



# New Jersey Labor and Employment Law Quarterly

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## View From the Chair

by Colin M. Lynch



As we approach the end of the first year of the current term, I want to provide Section members with an update on the activities of the Section and its Executive Committee as well as to announce two recent appointments affecting the

Section's Officers and Legislative Committee.

First, I would like to thank all those who braved the weather and the then-upcoming Thanksgiving Day holiday to attend our Section-wide meeting at the Law Center in New Brunswick in November. Those who were able to make it were treated to a presentation by Dana Ortiz-Tulla, who serves as an Artificial Intelligence Trainer and Staff Attorney in the New Jersey Administrative Office of the Courts. Ms. Ortiz-Tulla provided the Section with a thoughtful and engaging presentation on the “do’s and don’ts” of the use of AI as well as the advantages and risks of its use. We look forward to continuing the tradition of a Section-wide meeting in the fall during next year’s term, as it serves as an opportunity for all members to

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## Message From the Editor

by Lisa Barré-Quick



As we all begin to enjoy spring weather, we are happy to share a new issue of the *Quarterly* which we hope will provide insight and food for thought in advance of the Annual Meeting. The issue opens with Daniel Dowdy’s thoughtful

commentary on the scant guidance forthcoming from the New Jersey Cannabis Regulatory Commission since the enactment of CREAMMA more than five years ago. He also addresses the ongoing failure to implement WIRE certification, an issue which impacts both sides of the employment bar as employers navigate post-accident and other testing in the absence of robust guidance for navigating employee protections under CREAMMA.

The issue next turns to Liz Pudel’s article exploring the state of transgender discrimination law in the wake of the U.S. Supreme Court’s decision in *United States v. Skrametti* and how it will co-exist with the Court’s earlier *Bostock v. Clayton County, Georgia* decision in the employment law context.

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meet with the Section's Executive Committee and learn more about what the Section has to offer.

At our November meeting, we had the opportunity to mourn the passing of both long-time Executive Committee member and then-current Section Officer Gail Oxfeld Kanef and former Executive Committee member Bruce McMoran as well as to celebrate their accomplishments and contributions to the Section and the State Bar. Speaking on behalf of Gail were her cousin and law partner, Sandy Oxfeld, and Executive Committee member Michael Boldt, who gave moving tributes to Gail and her service to the Section, the profession as a whole, and the sense of community she fostered among colleagues and adversaries alike. Speaking on behalf of Bruce was his law partner, Justin Burns, who spoke eloquently about Bruce's career and dedicated service to his firm and clients. Both Gail and Bruce will be remembered and missed.

Gail's passing left a vacancy in the Section's slate of officers. In consultation with the Officers of the Section and our Nominations Committee, it is my honor and pleasure to announce the appointment of Sara Kaplan-Khodorovsky to the position of Recording Secretary. Sara, a partner with Green Savits, LLC, will make an excellent addition to our officer slate. Sara's elevation to the role of Recording Secretary is well deserved based on her contributions to the Section and her efforts as Co-Chair of the Section's Legislative Committee. Sara's appointment elevates former Recording Secretary Aileen O'Driscoll to the role of Treasurer, with former Treasurer Cheyne Scott now elevated to serve as Second Vice-Chair. I and the other officers look forward to serving with Sara for the remainder of this term and beyond.

In addition, Sara's elevation to Recording Secretary created a vacancy in her former role of Co-Chair of the Legislative Committee. I am pleased to announce the appointment of Liz Pudel as the new Legislative Committee Co-Chair. Liz, an associate at Selikoff & Cohen, has been an active and enthusiastic member of the Section and will undoubtedly serve the Section and the Executive Committee with the same passion and energy in their new role.

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Next, Reema Chandnani considers the Appellate Division's decision in *McDermott v. Guaranteed Rate, Inc.*, which interpreted the Ending Forced Arbitration of Sexual Assault and Harassment Act of 2021 to exclude from arbitration all other claims asserted along with sexual harassment and assault claims as well as the implication of this ruling for employment practitioners. Staying on the topic of arbitration of employment claims, Beth Zoller and Katie Ann Insinga address the New Jersey Supreme Court's decision *Fazio v. Altice USA* and the Third Circuit's decision in *Cornelius v. CVS Pharm. Inc.*

Finally, Boris Shapiro provides timely examination of the recent amendments to the New Jersey Family Leave Act and related laws and their expanded coverage, which begins to take effect in July 2026 and will no doubt have employers scurrying to revise policies and procedures related to leave.

Many thanks to the authors and editors, as well as our extraordinary Managing Editor, Hop Wechsler, who made this issue possible. We would also like to extend our thanks to our Legal Publications Editor, Mindy Drexel, and Associate Executive Director of Communications Kate Coscarelli at the New Jersey State Bar Association for their ongoing efforts and support of the *Quarterly*. Their behind-the-scenes work is essential to the *Quarterly's* ongoing success.

We hope you find this issue valuable and look forward to seeing you in Atlantic City in May! ■

*View From the Chair continued from page 2*

The State Bar's Annual Meeting and Convention is scheduled for May 13-15 at the Borgata in Atlantic City. The membership of the Section was active this year, submitting a wide range of excellent programs for consideration as part of the State Bar's Labor & Employment Track. A total of six programs were selected with an excellent and diverse group of topics, panelists, presenters, and moderators, including programs on off-duty speech, multigenerational workplaces, mediation, AI in employment settings, the future of employee mobility, and this year's labor and employment law update.

If you are attending the Annual Meeting, please be sure to additionally register for the Section's annual luncheon, which takes place on Thursday, May 14, at the American Bar & Grill in the Borgata from 12:15 to 1:45. At the luncheon, our Section will disclose and present the recipient of the this year's Sidney H. Lehmann Award, representing the highest honor which may be bestowed upon a member of the Section. The award presentation is a highlight of the Annual Meeting and it is anticipated that this year will be no different.

To everyone attending the Annual Meeting, we look forward to seeing you in May. ■

## **We want to hear from you...**

As always, we welcome new authors and editors. Please contact the Editor-in-Chief, Lisa Barré-Quick ([lbarrequick@ammm.com](mailto:lbarrequick@ammm.com)), or the Managing Editor, Hop Wechsler ([hwechsler@selikoffcohen.com](mailto: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.

## Commentary

# Dude, Where's Our Guidance? The New Jersey Cannabis Regulatory Commission's Failure to Issue Workplace Guidance Leaves Employers in a Haze

by Daniel R. Dowdy

On Feb. 22, 2021, Gov. Phil Murphy signed the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA) into law.<sup>1</sup> CREAMMA established a legal recreational marketplace for cannabis in New Jersey and, among other things, placed the authority to issue guidance on cannabis impairment in New Jersey workplaces under the New Jersey Cannabis Regulatory Commission (CRC).<sup>2</sup> The CRC has largely failed to exercise this authority, leaving significant room for confusion regarding how and when to test for cannabis and how to document instances of potential cannabis impairment in the workplace.<sup>3</sup>

The workplace provisions of CREAMMA are codified at N.J.S.A. 24:6I-52. That statute states that no adverse employment action may be taken against any employee “solely due to the presence of cannabinoid metabolites in the employee’s bodily fluid.”<sup>4</sup> In short, this means an employee cannot be disciplined for having cannabis in their system. While employers may still conduct drug tests that test for cannabis randomly, following a work-related accident, or upon suspicion of cannabis-related impairment, the results of the drug test alone may not be the cause of discipline.<sup>5</sup> Instead, CREAMMA requires that any drug test for cannabis be accompanied by “a physical evaluation in order to determine an employee’s state of impairment.”<sup>6</sup> These physical examinations must be performed by certificated individuals trained “to opine on the employee’s state of impairment, or lack thereof, related to the usage of cannabis items,” who are called Workplace Impairment Recognition Experts (WIRE).<sup>7</sup> The biggest problem with requiring a WIRE to conduct these examinations is that no certification process or standards exist for WIREs.

The CRC is charged with prescribing standards for

WIRE certification and issuing workplace guidance on cannabis impairment.<sup>8</sup> Pursuant to that charge, on Sept. 9, 2022, the CRC issued interim guidance on workplace impairment protocols relating to CREAMMA.<sup>9</sup> That document stated “[t]his document is intended to serve as guidance until the NJ-CRC formulates and approves standards for WIRE certifications.”<sup>10</sup> As of the drafting of this article, the CRC has yet to formulate or approve any such standards – five years after CREAMMA charged CRC with doing so.

The CRC’s interim workplace impairment guidance refers to a “Reasonable Suspicion Observed Behavior Report” (reasonable suspicion form), which is designed to document signs of possible cannabis impairment in real time.<sup>11</sup> The reasonable suspicion form contains a list of “Physical Signs or Symptoms” and a list of “Behavior Indicators” which purport to reflect cannabis impairment.<sup>12</sup> Some of the listed physical signs and symptoms are logical and perhaps obvious, such as “Odor of marijuana” and “Red/bloodshot eyes.”<sup>13</sup> Others of the 18 listed physical signs or symptoms arguably could apply to cannabis impairment, such as “Sleepy/stupor,” “Disoriented/confused,” “Delayed/mumbling speech,” and “Inappropriate wearing of sunglasses.”<sup>14</sup> However, more of the listed physical signs or symptoms arise from the use of substances other than cannabis, such as “Needle tracks or puncture marks,” “Odor of alcohol,” “Vomiting/excessive belching,” “Odor of chemicals,” “Shaking hands/body tremors/twitching,” “Frequent sniffing,” and “Runny nose/sores around nostrils.”<sup>15</sup> None of the physical attributes in this last category would be indicative of cannabis impairment and nothing on the form sets these attributes apart from the others. They are all recommended features to search for in order to determine cannabis impairment.

Some of the behavioral indicators listed on the form also deal with impairment more generally and some are more reflective of alcohol intoxication, such as “Swaying/stumbling/staggering” and “Falling down/reaching for support.”<sup>16</sup> Other behavioral indicators might not be reflective of intoxication from the use of any substance, such as “Use of profanity/argumentative,” “Sad, depressed, withdrawn,” “Excessive yawning/fatigue/lethargy,” and “Anxious/fearful.”<sup>17</sup> Others are reflective of the use of stimulants such as cocaine or amphetamines, for example “Uncharacteristically talkative” and “Rapid/rambling/repetitive speech.” Others are simply confusing, such as “Shouting/whispering/silent” and “In appropriate [sic] wearing of outerwear.”<sup>18</sup> Like the physical signs or symptoms portion of the form, the behavioral indicators section does not delineate between those behaviors that are intended to reflect cannabis impairment as opposed to impairment from other substances.

The reasonable suspicion form states that the form should be completed by one or two supervisors within 24 hours of the observed behaviors.<sup>19</sup> It does not indicate that anyone with expertise in workplace impairment should be involved in the process. As noted above, the CRC’s website specifically states that the reasonable suspicion form should be used until and unless the CRC passes WIRE certification regulations and guidance.<sup>20</sup> So, the extent to which the CRC has issued guidance on documenting workplace cannabis impairment as of the drafting of this update is 1) to document using a form not specific to cannabis impairment and 2) to have one to two people with no expertise in cannabis impairment fill out the form. This is hardly ideal, especially because there currently exists no reliable scientific testing – urinalysis, blood testing, or otherwise – which can prove that an employee is impaired by cannabis while on shift.

The current workplace guidance provided by the CRC is a poor barometer for determining cannabis impairment in the workplace. Certain improvements seem obvious, such as issuing a form for documenting suspected impairment in real time that is specific to

cannabis impairment, leaving less room for error when a supervisor inexperienced in the subject fills out the form. Of course, issuing a list of behaviors indicative only of cannabis impairment presents its own problems. Beyond the almost cartoonishly obvious signs – bloodshot eyes, laughter, and hunger – there are no easily identifiable signs of cannabis impairment. Field sobriety tests used by law enforcement to determine alcohol intoxication, for example, are ineffective in determining whether a person is impaired by cannabis.<sup>21</sup> A cannabis-specific form would, however, be a significant improvement over the current reasonable suspicion form recommended by the CRC.

Of course, actually issuing the WIRE certification guidelines and issuing final guidance on cannabis impairment in the workplace would be superior to simply correcting the CRC’s interim guidance. However, as of the drafting of this article, there are no apparent signs of that happening any time soon. This is perhaps the result of the CRC’s workload. In 2024, for example, with a staff of 86 total employees and contractors, the CRC approved 496 new cannabis business licenses and 6,050 cannabis business employees through a complex and highly regulated approval process.<sup>22</sup> Whatever the reason for this five-year delay, New Jersey employers have not been given the workplace guidance the CRC was tasked by the Legislature to give.

If the CRC is not willing or able to issue more specific guidance or regulations on cannabis impairment in the workplace, perhaps another state agency, such as the New Jersey Department of Health or the New Jersey Department of Labor and Workforce Development, might need to take the reins and provide clarity to New Jersey employers in determining how to document instances of alleged cannabis impairment in the workplace. Until then, employers can only develop their own guidance on the issue and hope it holds up under legal scrutiny. ■

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## Endnotes

1. Pub. L. No. 2021 c. 16 (2021), available at [njleg.state.nj.us/chapter-laws](http://njleg.state.nj.us/chapter-laws).
2. *Id.*

3. The New Jersey Legislature uses both the words “intoxication” and “impairment” to describe an employee’s cognitive or motor functions being actively impacted by recent cannabis use. *See, e.g.*, N.J.S.A. 24:6I-52(48)(a)(1) (“...observable signs of intoxication...” and “in order to determine an employee’s state of impairment”). This article uses the word “impairment” to describe that altered state of consciousness for the sake of consistency and because there is some debate over whether the word “intoxication” continues to apply while cannabinoids are still present in a person’s blood or urine but that person is no longer actively feeling the psychoactive effects of cannabis. Use of the word “impairment” seeks to avoid this confusion. *See, e.g.*, Scott Pearson and Scott Grinsteiner, American Bar Association, *Testing Challenges: No BAC for THC* (Aug. 12, 2024), *available at* [americanbar.org/groups/judicial/resources/highway-justice/testing-challenges-no-bac-thc/](https://americanbar.org/groups/judicial/resources/highway-justice/testing-challenges-no-bac-thc/) (“Blood alcohol content (BAC) serves as an accurate measurement of alcohol impairment because the substance is a relatively simple one; alcohol is highly water soluble and spends much of its time in the body within the watery blood. Peak blood concentration of alcohol coincides with peak impairment. While BAC level represents a robustly-researched accurate measurement of the alcohol impairment of a driver, the presence of THC in a driver’s body has not been shown to be a predictable measure of cannabis impairment”).
4. N.J.S.A. 24:6I-52(48)(a)(1) (“No employer shall refuse to hire or employ any person or shall discharge from employment or take any adverse action against any employee with respect to compensation, terms, conditions, or other privileges of employment because that person does or does not smoke, vape, aerosolize or otherwise use cannabis items, and an employee shall not be subject to any adverse action by an employer solely due to the presence of cannabinoid metabolites in the employee’s bodily fluid from engaging in conduct permitted under P.L.2021, c.16”).
5. *Id.* (“However, an employer may require an employee to undergo a drug test upon reasonable suspicion of an employee’s usage of a cannabis item while engaged in the performance of the employee’s work responsibilities, or upon finding any observable signs of intoxication related to usage of a cannabis item, or following a work-related accident subject to investigation by the employer. A drug test may also be done randomly by the employer, or as part of a pre-employment screening, or regular screening of current employees to determine use during an employee’s prescribed work hours”).
6. *Id.* (“The drug test shall include scientifically reliable objective testing methods and procedures, such as testing of blood, urine, or saliva, and a physical evaluation in order to determine an employee’s state of impairment”).
7. *Id.* (“The physical evaluation shall be conducted by an individual with the necessary certification to opine on the employee’s state of impairment, or lack thereof, related to the usage of a cannabis item in accordance with paragraph (2) of this subsection”).
8. N.J.S.A. 24:6I-52(48)(a)(2)(a).
9. New Jersey Cannabis Regulatory Commission, New Jersey Cannabis Regulatory Commission Guidance on “Workplace Impairment,” *available at* [nj.gov/cannabis/documents/businesses/Business%20Resources/Workplace%20Impairment%20Guidance%20922.pdf](https://nj.gov/cannabis/documents/businesses/Business%20Resources/Workplace%20Impairment%20Guidance%20922.pdf) (Sept. 9, 2022).
10. *Id.*
11. New Jersey Cannabis Regulatory Commission, Reasonable Suspicion Observed Behavior Report, *available at* [nj.gov/cannabis/documents/businesses/Business%20Resources/Workplace%20Impairment%20Guidance%20Sample%20Form.pdf](https://nj.gov/cannabis/documents/businesses/Business%20Resources/Workplace%20Impairment%20Guidance%20Sample%20Form.pdf).
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*

20. New Jersey Cannabis Regulatory Commission, *supra* n.9 (“This document is intended to serve as guidance until the NJ-CRC formulates and approves standards for WIRE certifications. Additionally, a template “Reasonable Suspicion” Observation Report Form is included for download and use. Please note that the sample form is not cannabis-specific”).
21. *See, e.g.*, United States Department of Justice, National Institute of Justice, Sobriety Tests and THC Levels Unreliable Indicators of Marijuana Intoxication (April 5, 2021), *available at* [nij.ojp.gov/topics/articles/field-sobriety-tests-and-thc-levels-unreliable-indicators-marijuana-intoxication](http://nij.ojp.gov/topics/articles/field-sobriety-tests-and-thc-levels-unreliable-indicators-marijuana-intoxication).
22. New Jersey Cannabis Regulatory Commission, Annual Report on the Medicinal Cannabis Program & Adult-Use Cannabis, 6 (June 12, 2025), *available at* [nj.gov/cannabis/documents/reports/NJCRC\\_2024\\_Annual\\_Report\\_FINAL.pdf](http://nj.gov/cannabis/documents/reports/NJCRC_2024_Annual_Report_FINAL.pdf).

# Taking Stock of *Bostock*: Transgender Discrimination Law After *United States v. Skrametti*

by Liz Pudel

On June 18, 2025, the U.S. Supreme Court issued a 6-3 decision in *United States v. Skrametti*<sup>1</sup> upholding a Tennessee law banning gender-affirming care<sup>2</sup> for minors who identify with a gender<sup>3</sup> other than their sex assigned at birth because the Court found that the law does not impermissibly discriminate on the basis of sex so as to warrant heightened scrutiny and passes rational basis scrutiny. The Court also rejected petitioner United States' argument that the Court's holding in *Bostock v. Clayton County, Georgia*<sup>4</sup> should alter the outcome in *Skrametti*. With notable silence from Justices Neil Gorsuch and Brett Kavanaugh—who wrote the majority and dissenting opinions in *Bostock*, respectively—nearly every member of the Court contributed to the scatterplot of constitutional analyses that formed *Skrametti*. The result was, at least in theory, a doctrinally narrow ruling that left many constitutional questions unanswered. This article does not address all of the legal theories raised in *Skrametti*. Instead, this article focuses on the parts of the decision most relevant to the employment context.<sup>5</sup>

## Legislative Context for *Skrametti*

*Skrametti* was filed as a pre-enforcement challenge to a Tennessee law, the Prohibition on Medical Procedures Performed on Minors Related to Sexual Identity, S.B. 1, 113th Assembly (SBI).<sup>6</sup> SBI's core legislative finding was that “medical procedures that alter a minor’s hormonal balance, remove a minor’s sex organs, or otherwise change a minor’s physical appearance” are “harmful” when “performed for the purpose of enabling a minor to identify with, or live as, a purported identity inconsistent with a minor’s sex or treating purported discomfort or distress from a discordance between the minor’s sex and asserted identity.”<sup>7</sup> The Legislature’s stated purpose in enacting the bill was to “encourag[e] minors to appre-

ciate their sex, particularly as they undergo puberty” and to “protect[] the integrity of the medical profession, including by prohibiting medical procedures...that might encourage minors to become disdainful of their sex.”<sup>8</sup> To achieve that purpose, SBI prohibits health care providers from performing medical procedures on minors that “(1) [e]nabl[e] a minor to identify with, or live as, a purported identity inconsistent with the minor’s sex; or (2) [t]reat[] purported discomfort or distress from a discordance between the minor’s sex and asserted identity.”<sup>9</sup>

The question presented was “whether [SBI] violates the Equal Protection Clause of the Fourteenth Amendment” by impermissibly discriminating on the basis of sex or, in the alternative, impermissibly discriminating on the basis of transgender identity.<sup>10</sup> Petitioner United States encouraged the Court to limit its inquiry to whether SBI warrants heightened scrutiny and requested that any application of heightened scrutiny be remanded to the Sixth Circuit.<sup>11</sup>

## The Majority Opinion in *Skrametti*

Writing for the Court, Chief Justice John Roberts explained that the Court need not decide whether state action that discriminates on the basis of transgender identity warrants heightened scrutiny—either as a classification in and of itself or as a sex-based classification—because SBI does not discriminate on the basis of either transgender identity or sex in the first place.<sup>12</sup> Instead, the Court found that SBI makes only “mere reference to sex” and classifies on the basis of age and medical use, both of which warrant only rational basis scrutiny.<sup>13</sup> The latter—medical use—dominated the Court’s analysis.

“Gender dysphoria”—the primary diagnosis that gender-affirming care seeks to address—is defined as “a medical condition characterized by clinically significant

and persistent distress resulting from incongruence between a person's gender identity and sex identified at birth."<sup>14</sup> As a result, "gender dysphoria" is a diagnosis that incorporates by reference both a person's sex assigned at birth and their gender identity and that is experienced almost exclusively by transgender and gender non-conforming people. In fact, the Court acknowledges that SBI operates differently with respect to transgender minors seeking treatment to affirm their gender identity, which is inconsistent with their sex assigned at birth, and cisgender minors seeking to affirm their gender identity, which is consistent with their sex assigned at birth. The former is banned by SBI, whereas the latter is not. However, the Court read SBI as limiting access to gender-affirming care only for the purpose of treating gender dysphoria, purportedly without regard for the sex or gender of the minor in question.<sup>15</sup>

Ignoring SBI's express legislative goals, the Court chose to distance the "gender dysphoria" diagnosis from its definitional root in both sex and gender to find that SBI limits medical access to people assigned male at birth and people assigned female at birth in equal measure.<sup>16</sup> The Court also held that SBI does not classify on the basis of transgender identity because it only prohibits a transgender person from accessing certain treatments when seeking them for the purpose of addressing gender dysphoria. Treatment sought for any other diagnosis is permissible under SBI for transgender and cisgender people alike.<sup>17</sup> Relying in part on *Geduldig v. Aiello*,<sup>18</sup> a prior Supreme Court case discussed further below, the Court held that absent a showing that SBI's prohibitions are "mere pretexts designed to effect an invidious discrimination against transgender individuals," the law warrants only rational basis scrutiny.<sup>19</sup> Applying a rational basis analysis, the Court held that the classifications made in SBI are a permissible exercise of the Tennessee Legislature's authority to wade into the "debate" among medical professionals regarding gender-affirming care for minors.<sup>20</sup>

### **Bostock Sets the Stage and Closes the Curtain for the Constitutional Analysis of Anti-Trans Discrimination in *Skrmetti***

To fully understand *Skrmetti*, it is important to analyze the doctrinal context in which it was decided. In 2020, the Court issued a 6-3 decision in *Bostock*,<sup>21</sup> authored by Justice Gorsuch, that held that Title VII of the Civil Rights Act of 1964's prohibition on sex

discrimination encompasses discrimination on the basis of sexual orientation and transgender identity: "[I]t is impossible to discriminate against an individual for being homosexual or transgender without discriminating against that individual based on sex."<sup>22</sup> The Court reasoned that employment decisions made on the basis of sexual orientation or gender identity are necessarily made with reference to employees' sex assigned at birth and the societal expectations bound up therein.<sup>23</sup> The dissent, authored by Justices Samuel Alito and Clarence Thomas, read Title VII more narrowly, suggesting that employers may be able to make employment decisions on the basis of an employee's sexual orientation or transgender identity without reference to "biological sex, attraction to men, or attraction to women" by making those decisions on the basis of "attraction to members of their own sex—in a word, sexual orientation."<sup>24</sup>

One of the core arguments advanced by petitioner United States in its petition for certiorari in *Skrmetti*, submitted by then-Solicitor General Elizabeth Prelogar's office under President Joseph Biden, was that there is no way to determine whether treatment must be withheld from a particular minor without impermissibly considering their sex.<sup>25</sup> In so arguing, the petitioner advocated that the Court import the logic of *Bostock* from the Title VII context into Equal Protection law.<sup>26</sup> The majority rejected this argument and held that it need not address whether *Bostock* applies in the Equal Protection context because the distinctions made under SBI, in its estimation, were unrelated to sex and gender.<sup>27</sup>

Having found *Bostock* inapposite, the Court's discussion of the Title VII case could have ended there. But it did not. Instead, the Court applied *Bostock* for the sake of argument and stated that changing a minor's sex or transgender identity would not alter the operation of SBI because "neither [] sex nor [] transgender status is the but-for cause of [a transgender boy's] inability to obtain testosterone."<sup>28</sup> As dicta, the Court's theoretical application of *Bostock* in *Skrmetti*—which was not germane to the resolution of the legal question—may cast a long shadow. In fact, some circuit courts have already applied *Skrmetti* so as to supplant established interpretations of *Bostock* under Title VII, further subverting transgender plaintiffs' ability to bring discrimination claims.

In *Lange v. Houston County*, the Eleventh Circuit applied the dicta from *Skrmetti* to a Title VII case to find that a county employer's insurance policy excluding coverage for gender-affirming care<sup>29</sup> does not discrimi-

nate on the basis of sex or transgender identity under Title VII.<sup>30</sup> Notwithstanding the fact that *Skrmetti* did not involve a Title VII claim, the Eleventh Circuit stated that “the Supreme Court recently rejected *Lange*’s interpretation of *Bostock* in [*Skrmetti*],” reading the Court’s dicta from an Equal Protection case as binding precedent in resolving a Title VII claim.<sup>31</sup> On that basis, the Eleventh Circuit found that “the County’s plan does not facially violate Title VII” because it “draws a line between certain treatments, which it covers, and other treatments, which it does not.”<sup>32</sup> As it happens, *Lange* also bears a striking factual resemblance to the Court’s decades’ old—and widely criticized—decision in *Geduldig v. Aiello*, which also found an ill-begotten home in *Skrmetti*.

### **Beyond *Bostock*: *Geduldig* Rears Its Head**

As Justice Sonia Sotomayor lambasted in dissent in *Skrmetti*, one of the more controversial doctrinal pivots the Court has made in recent years has been the revival of its holding in *Geduldig*. There, the Court held that a state disability insurance system that excluded pregnancy-related disabilities from coverage did not violate the Equal Protection Clause because the program “did not exclude any individual from benefit eligibility because of the individual’s sex but rather ‘remove[d] one physical condition—pregnancy—from the list of compensable disabilities.’”<sup>33</sup> Though *Geduldig* was decided in the Equal Protection context, the Court extended its logic to Title VII in *General Electric Co. v. Gilbert*.<sup>34</sup>

*Geduldig* is a decision that legal commentators and courts alike have criticized as being “egregiously wrong” when it was decided.<sup>35</sup> The outcry over the Court’s decisions in *Geduldig* and *Gilbert* even led to the enactment of the Pregnancy Discrimination Act of 1978, which

amended Title VII to prohibit employers from denying insurance coverage for pregnancy, neutralizing the direct harms caused by *Geduldig* and *Gilbert*.<sup>36</sup> However, by virtue of the PDA’s narrow focus, its enactment left the decisions’ underlying logic undisturbed and available for use in other medical contexts. That is precisely what happened in *Skrmetti*, as it was *Geduldig* that the Court relied on to find that there is a “lack of identity” between sex, gender dysphoria, and the prohibited treatments.<sup>37</sup>

It will take time to see the full effects of *Skrmetti* play out, including in the employment context, but it is already serving as a launching pad for lower courts and state legislatures to further encroach on the rights of transgender people. At minimum, *Skrmetti* provides state legislatures with a roadmap to enact facially discriminatory legislation that regulates the lives of transgender people while avoiding heightened judicial review. In New Jersey, the NJLAD’s explicit prohibition of discrimination on the basis of both sex and gender identity means that transgender litigants in our state may not need to tackle *Skrmetti* head-on. However, elsewhere in the country, *Skrmetti* will permit states to perpetuate anti-trans discrimination while thinly veiling bias through the language of medical diagnosis and treatment. As for Justice Amy Coney Barrett’s query as to whether there exists “a history of [transgender individuals having suffered] *de jure* discrimination as a class,”<sup>38</sup> the Court will one day need to grapple with the fact that it need look no further than its own decision in *Skrmetti* to find its answer.<sup>39</sup> ■

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### **Endnotes**

1. 605 U.S. 495 (2025).
2. The World Health Organization (WHO) defines “gender-affirming care” as including “any single or combination of a number of social, psychological, behavioral or medical (including hormonal treatment or surgery) interventions designed to support and affirm an individual’s gender identity.” WHO, Gender Incongruence and Transgender Health in the ICD, *available at* [who.int/standards/classifications/frequently-asked-questions/gender-incongruence-and-transgender-health-in-the-icd](http://who.int/standards/classifications/frequently-asked-questions/gender-incongruence-and-transgender-health-in-the-icd).

3. Though the Supreme Court has historically used the terms “gender” and “sex” interchangeably (*see, e.g., Skrmetti, supra* n.1, at 559 (Alito, J., concurring)), this article uses the medically accepted terminology set forth in the “Standards of Care for the Health of Transgender and Gender Diverse People, Version 8,” published in the International Journal of Transgender Health, *available at* [tandfonline.com/doi/pdf/10.1080/26895269.2022.2100644](https://doi.org/10.1080/26895269.2022.2100644), which distinguishes between sex and gender. Notably, since 1991, the New Jersey Law Against Discrimination has distinguished between sex and gender identity/expression as distinct protected classifications, defining “gender identity or expression” separately as “having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person’s assigned sex at birth.” *See* N.J.S.A. 10:5-12(a); *see also* N.J.S.A. 10:5-5(rr). As a result, transgender and gender non-conforming litigants in New Jersey are affirmatively protected by the NJLAD, notwithstanding Title VII and Equal Protection jurisprudence. Furthermore, a bill concerning protections for persons providing, receiving, and allowing children to receive gender affirming care was recently introduced in the Assembly. *See* Assembly Bill No. 3323, *available at* [njleg.state.nj.us/bill-search/2026/A3323/bill-text?f=A3500&n=3323\\_11](https://njleg.state.nj.us/bill-search/2026/A3323/bill-text?f=A3500&n=3323_11).
4. 590 U.S. 644 (2020).
5. In particular, this article will not address the concurrences in any meaningful way, as they are not doctrinally relevant to the employment context. However, it bears emphasizing that the vitriol the concurrences express toward transgender people do, and will continue, to color any current and future Supreme Court decisions impacting the lives of transgender people, including in the employment context. *See, e.g., Trump v. Orr*, 607 U.S. \_\_\_, 146 S. Ct. 44 (2025); *Little v. Hecox and West Virginia v. B.P.J.*, Sup. Ct. Dkt. Nos. 24-38, 24-43 (2026).
6. Tenn. Code Ann. § 68-33-101 *et seq.*
7. *Id.* at § 68-33-101(b) (emphasis added).
8. *Id.* at § 68-33-101(m) (emphasis added).
9. *Id.* at § 68-33-103(a) (emphasis added).
10. *Skrmetti, supra* n.1, at 509.
11. *See* Oral Argument Transcript, *United States v. Skrmetti*, No. 23-477, at 13-14 (Dec. 4, 2024), *available at* [supremecourt.gov/oral\\_arguments/argument\\_transcripts/2024/23-477\\_hgdj.pdf](https://supremecourt.gov/oral_arguments/argument_transcripts/2024/23-477_hgdj.pdf).
12. *Skrmetti, supra* n.1, at 512.
13. *Id.* at 511.
14. *Id.* at 581 (Sotomayor, J., dissenting) (emphasis added).
15. *Id.* at 515. As an aside, some advocates have pushed for the de-medicalization of transgender identity—*i.e.*, uncoupling transgender identity from the diagnoses of “gender dysphoria,” “gender incongruence,” and the like—to avoid, among other things, the kind of result we see in *Skrmetti*. *See* Dean Spade, *Resisting Medicine/ Remodeling Gender*, 18 *Berkeley Women’s L. J.* 15 (2003), *available at* [digitalcommons.law.seattleu.edu/faculty/592](https://digitalcommons.law.seattleu.edu/faculty/592) (exploring the pitfalls and dangers of medicalizing transgender identity by inextricably linking transgender identity to medically diagnosed mental illness while also recognizing the medical and legal limitations that moving beyond a medicalized model may present, particularly in obtaining gender-affirming care and in enforcing transgender peoples’ rights under anti-discrimination law.)
16. *Skrmetti, supra* n.1, at 515.
17. *Id.* at 518-19 (“... although only transgender individuals seek treatment for gender dysphoria, gender identity disorder, and gender incongruence... there is a ‘lack of identity’ between transgender status and the excluded medical diagnoses.”)
18. 417 U.S. 484 (1974).
19. *Skrmetti, supra* n.1, at 518.

20. *Id.* at 524 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007)). Numerous *amici curiae* briefs were filed on behalf of the professional medical community in support of the plaintiffs and the United States, including the American Psychological Association; the American Academy of Pediatrics; national and state medical and mental health organizations; the American Historical Association; clinical practice guidelines experts; gender-affirming care experts; expert scientists and researchers from the United States and Australia; and professors of law, medicine, and public health. Though the measure and type of gender-affirming care delivered must be assessed by a qualified medical professional in consultation with the person seeking care on a case-by-case basis, there is widespread medical consensus that gender-affirming care, as a category of care, is the appropriate treatment protocol for gender dysphoria in transgender adolescents. See, e.g., Brief of *Amici Curiae* American Academy of Pediatrics and Additional National and State Medical and Mental Health Organization in Support of Petitioner and Respondents in Support of Petitioner, *United States v. Skrmetti*, *supra* n.1.
21. For a detailed discussion of the *Bostock* decision, see Lisa Barré-Quick, *Bostock v. Clayton County, Georgia: The New Era of Title VII*, 42 *N.J. Lab. & Emp. L.Q.*, No. 1, 2020, at 7-13.
22. *Bostock*, *supra* n.4, at 660.
23. *Id.*
24. *Id.* at 698.
25. Petition for Writ of Certiorari at 14, 23, *United States v. Skrmetti*, No. 23-477 (Nov. 6, 2023), available at [supremecourt.gov/DocketPDF/23/23-477/288875/20231106135238432\\_U.S. v. Skrmetti - Pet.pdf](https://supremecourt.gov/DocketPDF/23/23-477/288875/20231106135238432_U.S. v. Skrmetti - Pet.pdf).
26. *Id.* at 22.
27. *Skrmetti*, *supra* at 520.
28. *Id.* at 521.
29. The Eleventh Circuit uses the language of “sex change” to describe medical procedures transgender and gender non-conforming people might seek as gender-affirming care. Because this is not the accepted nomenclature for gender affirming care in either the medical community or the transgender community, this article replaces the term “gender-affirming care.”
30. See *Lange v. Houston Cnty.*, 152 F.4th 1245 (11th Cir. 2025).
31. *Id.* at 1245, 1252; see also *id.* at 1276 (Pryor, J., dissenting) (“But the Supreme Court definitively held more than four decades ago that such line drawing is impermissible in Title VII cases when the dividing line is a medical condition that impacts employees differently based on sex. ...The law has been settled on that score ever since. Yet today the majority opinion makes the same mistake in its Title VII analysis that was addressed and corrected long ago by Congress and then by the Supreme Court—it imports equal protection reasoning into a Title VII case”).
32. *Id.* at 1255.
33. *Skrmetti*, *supra* n.1, at 518 (quoting *Geduldig*, *supra* n.18, at 486, 492-497).
34. 429 U.S. 125 (1976).
35. See, e.g., *Coleman v. Court of Appeals of Maryland*, 566 U.S. 30, 60 n.6 (2012) (Ginsburg, J., dissenting); see also S. Law., Rethinking Sex and the Constitution, *U. Pa. L. Rev.* 955, 983 (1984) (collecting law review articles criticizing the outcome and reasoning in *Geduldig* as being wholly divorced from the reality that pregnancy is a biological experience unique to those who are assigned female at birth, meaning that discrimination on the basis of pregnancy is, inherently, discrimination on the basis of sex assigned at birth.)
36. P.L. 95-555, 92 Stat. 2076, 42 USCS § 2000e.
37. *Skrmetti*, *supra* n.1, at 518 (“In *Geduldig*...for example, we held that that a California insurance program that excluded from coverage certain disabilities resulting from pregnancy did not discriminate on the basis of sex. ... We observed that the ‘lack of identity’ between sex and the excluded pregnancy-related disabilities became ‘clear upon the most cursory analysis.’”)
38. *Id.* at 557 (Barrett, J., concurring).

39. On March 2, 2026, the Supreme Court decided *Mirabelli v. Bonta*, 607 U.S. \_\_\_\_ (2026), in which the Court reinstated an injunction of a California school policy providing that teachers may not reveal a student’s name, pronouns, or gender presentation to their parents without the student’s consent, finding that the objecting parents had a high likelihood of success on the merits because “the intrusion on parents’ free exercise rights here—unconsented facilitation of a child’s gender transition—is greater than the introduction of LGBTQ storybooks we considered sufficient to trigger strict scrutiny in *Mahmoud [v. Taylor]*, 606 U.S. 522 (2025).” It is clear the Court is far from done whittling away at the rights of and protections for transgender and gender-nonconforming people.

# McDermott v. Guaranteed Rate: One Step Forward for the EFAA and One Step Backward for the FAA

by Reema L. Chandnani

On Dec. 26, 2025, the Appellate Division of the Superior Court of New Jersey joined courts in New York, California, and Connecticut in holding that when the Ending Forced Arbitration of Sexual Assault and Harassment Act of 2021<sup>1</sup> applies to a claim brought in court, the presence of that claim renders the entire action non-arbitrable – even in light of the Federal Arbitration Act’s<sup>2</sup> strong policy favoring arbitration.<sup>3</sup> As a case of first impression in New Jersey, the ruling is poised to reshape how we litigate employment matters in New Jersey. This article summarizes the decision and the potential implications moving forward.

## FAA & EFAA Background

Before turning to the specifics of the case, a brief overview of the FAA and EFAA is instructive. The FAA is a federal law whose purpose is to encourage courts to enforce arbitration agreements and reflects a strong policy favoring arbitration of disputes over traditional litigation.<sup>4</sup> However, in parallel with the rise of the #MeToo Movement, Congress amended the FAA by way of the EFAA.<sup>5</sup> This change responded to growing concerns that the confidential nature of arbitration could diminish the visibility and impact of sexual harassment claims for victims – an issue less likely to arise in court proceedings, which are generally public.<sup>6</sup> Congress explained that the purpose of the amendment was to “restore access to justice for millions of victims of sexual assault or harassment who are currently locked out of the court system and are forced to settle their disputes against companies in a private system or arbitration that often favors the company over the individual.”<sup>7</sup> Accordingly, Congress amended the FAA to provide that any arbitration agreement requiring an individual to arbitrate a sexual assault or sexual harassment dispute – thereby preventing them from bringing those claims in court –

is unenforceable with respect to those disputes.<sup>8</sup>

## McDermott History<sup>9</sup>

The Appellate Division’s opinion was a consolidation of two similar matters: *McDermott v. Guaranteed Rate, Inc.* and *Rivera-Santana v. CJF Shipping, LLC*.<sup>10</sup> In the first matter, Megan McDermott worked as a licensed mortgage loan officer for Guaranteed Rate, Inc.<sup>11</sup> She alleged that throughout her employment she experienced sexual harassment and gender discrimination that ultimately forced her to resign.<sup>12</sup> According to McDermott, she was subjected to abusive treatment, an explicit sexual comment, pressure not to file a complaint, and unequal compensation practices – specifically, pay structures that were less favorable than those of her male counterparts.<sup>13</sup> During her employment, McDermott signed a compensation plan containing an arbitration agreement.<sup>14</sup> In relevant part, that agreement required that all claims or disputes she might have against GRI be resolved through arbitration in Chicago.<sup>15</sup> Notwithstanding this provision, McDermott filed a 14-count complaint in court.<sup>16</sup> Her claims included, among others, sex- and gender-based harassment and hostile work environment, constructive discharge, failure to pay wages and commissions, and breach of contract.<sup>17</sup>

GRI filed a motion to dismiss and to compel arbitration.<sup>18</sup> The trial court found that the EFAA applied to McDermott’s sexual harassment claims; however, a conflict existed under the FAA and EFAA as to the remaining claims (Counts 4-14).<sup>19</sup> Relying on the Magistrate Judge’s opinion in *Mera v. SA Hospitality Group*,<sup>20</sup> which has since been reversed in relevant part,<sup>21</sup> the trial court held that the EFAA only covered those claims relating to sexual harassment and that all other claims are arbitrable.<sup>22</sup> The court found this to be consistent with the EFAA’s purpose while also not invalidating all pre-dispute arbitration agreements.<sup>23</sup> The

decision resulted in the bifurcation of the case.<sup>24</sup> The trial court further rejected McDermott's application to reconsider this portion of the decision, holding that the facts relating to her other claims were not "inextricably intertwined" with her sexual harassment claims.<sup>25</sup>

### Rivera-Santana History

In the companion case, Geraldine Rivera-Santana worked as a driver for CJF Shipping, LLC.<sup>26</sup> Rivera-Santana alleged that throughout her employment she was subjected to discrimination and sexual harassment, which ultimately led to her wrongful termination.<sup>27</sup> She alleged that she endured pervasive and threatening comments, was forced to work in conditions while pregnant that defied her doctor's orders, and was fired for complaining about the inappropriate conduct.<sup>28</sup> Like McDermott, Rivera-Santana signed an arbitration agreement requiring that all claims stemming from her employment, including discrimination and harassment claims, be resolved through arbitration rather than in court.<sup>29</sup> Rivera-Santana nevertheless filed a complaint in court, asserting claims for wrongful termination, retaliation, discrimination, and sexual harassment.<sup>30</sup>

Like GRI, CJF moved to dismiss and compel arbitration.<sup>31</sup> As in McDermott, the court held that the sexual harassment claim must proceed in court, per the EFAA.<sup>32</sup> However, it concluded that the remaining claims arose "out of a set of different facts" and, therefore, were not covered by the EFAA.<sup>33</sup> Those claims were compelled to arbitration.<sup>34</sup>

### Appellate Division Analysis & Holdings

Both McDermott and Rivera-Santana appealed.<sup>35</sup> On appeal, the Appellate Division was tasked with determining whether the EFAA's prohibition on mandatory arbitration applies only to claims directly related to sexual harassment or whether it extends to all claims asserted in McDermott's and Santana-Rivera's lawsuits.<sup>36</sup>

The Appellate Division disagreed with the lower courts' interpretation of the EFAA and found that its plain language dictates that when the EFAA applies, the entire case must proceed in court.<sup>37</sup> In particular, the court found that, when accepting the allegations in the complaints as true, both complaints made allegations relating to a "sexual harassment dispute" such that the EFAA prohibited arbitration of any portion of those cases.<sup>38</sup> The court reasoned that once a case includes at least one claim involving a sexual harassment dispute,

the inquiry ends, and the EFAA applies to the entire action.<sup>39</sup> Accordingly, the lower courts should have concluded that all claims in each case must proceed in court, not just the claims alleging sexual harassment or assault.<sup>40</sup> In making this determination, the Appellate Division focused on the EFAA's plain language and Congress's deliberate word choice.<sup>41</sup> The statute provides that "no predispute arbitration agreement...shall be valid and enforceable with respect to a case which is filed under...State law and relates to...the sexual harassment dispute."<sup>42</sup> The court emphasized that Section 402(a) of the EFAA uses the word "case," not "claim."<sup>43</sup> In a neighboring provision addressing the statute's effective date, Congress used the narrower term "claim."<sup>44</sup> The court reasoned that Congress's decision to use "claim" in one section and "case" in another was intentional.<sup>45</sup> By choosing the broader term "case" in the substantive provision, Congress signaled that the EFAA applies to the entire action when it includes a sexual harassment dispute and not just to individual harassment claims within it.<sup>46</sup>

The court explained that to accept the defendants' argument that the claims should be bifurcated would have required it to go beyond its judiciary authority by creating a limitation that Congress did not include.<sup>47</sup> Simply put, the court held that because both McDermott's and Rivera-Santana's complaints involved sexual harassment allegations, the EFAA required that each entire case proceed in court.<sup>48</sup>

Since this was a matter of first impression in New Jersey, the Appellate Division looked to cases in New York, Connecticut, and California as persuasive authority on this issue.<sup>49</sup> Among the decisions it relied on was *Johnson v. Everyrealm*<sup>50</sup> out of the Southern District of New York. In *Johnson*, the court likewise held that once the EFAA is implicated, the arbitration agreement is unenforceable as to the entire case, not just the specific claims alleging sexual harassment.<sup>51</sup> The *Johnson* court then went a step further and observed that Congress chose to amend the FAA itself to add the EFAA rather than amending Title VII to invalidate arbitration agreements only for discrimination and harassment claims.<sup>52</sup> This decision, the court reasoned, reflected Congress's intent for the EFAA to have broader reach, reinforcing that when a sexual harassment dispute is part of a case, the arbitration agreement cannot be enforced as to any of the claims in that action.<sup>53</sup>

Lastly, the Appellate Division rejected the *McDermott* trial court's finding that the non-sexual harassment

claims must be “inextricably intertwined” with the sexual harassment claim in order to remain in court.<sup>54</sup> Though the court stopped short of holding that a nexus is always required, it found that, even if some connection were necessary, that standard was met here.<sup>55</sup> Specifically, the court found that in both McDermott’s and Rivera-Santana’s cases, the additional claims were “materially and substantially informed by the nature of the sexual-harassing employment relationship.”<sup>56</sup> In other words, these other claims did not arise in isolation; they stemmed from the same allegedly harassing workplace environments.<sup>57</sup>

Since the court found that McDermott’s and Rivera-Santana’s claims stemmed from the alleged harassing environments they both endured, the Appellate Division determined that it was improper for the trial courts to bifurcate the cases at the motion to dismiss stage.<sup>58</sup> Particularly, it explained that it was incorrect for the lower courts to allow the sexual harassment claims to proceed in court while compelling arbitration of the remaining claims.<sup>59</sup>

The court briefly addressed the concern that plaintiffs might attempt to avoid arbitration by strategically pleading sexual harassment.<sup>60</sup> It noted that such action could be “ferreted out by a court on a motion to dismiss or to compel arbitration” or through “careful case management.”<sup>61</sup> The court described this as the more “practical approach,” rather than compelling arbitration of claims that appear unrelated at first glance “only to later discover...[they are] connected to the sexual harassment claim,” thereby “depriving a plaintiff of [the] right to” have those claims heard in court.<sup>62</sup> The

Appellate Division did not elaborate further on how that oversight would function in practice.

### What to Expect Going Forward

The Appellate Division’s decision will likely have immediate practical consequences. New Jersey courts can expect an uptick in cases where plaintiffs assert sexual harassment claims alongside other employment-related claims, all filed in court rather than proceeding to arbitration. With this shift, we will almost certainly see an increase in motions to dismiss and motions to compel arbitration. When these motions arise, trial courts will need to proceed carefully. Given the deference required to the non-moving party at the pleading stage, early dismissal or bifurcation will become more difficult.

It will be interesting to see how New Jersey courts analyze the “nexus,” if any, between the sexual harassment claims and accompanying non-harassment claims. Since this is a fine line that will often be difficult to draw, we may see more cases advance beyond the pleading stage and more cases proceed in court. From a practical standpoint, this dynamic may incentivize earlier resolution. Faced with less predictability around arbitration enforcement, some employers may opt to settle disputes sooner rather than later.

As with many significant shifts in employment law, the full impact will unfold over time. But one thing is clear: arbitration strategy in New Jersey just became even more complex. ■

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### Endnotes

1. Pub. L. No. 117-90, codified at 9 U.S.C. § 401 *et seq.*
2. 9 U.S.C. § 1 *et seq.*
3. *McDermott v. Guaranteed Rate, Inc.*, 483 N.J. Super. 264, 293 (2025).
4. *Id.* at 290.
5. *Id.*
6. *Id.* at 290-91.
7. *Id.* at 304 (quoting H.R. Rep. No. 117-234, at 3 (2022)).
8. *Id.* at 291 (quoting 9 U.S.C. § 402(a)).
9. The Appellate Division also found that McDermott’s and Rivera-Santana’s sexual harassment claims were not time-barred pursuant to the continuing violation theory. *Id.* at 286-289. Given the focus on the arbitration component, this article does not discuss the two cases’ facts and the court’s findings as they relate to the statute of limitations argument.

10. *Id.* at 272.
11. *Id.* at 273.
12. *Id.*
13. *Id.* at 273-4.
14. *Id.* at 274.
15. *Id.* at 274-75.
16. *Id.* at 275.
17. *Id.*
18. *Id.* at 276.
19. *Id.*
20. 675 F. Supp. 3d 442 (S.D.N.Y. 2023).
21. *McDermott, supra* n.3, at 277 (citing *Mera v. SA. Hosp. Grp., LLC*, 2025 U.S. Dist. LEXIS 225349, at \*26 (S.D.N.Y. Nov. 17, 2025)).
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 277-78.
26. *Id.* at 279.
27. *Id.* at 279-81.
28. *Id.*
29. *Id.* at 281.
30. *Id.*
31. *Id.*
32. *Id.* at 281-82.
33. *Id.* at 282.
34. *Id.*
35. *Id.* at 272.
36. *Id.* at 278, 282.
37. *Id.* at 290.
38. *Id.* at 291-92 (quoting 9 U.S.C. § 402(a)).
39. *Id.* at 292.
40. *Id.*
41. *Id.*
42. *Id.* (quoting 9 U.S.C. § 402(a)) (emphasis in original).
43. *Id.* at 292-93.
44. *Id.* at 293-94.
45. *Id.*
46. *Id.* at 294.
47. *Id.*
48. *Id.*
49. *Id.* at 295-303.
50. 657 F. Supp. 3d 535 (S.D.N.Y. 2023).
51. *McDermott, supra* n.3, at 295 (quoting *Johnson, supra* n.50, at 559-60).
52. *Id.* at 295.
53. *Id.* at 296.
54. *Id.* at 297.
55. *Id.* at 297-98.
56. *Id.* at 297.
57. *Id.*
58. *Id.* at 306-07.
59. *Id.*
60. *Id.* at 307.
61. *Id.*
62. *Id.*

# Recent New Jersey and Third Circuit Cases Provide Clarification on Arbitration Issues

by Beth P. Zoller and Katie Ann Insinga

Two recent cases, one in the Third Circuit and one from the New Jersey Supreme Court, provide guidance and clarification with respect to arbitration issues in New Jersey.

## **Cornelius v. CVS Pharm. Inc.**

In *Cornelius v. CVS Pharm. Inc.*,<sup>1</sup> the Third Circuit evaluated whether a claim fell within the purview of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act,<sup>2</sup> the type of evidence to be reviewed by the court, and when to discern if the parties had entered into a valid arbitration agreement under New Jersey law.

The plaintiff, Cornelius, worked for CVS for over 40 years and was promoted to store manager of the CVS location at issue in June 2017.<sup>3</sup> The plaintiff alleged that, starting in 2018, her supervisor intentionally targeted her “with severe and pervasive negative treatment, intentionally because she [was] a woman[,] [...] unfairly denied her promotions and pay increases, favored her male employees and counterparts,” abused her by sending unnecessary text messages, overworked her, and undermined her relationship with store employees.<sup>4</sup> She raised “many complaints to CVS” between 2019 and 2020, and was ultimately discharged in 2021.<sup>5</sup>

In August 2022, the plaintiff filed a gender discrimination claim with the Equal Employment Opportunity Commission, received a right to sue letter in February 2023, and filed her lawsuit in April 2023.<sup>6</sup> In May 2023, CVS moved to compel arbitration.<sup>7</sup> The plaintiff countered that the arbitration agreement was unenforceable under the EFAA.<sup>8</sup> The United States District Court for the District of New Jersey stated that because her claims did not constitute a “sexual harassment dispute” within the meaning of the EFAA, the EFAA did not apply.<sup>9</sup> The District Court “further held that the parties voluntarily entered into a valid and enforceable agreement to arbitrate” and rejected the plaintiff’s claim that the agreement was unconscionable.<sup>10</sup>

On appeal, the Third Circuit agreed, although on different grounds, that the EFAA did not apply to the plaintiff’s claim.<sup>11</sup> The text of the EFAA instructs that it applies to any dispute or claim that arises or accrues on or after the EFAA was enacted (March 3, 2022).<sup>12</sup> Although the plaintiff conceded that her claim accrued prior to her separation from CVS in November 2021, before the EFAA’s effective date, the plaintiff maintained that her dispute with CVS arose when she filed an external complaint with the EEOC in August 2022.<sup>13</sup> However, the Third Circuit dismissed this argument and agreed with CVS, finding that the plaintiff’s “dispute arose prior to March 3, 2022[,]” because she submitted her written internal complaints to CVS and CVS allegedly “disagreed with [her] position as to [the alleged] conduct[,]” sided with the supervisor, and dismissed her complaints, as well as failed to remedy the hostile work environment.<sup>14</sup> Thus, the Third Circuit found that the dispute arose long before the March 3, 2022, effective date of the EFAA and, as such, the EFAA was not applicable.<sup>15</sup>

Notwithstanding this, the Third Circuit remanded the case to the district court on a separate issue unrelated to the EFAA.<sup>16</sup>

## **Takeaways**

This case has some practical implications with respect to the application of the EFAA in the Third Circuit. Here, the Third Circuit determined that a “dispute” arises, and the EFAA applies, only when an employee communicates dissatisfaction and the employer expressly or implicitly rejects or opposes that position.<sup>17</sup> Even without litigation or a formal investigation, because CVS rejected Cornelius’ internal complaints before March 3, 2022, this dispute arose prior to the EFAA’s March 3, 2022, effective date.<sup>18</sup> Thus, the court concluded that the dispute arose before the EFAA applied and, as such, there was no bar to arbitration.<sup>19</sup>

## Other Circuits

However, the same issue regarding the applicability of the EFAA has been reviewed by other circuit courts, with some different results and reasoning. In *Famuyide v. Chipotle Mexican Grill, Inc.*,<sup>20</sup> the Eighth Circuit affirmed the district court's order denying a motion to compel arbitration and permitted the employee the right to pursue litigation in court.<sup>21</sup> The Eighth Circuit determined that under the language of the EFAA, the dispute only arose when the employee formally filed suit, which in this case occurred after March 3, 2022 (here, in July 2022).<sup>22</sup> The Eighth Circuit rejected Chipotle's argument that a dispute arose on Nov. 23, 2021, when the employee's co-worker sexually assaulted her in the restroom at the restaurant, because at that point Famuyide had not asserted any right, claim, or demand against Chipotle; Chipotle had not registered disagreement with any position of Famuyide's such that there was no conflict or controversy between company and employee as of Nov. 23, 2021; and no "dispute" between the parties could have been submitted to arbitration at that time.<sup>23</sup> Further, the Eighth Circuit rejected Chipotle's argument that a dispute had arisen when the employee and the company's attorneys exchanged exploratory correspondence in February 2022 because "[h]er lawyers did not assert that Chipotle violated Famuyide's rights[] and they did not demand compensation or payment from the company[[]]; thus there was no conflict or controversy between the parties[] and no 'dispute' that could have been submitted to arbitration in February 2022."<sup>24</sup>

In *Memmer v. United Wholesale Mortgage, LLC*,<sup>25</sup> the Sixth Circuit reviewed the EFAA's language and distinguished a "claim" from a "dispute," recognizing that even if a claim accrued before the act, the relevant "dispute" might arise later, such as when the employee files an EEOC charge or takes another formal step after March 3, 2022.<sup>26</sup> The court stated that "[a] dispute may arise between the parties about the harassment, but if the harassment continues, a continuing violation, such as a hostile work environment claim, might subsequently accrue due to the later events."<sup>27</sup> Ultimately, determining when a dispute arises is a "fact-dependent inquiry" that considers the context of the case.<sup>28</sup> As such, the Sixth Circuit remanded the case to the district court to factually determine when the dispute arose, as the timing of the dispute dictates whether the EFAA is applicable.<sup>29</sup>

Further, in *Olivieri v. Stifel*,<sup>30</sup> the Second Circuit

applied the continuing violation doctrine to hostile work environment claims, holding that while some acts predated the EFAA, ongoing retaliatory or harassing conduct after March 2022 caused the claim to re-accrue and "essentially [be] reborn" and thus the EFAA applied to bar arbitration.<sup>31</sup>

## Fazio v. Altice USA

In *Fazio v. Altice USA*,<sup>32</sup> the New Jersey Supreme Court addressed the issue of waiver of arbitration agreements and whether, when, and how an arbitration clause could be enforced by relying on habit or routine business practice as evidence.<sup>33</sup> In 2019, the plaintiff, Fazio, a quadriplegic with "significant limitations, including difficulty breathing," and thus unable to wear a mask, purchased cellular services from an Altice retail store.<sup>34</sup> A salesperson provided the plaintiff with a receipt that did not mention an arbitration agreement but stated that a copy of all documents and agreements would be sent electronically to the email address provided during account creation, which allegedly included a customer service agreement with arbitration provisions.<sup>35</sup> A week later, the plaintiff bought a cell phone at an Altice retail store and signed a retail installment contract which "did not mention anything about waiving his right to a jury trial or to sue in court."<sup>36</sup>

In June 2021, during the COVID-19 pandemic, the plaintiff visited an Altice retail store for an issue with his cell phone.<sup>37</sup> He was denied entry for failing to wear a face mask and the store employees called the police.<sup>38</sup> Subsequently, in October 2022, the plaintiff filed suit under the New Jersey Law Against Discrimination, alleging "that the Altice retail store is a place of public accommodation; the store employees discriminated against him by refusing to accommodate his medical condition and by calling the police; the employees harassed him because of his physical inability to wear a face mask; and the employees 'created a spectacle' that emboldened other customers to harass the plaintiff based on his disability."<sup>39</sup>

Thereafter, "Altice filed a motion to compel arbitration and dismiss the complaint for failure to state a claim."<sup>40</sup> Altice provided an affidavit from the Senior Director of Business Process Management for Altice retail stores who certified that he was familiar with Altice's and Optimum Mobile's business practices and generally certified that after procuring business cellu-

lar service, an individual would receive a copy of the customer service agreement by email.<sup>41</sup> Altice further relied on the retail installment contract which incorporated the terms of the customer service agreement.<sup>42</sup> The plaintiff challenged the “probative weight” of this affidavit, asserting “it was not his burden to show he never received the customer service agreement” and certifying that after searching his email account, he found no email concerning the arbitration clause.<sup>43</sup>

The trial judge dismissed the complaint and compelled arbitration.<sup>44</sup> The Appellate Division of the Superior Court of New Jersey affirmed the order and, while acknowledging “that neither party produced an email forwarding to [the] plaintiff a copy of the customer service agreement,” found that the plaintiff’s uninterrupted use of the cellular service for two years constituted evidence of a binding agreement.<sup>45</sup>

However, on appeal, the New Jersey Supreme Court reversed.<sup>46</sup> The Court noted that while a party may present “evidence of a specific, repeated, and regular business habit or practice,” to establish that a business acted in conformity with that practice and as evidence of a business’s routine practices (e.g., routinely sending arbitration agreements by email) to create a rebuttable presumption that the same practice was followed in a specific instance, Altice in this matter failed to establish this practice with enough specificity.<sup>47</sup> In particular, Altice failed to show with enough specificity that customer service representatives routinely discussed the arbitration agreement with customers and did not list how, when, or from whom the emails containing the customer service agreements were routinely sent.<sup>48</sup> The affidavit “did not set forth what either Altice’s or Optimum Mobile’s specific business practices were regarding how customers were provided with service agreements.”<sup>49</sup> Thus, Altice could not rely on this allegedly routine business practice as evidence that Fazio actually received the arbitration agreement.<sup>50</sup> Moreover, Altice could provide no direct proof that Fazio had ever received the agreement.<sup>51</sup>

In order to establish assent to arbitration, an organization must establish that an individual actually received the arbitration agreement and consented to its terms, which may be established by concrete evidence of receipt and consent or by routine business practice under New Jersey Rule of Evidence 406. While evidence of a routine business practice may be admissible to establish that arbitration agreements were provided to consumers and/or employees, the practice must be established with sufficient detail describing the who, what, when, and how of the routine behavior. Vague claims lacking specificity, as the Court concluded the defendant had raised in *Fazio*, will not suffice to establish that a consumer or employee actually received the agreement in question.

### Takeaways

This case highlights that organizations must meet a high standard of clarity when establishing that an individual assented to arbitration and waived their right to a jury. Once again, this case demonstrates that New Jersey courts will following the ruling in *Atalese v. U.S. Legal Servs, Grp., L.P.*,<sup>52</sup> in which the court held that arbitration clauses must include an explicit waiver of the parties’ rights to seek relief in a court of law as a prerequisite to enforceability.<sup>53</sup> In *Atalese*, the Court found that an arbitration clause in a consumer contract was unenforceable as it failed to clearly inform the consumer that she was waiving her right to sue in court.<sup>54</sup> The court maintained that arbitration agreements must include clear and unambiguous language explaining the waiver of the right to a judicial forum.<sup>55</sup> Thus, the court invalidated the arbitration clause based on lack of clarity and informed consent.<sup>56</sup> ■

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### Endnotes

1. 133 F.4th 240 (3d Cir. 2025).
2. 9 U.S.C. § 401 *et seq.*
3. *Id.* at 243.
4. *Id.*

5. *Id.* at 243-44.
6. *Id.* at 244.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 243.
12. *Id.* at 245.
13. *Id.* at 246-47.
14. *Id.* at 248.
15. *Id.*
16. *Id.* at 251.
17. *Id.* at 247.
18. *Id.* at 248.
19. *Id.*
20. 111 F.4th 895 (8th Cir. 2024).
21. *Id.* at 897.
22. *Id.* at 898.
23. *Id.*
24. *Id.*
25. 135 F.4th 398 (6th Cir. 2025).
26. *Id.* at 409-10.
27. *Id.* at 409.
28. *Id.*
29. *Id.* at 413.
30. 112 F.4th 74 (2d Cir. 2024).
31. *Id.* at 85.
32. 261 N.J. 90 (2025).
33. *Id.* at 93.
34. *Id.* at 94.
35. *Id.* at 94-95.
36. *Id.* at 96-97.
37. *Id.* at 97.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 98.
46. *Id.* at 104.
47. *Id.* at 101.
48. *Id.* at 102.
49. *Id.*
50. *Id.*
51. *Id.*
52. See 219 N.J. 430, 442 (2014).
53. *Id.* at 445.
54. *Id.* at 448.
55. *Id.* at 447.
56. *Id.* at 448.

# Expanding the Scope of Job-Protected Leave in New Jersey: Key Amendments to the NJ Family Leave Act and Related Leave Laws

by Boris Shapiro

On Jan. 17, 2026, Gov. Phil Murphy, as one of his last acts while in office, signed legislation expanding the New Jersey Family Leave Act (NJFLA)<sup>1</sup> as well as the state's Temporary Disability Insurance (TDI) and Family Leave Insurance (FLI) programs.<sup>2</sup> The amendments are phased in over three years, begin to take effect on July 17, and will significantly expand employer coverage and employee eligibility, potentially transforming the interaction between job-protected NJFLA leave and the state's TDI and FLI programs.

According to Murphy, the legislation will “expand job protection to hundreds of thousands of additional New Jersey workers.”<sup>3</sup> These legislative changes are among the most significant expansions of leave rights in recent years and will require employers, with the assistance of their employment/labor counsel, to reevaluate and revise their leave policies and compliance procedures.

This article summarizes the most significant changes to the law and examines their practical implications for your clients and their employees.

## I. Expansion of Employer Coverage Under the NJFLA

As way of background, the NJFLA entitles eligible employees who work for covered employers to up to 12 weeks of unpaid job-protected leave in a 24-month period.<sup>4</sup> Leave may be taken for a number of reasons, including but not limited to bonding with your child after birth, taking care of a seriously ill family member, and addressing certain needs arising during a declared public health emergency such as caring for children when schools or places of care are closed.<sup>5</sup>

One of the most notable aspects of the legislation is the reduction in the number of employees required for an employer to fall within the NJFLA's coverage. Currently, the NJFLA applies to all public employers

but only private employers with 30 or more employees nationwide.<sup>6</sup> However, beginning on July 17, the NJFLA will expand to apply to private employers with 15 or more employees nationwide.<sup>7</sup> As a result, an out-of-state business with a single employee working in New Jersey may be subject to the statute if it employs at least 15 employees nationwide.

The statute goes further by establishing a phased-in expansion of employer coverage during the following two years, *i.e.*, 2027 and 2028. Specifically, the coverage threshold will be reduced to 10 employees, effective July 17, 2027, and thereafter further reduced by half to five employees, effective July 17, 2028.<sup>8</sup> This is a stark reduction from 30 as of this writing and 50 when the NJFLA was enacted.<sup>9</sup>

This reduction will significantly increase the number of private employers required to comply with the statute. As a result, many small and mid-sized employers that historically fell outside the NJFLA's reach will soon be subject to its requirements, including job protection and reinstatement obligations.

## II. Expanded Employee Eligibility

The legislation also significantly broadens the pool of employees eligible to take leave under the NJFLA by lowering the length of employment and hours-worked requirements.

Currently, employees are eligible for NJFLA leave if they worked for the employer for at least 12 months and worked 1,000 hours during the preceding 12 months.<sup>10</sup> However, beginning July 17, these thresholds will be substantially reduced. Come July, an employee will now qualify if they have been employed for at least three months and worked at least 250 hours during the preceding three months.<sup>11</sup>

These revised eligibility criteria dramatically accelerate the point at which employees become eligible for

job-protected leave. Newer employees who previously would not have qualified for leave during their first year may now obtain statutory protection within a relatively short period after beginning employment. The practical effect of this change is to expand access to leave rights for a large segment of the workforce. However, during the relevant lookback period (whether the current 12 months or reduced three months), an employee must still work approximately 83 hours per month, which is unchanged.

### III. Interaction with Temporary Disability Insurance and Family Leave Insurance

In addition to expanding the NJFLA, the amendments also significantly modify the interaction between job-protected leave and New Jersey's TDI and FLI programs. Historically, TDI and FLI primarily functioned as wage replacement programs rather than job-protection statutes. While these programs provided partial wage replacement for certain qualifying absences, they did not necessarily guarantee that an employee's job would be protected.

The new legislation appears to change that dynamic. Effective July 17, an employee who receives TDI or FLI benefits generally must be restored, upon expiration of the leave, to the same position they held when the leave commenced or an equivalent position with the same seniority, status, benefits, pay, and other terms and conditions of employment.<sup>12</sup>

The legislation appears to indicate that receipt of TDI/FLI benefits could functionally operate as a form of job-protected leave even if the employee is not out on a protected leave of absence such as NJFLA. For example, FLI benefits may last up to 12 weeks, while TDI benefits may last up to 26 weeks.<sup>13</sup> If the reinstatement requirement is interpreted broadly, employees receiving these benefits could potentially obtain job-protected leave for significantly longer periods than those provided under the NJFLA alone.

### IV. Employee Control Over the Use of Paid Leave Benefits

Finally, the legislation also alters the sequencing of certain paid leave benefits.

Per the amendments, employees who qualify for both earned sick leave pursuant to the New Jersey Earned Sick Leave Law and either TDI or FLI leave benefits may choose which leave benefit to use and the order in which those benefits are taken.<sup>14</sup>

This change gives employees greater control over the timing of wage replacement benefits and proscribes employers from mandating that employees exhaust earned paid sick leave while out on an unpaid leave of absence. However, employees may not receive more than one type of paid leave benefit at the same time.<sup>15</sup>

### V. Compliance and Operational Challenges for Employers

The legislation creates a number of new compliance obligations and operational challenges. Employers will need to revise their employee handbooks, leave policies, and internal procedures to reflect the new coverage and eligibility requirements, and reinstatement obligations. Employers should train managers and supervisors on the new rules governing employee leave and reinstatement. Improper handling of leave requests or return-to-work issues may increase the risk of retaliation or failure-to-reinstate claims, which include attorney fee-shifting provisions.<sup>16</sup>

For attorneys advising clients or litigating employment disputes, these changes will require close attention to statutory interpretation through regulations and otherwise, compliance planning, and emerging case law.

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## Endnotes

1. P.L. 2025, C. 279, codified at N.J.S.A. 34:11B-3.
2. See N.J.S.A. 43:21-55.2.
3. Matthew Fazelpoor, Murphy signs expansion of NJ Family Leave Act into law, *NJBIZ* (Jan. 20, 2026), available at [njbiz.com/murphy-signs-nj-family-leave-act-expansion/](https://njbiz.com/murphy-signs-nj-family-leave-act-expansion/).
4. See N.J.S.A. 34:11B-4.
5. See *id.*

6. See N.J.S.A. 34:11B-3(f)(4).
7. N.J.S.A. 34:11-B(3)(f)(5).
8. N.J.S.A. 34:11-B(3)(f)(6), (7).
9. See N.J.S.A. 34:11-B-(3)(f)(3).
10. See N.J.S.A. 34:11-B(3)(e).
11. See *id.*
12. See N.J.S.A. 43:21-55.2(a).
13. See N.J.S.A. 43:21-39(b)(1).
14. See N.J.S.A. 43:21-55.2(d).
15. See *id.*
16. See N.J.S.A. 43:21-55.2(c).

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