the terms and conditions of employment would suffice.”⁴⁸ “Terms and conditions of employment ‘refer[] to those matters which are the essence of the employment relationship,’ and include further serious intrusions into the employment relationship beyond those solely affecting compensation and rank” such as “[c]hanges in the] length of the workday;... increase or decrease of salaries, hours, and fringe benefits;... physical arrangements and facilities;... and promotional procedures.”⁴⁹ Even prior to *Muldrow*, especially in the retaliation context under the LAD, New Jersey courts contemplated that a “disadvantageous transfer...[and/or] assignment to different or less desirable tasks” could be factors in, or themselves constitute, adverse employment actions given the right set of facts.⁵⁰ In *Richter v. Oakland Bd. of Educ.*, the Appellate Division explained:

We agree there is no bright-line rule defining an adverse employment action in the context of a LAD claim. New Jersey has been guided by the federal courts’ interpretation of Title VII and civil rights legislation to decide what constitutes an adverse employment decision with regards to a LAD retaliation claim. The factors to be considered include an “employee’s loss of status, a clouding of job responsibilities, diminution in authority, disadvantageous transfers or assignments, and toleration of harassment by other employees.”⁵¹

Thus, federal courts in New Jersey are applying this clarified standard in manner similar to other federal courts; however, given its more liberal interpretation of “adverse actions” under the LAD, it does not appear that its analysis has changed much. For example, in *Dzibela v. Blackrock Inc.*, the district court noted that *Muldrow* did not change its analysis in the case, stating that the plaintiff’s allegations of reduced compensation and termination clearly met the requirement for alleging an adverse employment action.⁵² Also, contrary to Dzibela’s assertion that the Supreme Court in *Muldrow* “lowered the standard required when alleging a defendant’s discriminatory animus in a Title VII claim,” the District Court of New Jersey explained that:

Muldrow lowered the bar for what constituted

an adverse employment action, not the requisite level of discriminatory animus. Accordingly, because Plaintiff’s allegations of non-promotion, reduced compensation, and termination clearly meet the requirement for alleging an adverse employment action, Plaintiff’s citation to *Muldrow* does not change the Court’s analysis.⁵³

In *Wilmoth v. Arpin Am. Moving Sys., LLC*, the plaintiff claimed that she had suffered a tangible adverse employment action with respect to her October 2018 reassignment whereby “her schedule varied, and that she sometimes worked more hours than before, and sometimes less.”⁵⁴ However, the defendant countered and the “parties do not dispute that Wilmoth’s compensation was never lowered during her restructuring and her responsibilities remained generally the same.”⁵⁵ In applying the *Muldrow* standard, the court determined that the plaintiff’s title change did not constitute an adverse employment action, and nothing in the record rose to the level of the changes that *Muldrow* experienced in connection with her transfer.

Going Forward

Based upon the foregoing, although *Muldrow* may favorably impact plaintiffs challenging adverse employment actions in other jurisdictions, it is unlikely that *Muldrow* will have a significant impact in New Jersey. Indeed, in his concurring opinion, Justice Samuel Alito opined that “[t]he predictable result of today’s decision is that careful lower court judges will mind the words they use but will continue to do pretty much just what they have done for years.”⁵⁶ The New Jersey courts’ interpretation and application of the LAD already broadly construes adverse employment actions, often recognizing that a lateral transfer might constitute an adverse action given the right set of facts. Therefore, the Court’s decision in *Muldrow* will likely do little to alter the analysis in Title VII or LAD cases or to change the playing field for New Jersey employees and employers significantly. ■

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Endnotes

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17. Title VII makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any

- individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." §2000e-2(a)(1).
2. 601 U.S. 346 (2024).
 3. *Id.* at 347 (emphasis added).
 4. *Id.* at 350.
 5. N.J.S.A. 10:5-1 *et seq.*
 6. See, e.g., *Jaleelah Ahmed v. Sch. Dist.*, No. 2:22-cv-11127, 2024 U.S. Dist. LEXIS 169748, at *20 (E.D. Mich. Aug. 26, 2024) (granting defendants' motion to dismiss in Title VII and disability discrimination case but rejecting the argument that the lowered pleading standard announced in *Muldrow* is limited to cases where the asserted discrimination is a forced transfer); *Johnson v. Nestlé USA*, No. 19-cv-07119, 2024 U.S. Dist. LEXIS 175587, at *10-11 (N.D. Ill. Sep. 27, 2024) (granting defendant's motion for summary judgment in a Title VII race discrimination case but citing and quoting *Muldrow*, *supra* n.2, in finding that "there is no reason to limit the reasoning of *Muldrow* to position transfers given the Supreme Court's reliance on the general statutory text").
 7. See *Muldrow*, *supra* n.2, 601 U.S. at 350-51.
 8. *Id.* at 351.
 9. *Id.*
 10. *Id.* (citations omitted).
 11. *Id.*
 12. *Id.* at 352.
 13. *Id.*
 14. *Id.*
 15. *Id.*
 16. *Id.* at 352 (citing *Muldrow v. City of St. Louis*, No. 4:18-CV-02150-AGF, 2020 U.S. Dist. LEXIS 166560 22 (E.D. Mo. Sep. 11, 2020)).
 17. *Id.* (citing *Muldrow*, 2020 U.S. Dist. LEXIS 166560, at *21-22) (emphasis added).
 18. *Id.* (emphasis added).
 19. *Id.* (citing *Muldrow v. City of St. Louis*, 30 F.4th 680, 688-89 (8th Cir. 2022)).
 20. *Id.*
 21. *Id.*
 22. *Id.* at 354.
 23. *Id.* at 354-55.
 24. *Id.* at 355.
 25. *Boone v. Goldin*, 178 F. 3d 253, 256 (4th Cir. 1999) (emphasis added).
 26. *Daniels v. United Parcel Serv., Inc.*, 701 F. 3d 620, 635 (10th Cir. 2012) (emphasis in original).
 27. *Cole v. Wake Cty. Bd. of Educ.*, 834 Fed. Appx. 820, 821 (4th Cir. 2021) (emphasis added).
 28. *Muldrow*, *supra* n.2, at 354 (emphasis added).
 29. *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53 (2006).
 30. See *Muldrow*, *supra* n.2, at 357-58.
 31. *Id.* at 357 (quoting *White*, *supra* n.29, 548 U.S. at 68).
 32. *Id.*
 33. *Mitchell v. Planned Parenthood of Greater N.Y., Inc.* No. 1:23-cv-01932 (JLR), 2024 U.S. Dist. LEXIS 146325, at 24 (S.D.N.Y. Aug. 16, 2024).
 34. *Id.* at *24-25 (S.D.N.Y. Aug. 16, 2024) (relying on *Peifer v. Pennsylvania*, 106 F.4th 270, 277 (3d Cir. 2024) (applying *Muldrow* to non-transfer case); *Cole v. Grp. Health Plan, Inc.*, 105 F.4th 1100, 1114 (8th Cir. 2024) (same); *Williams v. Memphis Light, Gas & Water*, No. 23-5616, 2024 U.S. App. LEXIS 17623, 2024 WL 3427171, at *5-6 (6th Cir. July 16, 2024) (same); *Riggs v. Akamai Techs.*, No. 23-cv-06463 (LTS), 2024 U.S. Dist. LEXIS 119502, 2024 WL 3347032, at *6 (S.D.N.Y. July 8, 2024) (same)).
 35. *Anderson v. Amazon.com, Inc.*, 23-CV-8347 (AS), 2024 WL 2801986 (S.D.N.Y. May 31, 2024).

36. *Id.* at *11.
37. *Peifer, supra*, 106 F.4th at 277.
38. *Mitchell, supra* n.33, at *24-25 (relying on *Milczak v. Gen. Motors, LLC*, 102 F.4th 772, 787 (6th Cir. 2024) (applying *Muldrow* to ADEA claim); *Van Horn v. Del Toro*, No. 23-5169, 2024 U.S. App. LEXIS 15154, 2024 WL 3083365, at *2-3 (D.C. Cir. June 21, 2024) (same); *Rios v. Centerra Grp. LLC*, 106 F.4th 101, 112-13 (1st Cir. 2024) (same for ADA claim); *Davis v. Orange Cnty.*, No. 23-12759, 2024 U.S. App. LEXIS 17964, 2024 WL 3507722, at *3-4 (11th Cir. July 23, 2024) (same)).
39. *Mitchell, supra* n.33, at *24-25.
40. *Milczak v. GM, LLC*, 102 F.4th 772 (6th Cir. 2024).
41. *Id.* at 787.
42. *Id.* (citing *Muldrow, supra* n.2, at 354).
43. *Phillips v. Baxter*, No. 23-1740, 2024 WL 1795859 (7th Cir. April 25, 2024).
44. *Id.* at *3.
45. *Id.*
46. *Id.*
47. See *Richter v. Oakland Bd. of Educ.*, 459 N.J. Super. 400, 418 (App. Div. 2019), *aff'd as modified*, 246 N.J. 507 (2021) (recognizing that “employer actions that fall short of [discharge, suspension, or demotion] may nonetheless be the equivalent of an adverse action” in a LAD case) (quoting and relying on *Nardello v. Twp. of Voorhees*, 377 N.J. Super. 428, 433-34 (App. Div. 2005) (alteration in original), which reversed the lower court’s decision to grant summary judgment where there was no discharge, suspension, or demotion, holding that many separate but relatively minor instances of behavior directed against an employee which combined make up a pattern of retaliatory conduct may constitute an adverse employment action pursuant to the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 et seq.); see also *Lick v. Gloucester Cty. Prosecutor’s Office*, No. 1:21-cv-13564-NLH-AMD, 2022 U.S. Dist. LEXIS 195257, at *13-22 (D.N.J. Oct. 26, 2022) (analyzing the plaintiff’s CEPA and LAD retaliation claims together and explaining that while there are nuanced differences between the statutory frameworks, the standards for determining an adverse action are “similar enough” under Title VII, the LAD, and CEPA; however, “Title VII and [the] [LAD] have broader definitions of what count as retaliatory actions”).
48. *Lick, supra* n.47, at *15 (emphasis added) (quoting *Victor v. State*, 401 N.J. Super. 596, 616 (App. Div. 2008), *aff'd as modified*, 203 N.J. 383 (2010)); see also *Richter, supra* n.47, at 418 (quoting *Victor, supra*).
49. *Beasley v. Passaic County*, 377 N.J. Super. 585, 608 (App. Div. 2005) (CEPA case listing examples of possible adverse actions from New Jersey court cases); see also *Lick, supra* n.47, at *16 (relying on *Victor, supra* n.48, at 615 (“CEPA, like the LAD, is ‘remedial’ legislation, and ‘we discern no ground on which to conclude that the meaning of the prohibited adverse employment actions’ between the statutes ‘is significantly different’”) (internal citation omitted)).
50. *Mancini v. Twp. of Teaneck*, 349 N.J. Super. 527, 564 (App. Div. 2002) (“assignment to different or less desirable tasks can be sufficient to constitute an adverse employment action”), *aff'd as modified*, 179 N.J. 425 (2004).
51. *Richter, supra* n.47, at 417 (relying on and quoting *Mancini, supra* n.50).
52. *Dzibela v. Blackrock Inc.*, Civil Action No. 23-02093 (RK) (JBD), 2024 U.S. Dist. LEXIS 176895, at *36 n.9 (D.N.J. Sep. 30, 2024).
53. *Id.* (citing *Muldrow, supra* n.2, at 358).
54. *Wilmoth v. Arpin Am. Moving Sys., LLC*, No. 19cv19187 (EP) (CLW), 2024 U.S. Dist. LEXIS 126297, at *24 (D.N.J. July 17, 2024).
55. *Id.*
56. *Muldrow, supra* n.2, at 363.

Commentary

‘Terms and Conditions’ Apply: The New Jersey Public Employment Relations Commission Should Adopt the U.S. Supreme Court’s More Equitable ‘Some Harm’ Test from *Muldrow v. City of St. Louis* in Evaluating (a)(3) Allegations

by Daniel R. Dowdy

***Muldrow* and the Employer-Employee Relations Act**

In *Muldrow v. City of St. Louis*, the U.S. Supreme Court unanimously held that while an employee must show that “some harm” resulted from a transfer based on protected class status under Title VII, the aggrieved employee need not show that the transfer caused a “significant” employment disadvantage.¹ The idea that even Justices Clarence Thomas and Samuel Alito would concur in a judgment establishing a low bar for demonstrating harm in an employment discrimination case is perhaps startling. While the Court’s opinion requires only that an aggrieved employee show “some harm” and makes clear that the harm shown need not be “significant,” even Justice Thomas’s more limiting concurring opinion would only require that the harm to terms and conditions of employment be “more-than-trifling.”²

Title VII specifically makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”³ Similarly, a state labor statute, the New Jersey Employer-Employee Relations Act (EERA or Act), under subsection (a)(3) of its unfair practice provisions, forbids employers from “[d]iscriminating in regard to hire or tenure of employment or any term or condition of employment” in order to discourage employees from engaging in protected union activity.⁴ Each law similarly prohibits discrimination and retaliation in terms and conditions of employment based on protected status and conduct.

In analyzing the EERA in a post-*Muldrow* world, the focal point of the New Jersey Public Employment Commission’s (PERC) analysis should be the actual harm visited on the employee’s terms and conditions of employment. In other words, what degree of harm must be shown by an employee to prove that their terms and conditions of employment have been sufficiently altered to make out a claim under subsection (a)(3) of the EERA?

In *Muldrow*, the Court looked beyond the fact that a transfer had actually occurred and reached into the ancillary changes that accompanied that transfer to determine whether there had been a “disadvantageous change in an employment term or condition.”⁵ After all, a transfer might be neutral or even advantageous. Ultimately, the Court found that the plaintiff was required only to show “some harm respecting an identifiable term or condition of employment” and that such a change need not be “significant, serious, or something similar.”⁶

Before Sgt. Muldrow was transferred, she had worked as a plainclothes officer in the St. Louis Police Department’s specialized Intelligence Division, where she actively participated in investigations.⁷ Muldrow opposed her transfer out of the Intelligence Division and later brought suit under Title VII in the United States District Court for the Eastern District of Missouri, asserting that she was transferred on the basis of sex, i.e., because she was a woman.⁸ While Muldrow showed that she had been moved to a less desirable position with a significantly altered schedule, she did not show that she had lost base pay or rank.⁹ The District Court held that Muldrow failed to show that she had been subjected to an “adverse employment action” because she had not

shown “significant” harm had been visited on her terms and conditions of employment.¹⁰ The Eighth Circuit affirmed, holding that Muldrow failed to establish that her transfer constituted an “adverse employment action” because the changes to her terms and conditions of employment accompanying the transfer did not constitute a “materially significant disadvantage.”¹¹

The Court reversed and remanded the Eighth Circuit’s decision, clearly stating that the appropriate level of harm which constitutes an adverse employment action is “some harm,” not “significant harm.” The Court did not make the final determination as to whether the changes to Muldrow’s terms and conditions of employment met the “some harm” standard. However, Justice Elena Kagan’s opinion for the Court strongly implied that Muldrow had met this threshold.

The “terms [or] conditions” phrase, we have made clear, is not used “in the narrow contractual sense”; it covers more than the “economic or tangible.” Still, the phrase circumscribes the injuries that can give rise to a suit like this one. To make out a Title VII discrimination claim, a transferee must show some harm respecting an identifiable term or condition of employment. [...]

Muldrow need only show some injury respecting her terms and conditions of employment. The transfer must have left her worse off, but need not have left her significantly so. And Muldrow’s allegations, if properly preserved and supported, meet that test with room to spare.[...]It does not matter, as the courts below thought (and Justice Thomas echoes), that her rank and pay remained the same.¹²

Applying the Court’s logic here to the EERA’s prohibition on “[d]iscriminating in regard to hire or tenure of employment or any term or condition of employment” in subsection (a)(3), a charging party before PERC should only be required to show that “some harm” was visited upon their terms and conditions of employment for engaging in union activity. Such harm should not need to be “economic or tangible.” It should not be relevant whether an employee’s “rank and pay remain[] the same.” This would meet the post-*Muldrow* definition for discrimination as to an employee’s “terms or conditions of employment.”

The Court held in *Muldrow* that it would not impose the “significant harm” standard because it was not

required by statute, stating “we will not add words to the law to achieve what some employers think a desirable result.”¹³ There is similarly no statutory requirement contained in the EERA calling for a raised level of harm or a rigidly defined adverse employment action. Subsection (a)(3) only requires – under the analysis in *Muldrow* – that some harm has been done to an employee’s terms and conditions of employment as a result of protected conduct.¹⁴

Adverse Employment Actions and the PERC Pleading Standard

Before PERC, when a charging party pleads discrimination on the basis of protected union activity, that action may be pleaded under three separate but oft-intertwined subsections of the Act. N.J.S.A. 34:13A-5.4(a)(1) prohibits public employers from “[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act.” Subsection (a)(5) prohibits public employers from “[r]efusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment[.]” As noted above, subsection (a)(3) prohibits employers from “[d]iscriminating in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act.”

Under the current pleading standard, PERC takes a hard look at alleged subsection (a)(3) violations, often declining to issue complaints where a narrowly-defined adverse employment action has not been pleaded.¹⁵ On its own initiative, the agency has dismissed (a)(3) allegations where the pleading “does not allege, for example, that members were suspended at the conclusion of the investigation, or that wages or benefits were wrongfully withheld.”¹⁶ It has dismissed (a)(3) allegations for the failure to plead specific monetary loss or a narrowly-defined adverse employment action without requiring that the respondent file an answer and before the parties exchange discovery.¹⁷ In light of the Court’s decision in *Muldrow*, the natural question is why a charging party alleging a retaliatory transfer should have to meet a higher bar under state law to avoid sua sponte dismissal than a plaintiff under federal law does. It is anomalous that the conservative Court has a more expansive view of employees’ rights on this subject than an administrative agency of an otherwise progressive state. PERC’s

pleading standard should be adjusted accordingly.

In *Matter of Bridgewater Twp.*, the New Jersey Supreme Court made clear that when anti-union retaliation is alleged under subsection (a)(3), “a prima facie case must be established by showing that the employee engaged in protected activity, that the employer knew of this activity, and that the employer was hostile toward the exercise of the protected rights.”¹⁸ Once a prima facie case is established, the burden then shifts to the employer to present any legitimate non-retaliatory reasons for the change in terms and conditions of employment.¹⁹

However, the agency has sua sponte dismissed subsection (a)(3) allegations even where a retaliatory transfer was explicitly pleaded, as in *Muldrow*. In *Saddle River Bd. of Educ.*, the charging party teachers’ union alleged that teachers had engaged in protected activity, specifically through the filing of grievances and two votes of no confidence in the superintendent.²⁰ The employing board of education was aware of that protected activity. The no confidence votes were read into the record at school board meetings and the grievances were filed with the school district.²¹ The union asserted that certain teachers were transferred in retaliation for that protected activity, resulting in those teachers being assigned to classrooms they had significantly less experience teaching.²² The union further asserted that those teachers were transferred “almost immediately after” they were interviewed by district administration regarding a grievance filed addressing the superintendent’s alleged lack of professionalism.²³

This should have satisfied PERC’s pleading standard under subsection (a)(3) of the EERA and *Bridgewater Twp.*²⁴ However, the agency initially found that it did not, asserting that “nothing in the charge alleges that any member suffered a particular adverse employment action as a result of a contested transfer. There is no allegation that transferred teachers lost pay or were otherwise adversely impacted in any term or condition of employment.”²⁵ In other words, the agency initially found that a retaliatory transfer can never constitute a change in an employee’s terms and conditions of employment under subsection (a)(3) unless there is resulting monetary loss or some additional significant harm accompanies the transfer. This is a far more rigid and formulaic interpretation of the phrase “terms and conditions of employment” than even Justice Thomas’s concurrence in *Muldrow*, i.e., the “more-than-trifling” standard as applied to retaliatory transfers.²⁶ Again, the

allegation in *Saddle River* was that there had been some harm done to the terms and conditions of employment of those teachers – that they were retaliatorily transferred to less advantageous classrooms.

While the Chair of the Commission ultimately stepped in and reversed course in *Saddle River*, directing that a complaint issue on the (a)(3) allegation,²⁷ if PERC were to formally adopt the *Muldrow* “some harm” standard, this type of intra-agency disconnect could likely be avoided altogether.

PERC’s mechanical application of the “adverse employment action” doctrine at the pleading stage is even more surprising in light of the New Jersey Supreme Court’s prior analysis of (a)(3) violations and PERC’s jurisdiction reaching back as far as 1978 and 1980. In *City of Hackensack v. Winner*, the Court analyzed PERC’s jurisdiction as to subsection (a)(1) and (a)(3) violations and found “PERC’s jurisdiction over unfair practices is sufficiently broad to accommodate claims of wrongful treatment relating to the organizational rights of employees as well as to their working conditions.”²⁸ This jurisdiction undoubtedly covers harms to terms and conditions of employment which do not manifest themselves in economic or tangible losses.

PERC’s restrictive reading of the phrase “terms and conditions of employment” as to allegations of (a)(3) violations also represents a departure from the agency’s interpretation of the exact same phrase in other contexts. For example, it has long been a contention of PERC in cases dealing with an employer’s unilateral implementation of terms and conditions of employment under subsection (a)(5) (an employer’s refusal to negotiate) that “the scope of negotiation is limited to the terms and conditions of public employment.”²⁹ In those cases, terms and conditions of employment are defined as “those matters which intimately and directly affect the work and welfare of public employees and on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy.”³⁰

In those negotiations cases, no such formulaic adverse employment action is required. Historically, PERC has not required that public employees lose money or be subjected to significant harm in order to find that their employer has unilaterally imposed a change to their “terms and condition of employment.” So why apply a completely different standard to anti-union animus cases? Why interpret the exact same

phrase – “terms and conditions of employment” – in a fluid, case- and context-specific manner for (a)(5) unilateral implementation cases but a restrictive manner for (a)(3) anti-union animus cases?

(a)(3) and Public Employer Threats

Say, for example, a public employer tells its employees who also serve as union officers, “If you file grievances on behalf of union members, you will not be promoted,” or “If the union endorses candidates [x], [y], and [z] for the school board, you should be worried about the terms and conditions of your employment.” These hypothetical threats are not themselves economic or tangible changes, but they obviously visit harm upon the terms and conditions of employment of those employees on the basis of protected union activity. Under *Muldrow*’s “some harm” standard, these threats made by a public employer would likely constitute (a)(3) violations. The New Jersey Supreme Court also specifically stated in *Hackensack* that under subsection (a)(3) of the Act, PERC has broad jurisdiction to prevent and prohibit public employers from threatening its employees on the basis of protected union activity.³¹

However, it is unclear whether PERC would even issue an (a)(3) complaint based on these threats. In *Pinelands Regional Bd. of Educ.*, PERC refused to issue a complaint regarding emails from a superintendent and a school board president which stated that school employees should not have placed signs in the windows of their personal vehicles during “Back to School Night” which stated “[h]ere for the kids, without a contract.”³² The superintendent sent an email to all school district staff which called the protected activity “disheartening” and placed blame on union leadership.³³ The email from the school board president stated that not only was engaging in the protected activity “disheartening” but that the protected activity itself was “unbecoming” – a term all tenured school employees know to be associated with tenure charges, discipline, and termination.³⁴

Going beyond even the agency decisions discussed above which require an economic or tangible adverse employment action, the agency actually suggested in *Pinelands Regional* that all employer comments on protected activity might somehow be protected under the First Amendment. The agency held that “[t]he comments generally fall under the category of protected employer free speech; they represent an expression not an opinion about the signs in question during ‘Back to

School Night.’”³⁵ No First Amendment analysis supported this proposition. Notably, both the superintendent and the school board president were clearly speaking in their official capacity and as government employers, not as private citizens. It is a fundamental tenet of First Amendment jurisprudence that the First Amendment to the United States Constitution protects individuals from state actors, not the other way around.³⁶

Since both the email from the superintendent and the email from the school board president in *Pinelands Regional* clearly stated that union members should not have engaged in protected activity, it is unclear how far this protection of government speech against unions would stretch. Can a public employer send an email to all staff like the superintendent in *Pinelands Regional* did but stating “Union President John Smith shouldn’t be negotiating on your behalf and if you support him, bad things might happen”? There is no economic or tangible adverse employment action in that scenario. Given its holding in *Pinelands Regional*, PERC may consider this email to be “an expression, not an opinion” about John Smith’s union leadership and therefore entitled to protection.

In refusing to issue complaints based on subsection (a)(3) allegations, PERC has recently cited *Ridgefield Park Bd. of Educ.* for the proposition that “[a]n adverse employment action is an essential element of 5.4(a)(3) claims.”³⁷ This case was cited in dismissing the (a)(3) allegation in both *Saddle River* and *Pinelands Regional*. However, *Ridgefield Park* does not stand for this proposition. Instead, in *Ridgefield Park*, PERC dismissed the (a)(3) allegation because “there was no proof of any change in any employee’s terms or conditions of employment.”³⁸ The term “adverse employment action” is found nowhere in PERC’s decision. In fact, *Ridgefield Park* specifically contemplates that threats made to the terms and conditions of employment are sufficient for making out (a)(3) claims in lieu of an economic or tangible adverse employment action.³⁹ Nor did *Ridgefield Park* set out any First Amendment protections for anti-union government speech.

What is more, in *Ridgefield Park*, the agency issued a complaint as to the (a)(3) allegation. It required the respondent to file an answer. It even held a hearing before making a determination as to the (a)(3) allegation.⁴⁰ *Ridgefield Park* simply does not support PERC’s refusal to issue a complaint before an answer has been filed and discovery has been exchanged.

While there may be some room for debate about

whether the emails in *Pinelands Regional* constituted actual threats, it is clear that PERC is narrowing its own jurisdiction to hear (a)(3) allegations even at the pleading and complaint issuance stage. By narrowly defining what constitutes an adverse employment action, by protecting anti-union government speech directed at public employees with a vague First Amendment reference, and by refusing to issue complaints by citing cases in which PERC had previously issued complaints, it is clear that the agency's (a)(3) pleading standard is being interpreted in a way starkly favorable to public employers.

Conclusion

The U.S. Supreme Court has ruled that in the workplace, “terms and conditions of employment” “covers more than the ‘economic or tangible.’”⁴¹ The New Jersey Supreme Court has stated that “PERC’s jurisdiction over unfair practices is sufficiently broad to accommodate claims of wrongful treatment relating to the organizational rights of employees as well as to their

working conditions.”⁴² Even PERC itself has interpreted the phrase “terms and conditions of employment” in non-(a)(3) cases to encompass all “those matters which intimately and directly affect the work and welfare of public employees.”⁴³ To require proof of an economic or tangible adverse employment action to make out an allegation under (a)(3) that “terms and conditions of employment” have been altered in anti-union animus cases is inconsistent with all of these sources of law.

It is my personal opinion that PERC should reevaluate its standard for issuing complaints under subsection (a)(3) of the EERA. At minimum, the agency should not be applying a more rigid and formulaic interpretation of the phrase “terms and conditions of employment” than Clarence Thomas. ■

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Endnotes

1. 601 U.S. 346 (2024).
2. *Id.* at 361 (Thomas, J., concurring).
3. 42 U.S.C. § 2000e-2 (“It shall be an unlawful employment practice for an employer – to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”)
4. N.J.S.A. § 34:13A-5.4(a)(3).
5. *Muldrow*, *supra* n.1, at 354.
6. *Id.*
7. *Id.* at 351.
8. 42 U.S.C. § 2000e-2.
9. *Muldrow*, *supra* n.1, at 351.
10. *Muldrow v. City of St. Louis*, 2020 WL 5505113, at *9 (E.D. Mo. Sept. 11, 2020).
11. *Muldrow v. City of St. Louis Missouri*, 30 F.4th 680, 688 (8th Cir. 2022).
12. *Muldrow*, *supra* n.1, at 354, 359.
13. *Id.* at 358 (citing *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015)).
14. *See supra* n.4.
15. *Saddle River Bd. of Educ.*, D.U.P. No. 2023-11, 49 NJPER 179 (¶ 41 2022).
16. *Tp. of Jackson*, D.U.P. No. 2023-4, 49 NJPER 144 (¶ 32 2022) (“The charge does not allege, for example, that members were suspended at the conclusion of the investigation, or that wages or benefits were wrongfully withheld during the required quarantine period”).
17. *Id.*
18. 95 N.J. 235, 246 (1984).
19. *Id.* at 244.

20. See *supra* n.15 (“The Association alleges that the transfers were in retaliation for two ‘votes of no confidence’ in the District Superintendent, and because of multiple grievances filed by the Union that are critical of the Superintendent”).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Matter of Bridgewater Tp.*, *supra* n.17 (requiring that an (a)(3) claim assert 1) that the employee engaged in protected activity, 2) that the employer was aware of the protected activity, and 3) that the employer was hostile to that protected activity).
25. *Saddle River Bd. of Educ.*, *supra* n.15.
26. *Muldrow*, *supra* n.1, at 978 (Thomas, J., concurring).
27. *Saddle River Bd. of Educ.*, P.E.R.C. No. 2025-12, 51 NJPER (¶ 34 2024), at n.2.
28. *City of Hackensack v. Winner*, 82 N.J. 1, 20 (1980) (citing *Galloway Twp. Bd. of Educ.*, 78 N.J. 25 (1978)).
29. *State v. State Supervisory Emp. Ass’n*, 78 N.J. 54, 77 (1978).
30. *Id.* at 67.
31. *City of Hackensack*, *supra* n.28, at 20) (“For present purposes, we would content ourselves on this point with the analogy furnished by the National Labor Relations Act, 29 U.S.C.A. 151, et. seq., see *Lullo v. International Ass’n of Fire Fighters*, 55 N.J. 409, 422-425 (1970), and note simply that the denial or threatened withholding of a promotion because of union activities has been recognized as a violation of that act”).
32. *Pinelands Reg’l Bd. of Educ.*, D.U.P. No. 2023-18, 49 NJPER 332 (¶ 80 2023).
33. *Id.*
34. *Id.*; N.J.S.A. 18A:6-10 (No tenured school employee “shall be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause ...”) (emphasis added).
35. *Pinelands Regional Bd. of Educ.*, *supra* n.32.
36. See, e.g., *Kennedy v. Bremerton*, 597 U.S. 507 (2022) (whether school board employee’s speech was protected under the First Amendment turned on whether his speech was that of a private citizen, and therefore protected, or whether it could be construed as government speech on behalf of the school district, and therefore not entitled to protection).
37. *Saddle River Bd. of Educ.*, *supra* n.15; *Twp. of Jackson*, *supra* n.15; *Pinelands Regional Bd. of Educ.*, *supra* n.32 (all citing *Ridgefield Park Bd. of Ed.*, 10 NJPER 229 (¶ 15195 1984), *adopted* P.E.R.C. No. 84-152, 10 NJPER 437 (¶ 15195 1984), *aff’d* NJPER Supp. 2d 150 (¶ 133 App. Div. 1985)).
38. *Ridgefield Park Bd. of Educ.*, *supra*, 10 NJPER 437.
39. *Id.* (“The principal did not threaten any employees, change any terms and conditions of employment, or seek to undermine the exclusive representative status of the Association”) (emphasis added).
40. *Id.* (“The Director of Unfair Practices issued a Complaint and Notice of Hearing”; “The Board then filed an Answer”; “Hearing Examiner Edmund G. Gerber conducted a hearing”).
41. *Muldrow*, *supra* n.1, at 354 (internal citations omitted).
42. *City of Hackensack*, *supra* n.28, at 20.
43. *State v. State Supervisory Employees Association*, *supra* n.29, at 66.



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