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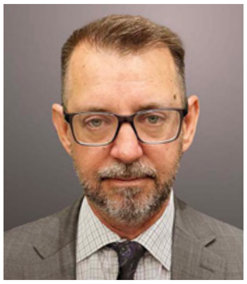
View From the Chair

by Colin M. Lynch



In closing out the first year of the current term, I want to thank the Section's Officers and Executive Committee for their support and efforts on behalf of the Section. I would like to extend a special thank you to former Chairs Stephanie Wilson, Keith Waldman, Ian Meklinsky, and Lisa Manshel for their wisdom, support, and guidance through this trying period, as we mourned the losses of Gail Oxfeld Kanef and Bruce McMoran and celebrated their lives – together – this past term, demonstrating the value and strength of the bonds forged among members of the Section.

I would also like to thank all those who attended our quarterly dinner meetings this year. While there are undoubtedly many reasons for this, during the past several years the number of attendees has slowly decreased. As legal practitioners, our professional lives can often become hectic and are subject to the demands of our clients and the courts. As Chair of the Section, I would like to encourage the members of the Executive

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Message From the Editor

by Lisa Barré-Quick

Our new issue commences with two different perspectives on the New Jersey Supreme Court's holding in *Rutgers v. AFSCME Local 888* that grievance procedures in a collective negotiations agreement may be preempted by federal Title IX regulations. Ian Gillen analyzes the decision from the management side vantage point while Wesley Friedman presents the union perspective.

Next, Madeline Buitelaar, Danielle Drossel, and Beth Gramigna discuss the potential pitfalls of managing an increasingly multigenerational workforce and the resultant legal risk, cultural impact, and potential fallout when employers fail to recognize and address the emerging issues associated with our evolving workforce. The issue continues with Marty Fojas and Allesandro Angelori's insightful analysis of the rapidly changing implications of employer use of generative artificial intelligence tools in the wake of *U.S. v. Heppner* and the associated privilege and discovery issues that will need to be navigated.

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Committee to commit, to the extent possible, to regular attendance going forward. Your presence is valued and serves as an important voice to the questions and concerns of the members of the Section as a whole, ensuring that the other members of the Executive Committee and the Officers of the Section are fully in tune with and informed of developments in both labor and employment law and the legal practice as a whole. Moreover, your presence ensures the greatest diversity of thought and perspectives as the Executive Committee debates whether and how to weigh in on areas affecting our practice. Lastly, and perhaps most importantly, we would like to see and break bread with you more often. If any member has any suggestions which would make it more convenient to attend in the future, the Officers are all ears. As a gentle reminder, if you are unable to attend a scheduled quarterly meeting, please contact our Recording Secretary, Sara Kaplan-Khodorovsky, in advance.

Lastly, I would like to thank members of the Executive Committee and the Section for developing a wide range of excellent Section programming for the annual meeting this year, which included important and timely topics addressed by engaging moderators and speakers. It was great to see everyone who was able to attend our annual Section Luncheon and posthumously honor Gail as this year's recipient of the Section's Sidney H. Lehmann Award. Gail is a truly deserving recipient of the award, representing the best the Section has to offer, both personally and professionally. As always, Steven Cohen delivered a heartfelt and thoughtful tribute to Gail and her importance to the Section as well as recognizing its prior recipients and the remarkable career of the award's namesake. Accepting the award on behalf of Gail was her husband, Michael Kanef, who gave a moving acceptance speech on Gail's behalf. We were honored by his kind words and presence.

As we move forward into the second year of the term, the Officers look forward to continuing our practice of hosting a Section-wide meeting at the Law Center, inclusive of a guest speaker, as well as continuing to encourage and support informative programming sponsored by the State Bar. While we were forced this year to change the location of our annual holiday party, any

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Turning back to labor law, Arlene Quiñones Perez addresses a groundbreaking ruling by the National Labor Relations Board finding that "captive audience" meetings violate the National Labor Relations Act, reviews recent New Jersey legislation and case law that supports a similar conclusion, and provides a compliance playbook to help employers navigate these treacherous waters.

Finally, our issue concludes with Nicole DeMuro's examination of whether and how other circuit courts have applied the U.S. Supreme Court's landmark decision in *Muldrow v. City of St. Louis* in the context of hostile work environment claims and what the Third Circuit may do when it eventually addresses the issue.

Many thanks to all the authors and editors, particularly our managing editor, Hop Wechsler, all of whom worked tirelessly to bring this issue to you. It is an honor to work with all of our authors and editors and their collective efforts are greatly appreciated. We hope you enjoy this issue and the rest of your summer.

Correction

Two changes to employee eligibility under the New Jersey Family Leave Act amendments effective July 17, 2026 were stated incorrectly in the May 2026 issue in error.

On page 23, "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" should have read "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 12 months."

On page 24, "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" should be deleted.

The editors regret the errors.

View From the Chair *continued from page 2*

ideas for a new space and/or location for this year's event are welcome. Also, please feel free to suggest to myself or the Officers potential future guests for upcoming Section meetings to encourage new members interested in participating in and contributing to the Section and expanding its diversity in backgrounds, thought, and perspectives.

We hope everyone enjoys their summer and we look forward to seeing you at our next quarterly meeting in the fall.

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), 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*!

Inside this issue

The New Jersey Supreme Court Holds that Grievance Procedures May Be Preempted by the U.S. Department of Education's Title IX Regulations

by Ian C. Gillen

Earlier this year in *Rutgers v. AFSCME Local 888*, the New Jersey Supreme Court held that the federal Title IX regulations promulgated by the U.S. Department of Education preempted the grievance procedure in the collective negotiations agreement (CNA) between Rutgers University and one of its employee unions, the Local 888.[1] The Court agreed with Rutgers that the CNA was preempted by federal regulation because the grievance procedures did not "apply equally" to both the alleged victim and harasser.[2] In so doing, the Court issued a narrow ruling but provided clear guidance to unions and management in how to craft CNAs to ensure compliance with federal law.

Case History and the Court's Reasoning

The factual setup for the case is fairly straightforward. Jane (a pseudonym), a female custodian, alleged that her male co-worker J.M. physically assaulted and sexually harassed her.[3] Jane filed an internal complaint.[4] Rutgers investigated the complaint and issued a report with detailed findings.[5] A hearing then took place in which both Jane and J.M. participated.[6] After the investigation and the hearing, the Title IX decision-makers concluded that J.M. violated the university policy that prohibits discrimination and harassment as well as two provisions of Rutgers' Title IX policy.[7] Based on these findings, the Title IX decision-makers reasoned that "just cause" existed for terminating J.M. from employment.[8] J.M. appealed unsuccessfully and thereafter received a letter terminating his employment immediately.[9]

Local 888, of which both Jane and J.M. were members, then filed a grievance to dispute J.M.'s termination and, per the CNA, requested a meeting to discuss the just cause determination.[10] Rutgers denied the request on the grounds that the CNA was preempted by the DOE's 2020 Title IX regulations.[11] In response, Local 888 filed for arbitration with the New Jersey Public Employment Relations Commission, alleging that Rutgers violated the CNA by refusing to arbitrate Rutgers' termination of J.M.'s employment.[12] Rutgers sought to restrain the arbitration, maintaining the same position of preemption. PERC ultimately concluded that when applying New Jersey preemption law—not federal preemption law—Title IX did not preempt the CNA.[13]

On appeal, the Appellate Division affirmed.[14] Of note, it held that the grievance arbitration would not conflict with the Title IX process because the grievance filed by J.M. was limited solely to his discharge.[15] Even though Jane would not be a party to the grievance arbitration, Rutgers could introduce evidence related to her viewpoint and allegations for the arbitrator's consideration.[16] If Jane was unhappy with the outcome of the arbitration, the Appellate Division reasoned, Local 888 could file a new grievance under the CNA on Jane's behalf alleging, for example, a hostile work environment.[17]

The Supreme Court reversed and found, pursuant to federal preemption law, Title IX preempted *this particular CNA* between Rutgers and Local 888.[18] The Court first concluded that because Title IX and its accompanying regulations are federal law, federal preemption law governed.[19]

The Court focused on language in the DOE's 2020 regulations[20] that required both the complainant and the respondent to have available to them identical procedures and rights in the grievance process, including in any appeal.[21] The regulations require that the "provisions, rules[,] or practices" adopted "must apply equally to both parties."[22] Moreover, the grievance process is required to "[t]reat complainants and respondents equitably" and allow both the complainant and the respondent "procedures and permissible bases for [each] to appeal."[23] Also, for all appeals, the DOE regulations required in relevant part that when one party appeals, the other party receives written notice; both parties receive the same appeal procedures; both parties have the opportunity to submit a written statement support-ing or disputing the decision; and both parties should be provided with the written decision simultaneously.[24] The regulations also contain a preemption clause, stating that in the event of a conflict between Title IX and state or local law, "the obligation to comply with § 106.45 [the 'apply equally' provision of the 2020 regulations] is not obviated or alleviated by any State or local law."[25] Additionally, the preamble to the regulations states that "in the event of an actual conflict between a union contract or practice and the final" rules, the DOE regulations would have "preemptive effect."[26]

Applying these regulations to the CNA, the Court found that the arbitration and appeal procedures were inadequate.[27] At the arbitration stage, only Rutgers, J.M., and the union would be involved – Jane would not.[28] Therefore, Jane would not have a right to an appeal in the event she disagreed with the outcome.[29] The avenue of appeal thus was not being offered equally to each party.[30]

Jane's exclusion from the arbitration would harm the proceeding because she would have no formal role.[31] She would not be able to present her side of the story and if she wished to appeal any discipline imposed on J.M., she would be denied the opportunity as a non-party.[32] The Court reasoned that it is no response to say that Jane could file her own grievance; that would not provide her equal participation in J.M.'s grievance.[33] Put differently, if Local 888 were to appeal J.M.'s termination, it would be seeking to do so without Jane's participation.[34] In light of these findings, the Court concluded that under this particular CNA, "the alleged victim has no rights in the arbitration process, whereas the alleged sexual harasser has rights in the post-termination arbitration. Those rights are not equal."[35] Consequently, Title IX preempted the CNA.[36]

Management-Side View of this Case

The Supreme Court's conclusion avoids piecemeal litigation that could result in inconsistent rulings that cannot be reconciled. As the Court recognized, if Jane wanted to appeal, for example, the reversal of J.M.'s termination, her only avenue to do so would be to file her own grievance stating her own affirmative claims. That is not a sufficient answer because her own grievance has no relation to the proceeding that reviewed J.M.'s termination. Jane bringing her own affirmative claim has nothing to do with whether J.M. should be reinstated to his prior position. Therefore, from a management perspective, this result will streamline the process and ensure that employers do not have to respond to potentially multiple grievances arising out of the same set of facts that are all proceeding on parallel tracks but will never converge.

The Court's rejection of PERC's "decades of experience" in deciding this issue is also reflective of the changing role of agencies.[37] Although the Court did note it typically reviews de novo pure questions of law decided by an agency, this conclusion is also consistent with the U.S. Supreme Court's recent decision in *Loper Bright Enters. v. Raimondo* that overturned *Chevron* deference to agencies.[38] The Court has not yet opined on the applicability of *Loper Bright* to New Jersey state agencies; however, its recent recognition that New Jersey has "conflicting case law" on the deference afforded to an agency's interpretation of its own statute and that the U.S. Supreme Court's decision in *Loper Bright* will eventually need to be "grapple[d] with" means that legal issue may be before the Court in the coming terms.[39]

The Court's opinion made clear that its holding simply resolved the dispute before it and the preemption analysis would not necessarily apply to all individually negotiated CNAs between a union and management. Conceivably, some or many may not be preempted. But management and unions would be wise to revisit and potentially renegotiate their CNAs so as to avoid litigation and ensure up-to-date compliance with federal regulations. The Court's opinion centered on one aspect of the Title IX regulations and their interplay with the CNA; conceivably, there are many other areas where preemption could turn on whether a conflict exists that the Court's opinion did not address.

Additionally, this ruling may encourage more uniform procedures across unions. The Court's opinion mandates a close examination of grievance procedures to ensure no conflict exists with federal regulations. By encouraging uniformity across these procedures, the decision will avoid preemption litigation and ensure the grievance and appeals process proceeds without an attack on the legitimacy of the proceeding itself. This will also create more uniformity in management's agreements with various unions and avoid varying complex agreements with their own unique procedures and requirements. More uniformity will make it easier for management to navigate these issues as they arise.

To the extent management and a union want to keep an existing CNA in place, this opinion makes clear that the grievance, arbitration, and appeal process all must apply equally to the complainant and the respondent. Any step of the process where one party is excluded will put the proceedings in jeopardy. ■

Ian C. Gillen is an associate at Fox Rothschild LLP in Princeton. Rutgers University is a client of Fox Rothschild LLP; however, Fox Rothschild LLP had no role in this litigation

Endnotes

1. *State Univ. of N.J. v. AFSCME Loc. 888 (In re Rutgers)*, 262 N.J. 523, 528 (2026). .
2. *Id.* at 528 (citing 34 C.F.R. § 106.45(b)).
3. *Id.* at 528-29.
4. *Id.*
5. *Id.* at 529.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 530.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 528.
19. *Id.* at 533-34.
20. In 2024, the DOE proposed regulations and issued a final rule to that effect. *See Sex Discrimination: Overview of the Law*, U.S. Department of Education, ed.gov/laws-and-policy/civil-rights-laws/title-ix-and-sex-discrimination/sex-discrimination-overview-of-law. Among other changes to the previous regulations, the final rule sought to broaden the definition of sex-based discrimination. In response, six states filed suit against the DOE in the Eastern District of Kentucky. *See Tennessee v. Cardona*, 737 F. Supp. 3d 510 (E.D. Ky. 2024), *appeal dismissed sub nom. Tennessee v. McMahon*, No. 24-5588, 2025 WL 848197 (6th Cir. Mar. 18, 2025). The district court first entered a nationwide injunction preventing implementation of the regulations, *id.* at 572, and then subsequently granted the states' motion for summary judgment, *see Tennessee v. Cardona*, 762 F. Supp. 3d 615, 621 (E.D. Ky. 2025), *as amended* (Jan. 10, 2025), thereby preventing the regulations from being implemented. As a result, the DOE now enforces the 2020 regulations implemented under President Trump's first term. Those are the regulations the New Jersey Supreme Court reviewed in this case.
21. *Rutgers*, *supra* n.1, at 537.
22. *Id.* (citing 34 C.F.R. § 106.45(b)).
23. *Id.* at 537 (citing 34 C.F.R. § 106.45 (b)(1)(viii)).
24. *Id.* at 537-38 (citing 34 C.F.R. § 106.45(b)(8)(iii)(A),(B),(D),(F)).
25. *Id.* at 538 (citing 34 C.F.R. § 106.6(h)).
26. *Id.* at 539-40.
27. *Id.* at 539.
28. *Id.* at 541.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 541-42.
34. *Id.* at 542.
35. *Id.* at 543.
36. *Id.* at 544.
37. *Id.* at 534 n.4.
38. 603 U.S. 369 (2024) (overruling *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984)).
39. *See Matter of P.T. Jibsail Fam. Ltd. P'ship Tidelands License No. 1515-06-0012.1 TDI 190001*, 263 N.J. 208, 216-17 (2026).

POINT/COUNTERPOINT

Title IX Preemption and Collective Bargaining: The Impact of *Rutgers v. AFSCME* on Disciplinary Arbitration in New Jersey

by Wesley B. Friedman

In its January 2026 decision in *Rutgers v. AFSCME*, the New Jersey Supreme Court held that Title IX regulations preempt grievance arbitration of employee discipline where the complainant is not afforded equal participatory rights under the bargained agreement.[1] The case arose from a sexual harassment complaint investigated by Rutgers University, a Title IX-covered recipient of federal funding, which ultimately terminated the accused employee following its internal process.[2] The employee through his union, AFSCME Local Union No. 888, then sought to challenge that termination through binding arbitration under the parties' collective negotiations agreement, which guarantees review of disciplinary actions for just cause.[3] Rutgers refused to arbitrate, asserting that the Title IX policy it adopted preempted the contractual grievance process.[4] The Court agreed, overturning the Appellate Division's decision to the contrary and holding that grievance arbitration is preempted because any grievance procedures beyond those specified in the Title IX regulations "must apply equally to both" the alleged victim and the alleged harasser and this particular CNA's arbitration process excludes the alleged victim.[5]

The Court's conclusion rests primarily on its determination that a conflict exists between the CNA and the Title IX regulatory framework.[6] In reaching that conclusion, the Court found that the regulations extend to both pre- and post-disciplinary matters, including appeals of disciplinary outcomes.[7] Thus, the Court characterized the grievance arbitration as an "appeal"[8] of the Title IX determination and therefore subject to the regulations' requirement that both parties be afforded equal procedural rights, including equal notice and a meaningful opportunity to be heard.[9] In the Title IX context, those "parties" are the complainant – the employee who alleged sexual harassment – and the respondent – the employee who was terminated as a result of that complaint. The grievance arbitration procedure, however, was limited to Rutgers and the accused employee (through his union) and did not include the complainant as a participant. The Court concluded that the arbitration process fell short of Title IX's requirement because it did not afford the complainant the same opportunity to participate.[10]

The U.S. Department of Education's commentary accompanying the regulations indicates that the regulations do not "preclude a recipient's obligations to honor additional rights negotiated by faculty in any collective bargaining agreement," provided that the institution fulfills its Title IX obligations.[11] This quote reflects an explicit federal intent to allow coexistence between Title IX procedures and collectively bargained rights. Consistent with this notion, the Appellate Division concluded that the arbitration did not conflict with Title IX because its limited purpose is to review the employee's discharge.[12] However, rather than viewing grievance arbitration as a separate, post-disciplinary review, the Court determined that the arbitration operates as an additional layer of review that can alter the outcome of the Title IX process.[13] The court was concerned that "Title IX sanctions may be undone and nullified by a separate process in which the complainant could not equally participate."[14]

The Court also declined to adopt the Appellate Division's view that the complainant's interests could be adequately protected through indirect participation, such as testifying as a witness or submitting an affidavit, or through representation by the employer.[15] In fact, this Court has previously recognized that an individual employee affected by a grievance may be entitled to participate in arbitration proceedings where their interests are implicated.[16] Thus, the Court if it chose could have required that arbitrators ensure equal procedural opportunities for complainants, thereby aligning the arbitration process with Title IX's requirements. This practical solution would have preserved the integrity of both federal law and collective bargaining rather than sacrificing one in favor of the other. However, the Court found those measures insufficient, noting that the employer is not the complainant's equivalent as she is not guaranteed the same opportunity to present her position or respond to the issues being decided.[17] For that reason, the Court determined that the grievance arbitration process does not provide the equal participation required under Title IX and therefore conflicts with the federal regulations. This rationale is difficult to reconcile with this Court's prior recognition that "the case for federal pre-emption is particularly weak" where Congress has indicated its awareness of state law and chosen to tolerate any resulting tension.[18]

Furthermore, by seeking to maintain the procedural rights of Title IX complainants, the Court indirectly granted Rutgers unilateral control over the disciplinary outcome. Under the Court's framework, once a Title IX process concludes, Rutgers' determination is effectively insulated from meaningful review under the CNA. Local 888's bargained-for right to challenge discipline before a neutral arbitrator is extinguished, while Rutgers retains full authority over both the process and the outcome. This is not a balancing of interests. Frankly, the effect is a reallocation of power. And notably, it does not enhance the rights of complainants, who remain confined to the institutional process and decision controlled by the employer. As a result, a complainant employee dissatisfied with the outcome has no meaningful avenue to challenge that determination through the collectively bargained process, leaving the employer's decision effectively final for everyone involved.[19]

Ultimately, however, while the Court's decision shifts authority to public employers in the immediate term, that imbalance may prove temporary. The Court emphasized that its holding is limited to this particular bargaining agreement and that the agreement may be renegotiated to bring it into compliance with Title IX.[20] In that respect, unions negotiating successor agreements would be well advised to address the intersection of Title IX procedures and disciplinary review at the bargaining table, particularly where grievance procedures do not afford complainants equal participatory rights. By negotiating how Title IX matters are handled, labor organizations can ensure compliance with federal law while preserving meaningful employee protections and begin to restore the balance this decision has, for now, unsettled.

Wesley B. Friedman is an associate at the law firm of Zazzali, P.C. in Newark. He is an employment litigator who advocates for employees and unions, drawing on over a decade of in-house experience representing management.

Endnotes

1. *State Univ. of NJ. v. AFSCME Loc. 888 (In re Rutgers)*, 262 N.J. 523, 543 (2026).
2. *Id.* at 528.
3. *Id.* at 529.
4. *Id.* at 530.
5. *Id.* at 543.
6. *Id.* at 540.
7. *Id.*
8. 34 C.F.R. § 106.45(b).
9. *Rutgers*, *supra* n.1, at 541.
10. *Id.*
11. 85 Fed. Reg. 30442 (May 19, 2020).
12. *Rutgers*, *supra* n.1, at 530.
13. *Id.* at 542.
14. *Id.*
15. *Id.*
16. *Saginario v. Atty Gen.*, 87 N.J. 480, 496 (1981).
17. *Rutgers*, *supra* n.1, at 541.
18. *Hager v. M&K Const.*, 246 N.J. 1 (2021).
19. *Rutgers*, *supra* n.1, at 530.
20. *Id.* at 543.

Managing a Multigenerational Workforce in 2026: Legal Risk, Culture, and Practical Strategies for Employers

by Madeline Buitelaar, Danielle Drossel, and Beth Gramigna

The complaints did not begin with a formal allegation of age discrimination.

They began with a shift in tone.

A group of employees—many of whom had spent decades in their roles—found themselves navigating a series of changes led by a new supervisor. The changes were, on their face, unremarkable: updated technology, revised expectations, and a push toward more "modern" ways of working.

But over time, the language surrounding those changes began to stand out. Employees were described as "stuck in their ways," "not forward-facing," or lacking "new energy." At the same time, several of the most experienced employees began to leave.

By the time a formal complaint was filed, the issue was no longer the modernization itself. It was how that modernization had been communicated, experienced, and applied.

This scenario—drawn from a real workplace investigation—illustrates a recurring challenge for employers: generational dynamics rarely present as overt bias. Instead, they emerge through everyday interactions, assumptions, and decisions that, over time, can create both cultural tension and legal risk.

Employers today operate in workplaces shaped by rapid technological change, shifting norms around communication, and evolving expectations about authority and professionalism. These changes have made generational differences more visible and consequential than ever before. For human resources professionals, in-house counsel, business owners, and management-side employment lawyers, generational dynamics are no longer a background consideration. They are a recurring source of employee complaints, workplace investigations, and legal risk.

Managing a multigenerational workforce now requires more than awareness of age discrimination laws. It requires understanding how differing experiences, communication styles, and assumptions about work can collide in everyday interactions, with consequential effects on the workplace. This article examines those dynamics through the lens of recent investigation trends and training experience and offers practical guidance for employers seeking to foster a respectful, effective workplace while also reducing risk.

Five Generations, Plus Micro-Generations

Workplaces today may include Traditionalists, Baby Boomers, Generation X, Millennials, and Generation Z. While these labels can provide a useful starting point, they are broad categories that often mask meaningful differences in lived experience.

In practice, generational identity is not always clear-cut. Employees born on the margins of generational categories – sometimes referred to as "micro-generations" – often identify with characteristics of more than one cohort. For example, employees born in the early 1980s are often described as "Xennials," reflecting a blend of Generation X and Millennial experiences. These employees typically share an analog childhood and digital adulthood and may serve as informal "translators" between colleagues with different expectations around communication, feedback, and technology.

The key takeaway is that generational categories are approximations, not identities. Treating generations as monoliths can itself become a form of stereotyping, undermining the very inclusion employers seek to promote and fueling the assumptions that often lead to workplace conflict.

For employers, this matters because workplace conflict often arises not from age itself, but from assumptions about what age is supposed to mean—assumptions that can drive miscommunication, conflict, and, in some cases, legal risk.

Microaggressions and Age-Coded Language

Age-based comments remain one of the most common sources of intergenerational tension. Statements such as "I'm having a senior moment," "that's before your time," or remarks equating youth with innovation and experience with resistance to change are often framed as jokes or shorthand. In practice, they frequently function as microaggressions: subtle, often unintentional expressions of bias that accumulate over time.

From an investigative standpoint, these comments matter even when they do not meet the legal threshold for age discrimination. Employees repeatedly exposed to age-coded language may disengage, self-censor, or interpret neutral management decisions as biased. Older employees may feel pressured to prove they are "still relevant," while younger employees may conclude that their contributions are discounted because of their age.

The legal risk arises when these comments appear alongside adverse actions such as performance management, restructuring, or promotion decisions. Language such as "stuck in their ways," "lacking new energy," or "not forward-facing" is increasingly scrutinized as circumstantial evidence of age bias, particularly when it correlates with age-based outcomes.

Assessing Intent Versus Impact

One of the most consistent lessons from workplace investigations is that intent and impact often diverge – and it is the gap between the two that creates risk. Managers may believe they are communicating efficiently, maintaining standards, or driving modernization. Employees, particularly those from different generations, may experience those same actions as dismissive, hostile, or biased.

Recent investigations illustrate how similar fact patterns can lead to very different outcomes depending on context, tone, and documentation. In one matter, an employer implemented a legitimate technology transition led by a younger supervisor. Although the business decision was justified, the supervisor used age-coded language about senior staff, treated younger employees differently, mocked older workers outside formal channels, and offered more training to younger staff. Taken together, those behaviors supported a finding that age bias affected the work environment, even though the underlying modernization effort was justified.

By contrast, a second investigation involved an older employee who perceived increased supervision and a performance improvement plan as age-based targeting following a shift to new digital tools. The investigation found that the employer had documented performance concerns over an extended period, applied the same supervisory practices across age groups, and provided training and support tied to clear expectations. In that case, the allegations were not substantiated. The evidence showed that the employee's perception of unfairness stemmed from the emotional impact of receiving critical feedback after longstanding autonomy rather than discriminatory intent.

These examples underscore a critical point for employers: generational conflict rarely turns on a single comment or decision. It is the accumulation of tone, assumptions, and documentation that determines whether a dispute remains manageable or becomes legal exposure.

The Legal Framework: Federal and State Considerations

At the federal level, the Age Discrimination in Employment Act protects employees who are 40 and older and generally requires proof that age was the "but-for" cause of an adverse employment action in private sector cases. Disparate impact claims are permitted but employers may defend neutral policies by showing they are based on reasonable factors other than age. The New Jersey Law Against Discrimination provides broader protection; it does not have an age limit for protection. This broader scope means that both "too young" and "too old" age-based claims may be viable under state law even where federal coverage would not apply.

New Jersey courts evaluate age discrimination claims in a highly contextual manner, placing significant weight on age-coded language, patterns of decision-making, and circumstantial evidence. Case law underscores that even informal workplace language can carry legal significance when viewed in context. In *Abrams v. Lightolier Inc.*,[1] the court recognized that remarks outside a specific employment decision may still support an inference of bias when they reflect underlying attitudes about age. Consistent with that approach, the New Jersey Supreme Court in *Bergen Commercial Bank v. Sisler*[2] reaffirmed that a plaintiff "need not prove that age was the sole or exclusive consideration" in an employment decision, but only "by a preponderance of the evidence that it made a difference."[3] These principles are reflected in current litigation trends. In *Lopez v. AT&T, Inc.*,[4] a recently filed New

Jersey federal case, the plaintiff alleges that restructuring and return-to-office policies were accompanied by leadership remarks that emphasized "younger" workers and signaled a shift away from more experienced employees. Although the merits remain to be tested, the case illustrates how modern workplace initiatives—when paired with age-coded messaging—can be framed as evidence of discriminatory intent.

Training That Goes Beyond Compliance

Traditional harassment training often addresses age discrimination only at a high level. In 2026, that approach is insufficient. Effective training should include realistic, scenario-based discussions about generational communication styles, technology adoption, feedback, and supervision.

Two concepts are particularly important: humility and curiosity. Humility means recognizing that even well-intended comments may land poorly and choosing openness over defensiveness when they do. Curiosity requires resisting the instinct to assume negative intent and instead asking questions, seeking context, and working to understand.

Tools for Employers

Mentorship remains one of the most effective tools for bridging generational divides, particularly when learning flows in both directions. From a legal and risk-management perspective, well-designed mentorship programs can also demonstrate good faith and equitable investment across age groups. Equally critical is consistent documentation. Employers should document performance concerns, coaching conversations, training efforts, and informal interventions uniformly across employees, regardless of age. In practice, these records often determine whether later investigations are resolved as evidence of fair management or framed as indicia of bias.

Looking Forward

Managing a multigenerational workforce in 2026 presents real challenges, but it also offers meaningful opportunities. When employers move beyond rigid generational narratives and focus on clear expectations, respectful communication, and consistent management practices, generational differences become a source of strength rather than friction.

From a risk-management perspective, the path forward rests on fundamentals: thoughtful supervision, even-handed documentation, and early intervention before misunderstandings harden into grievances or claims. Providing training for managers to identify age-coded language, understand how their communication affects others, and carefully record decisions does not mean lowering standards or shirking responsibility. Instead, it means promoting clear, fair, and consistent practices. It may also mean encouraging and empowering employees to have open dialogue and communications with peers, practicing humility, and speaking up respectfully and honestly when language is offensive.

Ultimately, generational conflict is rarely about age alone. It is about how change is communicated, how feedback is delivered, and whether employees feel respected in the process. Employers that approach these issues with structure and compassion rather than assumption are better positioned to reduce legal risk while building workplaces that are collaborative, resilient, and prepared for what comes next. ■

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Endnotes

1. 702 F. Supp. 509 (D.N.J. 1988).
2. 157 N.J. 188 (1998).
3. *Id.* at 211.
4. Case No. 3:26-cv-03561 (E.D.N.J.) (filed Apr. 2, 2026).

No Attorney, No Privilege: Managing Employer Use of Generative AI Tools in Employment Matters after *U.S. v. Heppner*

by Martin C. Fojas and Alessandro J. Angelori

A human resources director who drafts an investigation report using ChatGPT, a business owner who uses generative artificial intelligence to respond to an Equal Employment Opportunity Commission charge, and a manager who formulates a legal strategy using an AI tool to minimize legal costs: each may unknowingly assume that their use of AI will be protected from disclosure because it is connected to a pending or anticipated employment matter. However, a recent federal decision out of the Southern District of New York suggests that in each instance, the attorney-client privilege and work product protections may not apply to communications with AI tools or AI-generated materials. Such protections may even be lost for privileged documents and communications that an employer unwittingly feeds into an AI tool.

In *United States v. Heppner,*[1] a case of first impression nationwide, the Southern District of New York held that the attorney-client privilege and work product protections are a function of the attorney-client relationship and do not arise solely from an employer's intent to produce work product or prepare a legal strategy in connection with a legal matter.

This is not to say that generative AI tools cannot or should not be used by human resources professionals or by managers in matters of employment. Rather, *Heppner* challenges the assumption that an employer's AI prompts and AI-generated materials will be immune from discovery in a legal matter where the employer has not consulted with or involved an attorney. Employment attorneys should understand the *Heppner* ruling and its implications so that they can counsel their clients, including human resources and business partners, on the practical risks of inputting data into these popular tools.

The *U.S. v. Heppner* Decision

In *Heppner*, the defendant, Bradley Heppner, was facing an impending trial for several criminal charges including securities fraud, wire fraud, and falsifying corporate records.[2] In connection with his arrest, FBI agents executed a search warrant at his home and seized numerous documents, including 31 documents memorializing communications that the defendant had with the AI tool Claude.[3] His counsel argued that these documents were privileged because they were prepared in anticipation of Heppner's impending indictment and contained defense strategy.[4] However, the court ruled against Heppner, finding that neither the attorney-client privilege nor the work product doctrine applied to the AI communications.[5]

Judge Jed S. Rakoff held that Heppner's AI communications failed the three-part test for the attorney-client privilege. First, an attorney-client relationship could not exist because Claude is not an attorney.[6] Second, the court held that the AI documents were not confidential, pointing to Claude's privacy policy, which specifically stated that Anthropic, the private company that owns and operates Claude, retained the right to disclose data such as a user's inputs and the tool's outputs to third parties, including government authorities.[7] Third, the court noted that Heppner did not communicate with Claude for the specific purpose of obtaining legal advice and was not directed to do so by counsel.[8]

The court further held that the work product doctrine could not apply because the documents were neither prepared by—or at the behest of—counsel, nor did they reflect Heppner's counsel's strategy.[9] Instead, Heppner acted on his own volition in communicating with the AI tool.[10] However, Judge Rakoff rejected a prior ruling that had broadly construed the workproduct doctrine to encompass documents created independent of attorney direction or participation, instead holding that the purpose of the doctrine is to "protect lawyers' mental processes."[11]

That said, the work product doctrine may still apply to communications with AI tools in certain circumstances. Just seven days before the *Heppner* decision was entered, Judge Anthony P. Patti of the Eastern District of Michigan entered an order denying the defendants' motion to compel the production of a *pro se* plaintiff's documents and information concerning her use of third-party AI tools on the basis that the materials are protected by the work product doctrine.[12] The plaintiff in *Warner v. Gilbarco, Inc.* was effectively acting as her own counsel using ChatGPT to assist with and create materials in preparation for litigation.[13] The court held that mere use of the AI tool in connection with a lawsuit does not inherently waive work product protections; instead, the waiver must be "to an adversary or in a way likely to get in an adversary's hand."[14] The court also agreed with the plaintiff's contention that the information sought constituted her internal analysis and mental impressions rather than existing documents or evidence, which is not discoverable as a matter of law.[15] Despite their divergent outcomes (which may be subject to appeal), both *Heppner* and *Warner* illustrate that the applicability of the work product doctrine is highly fact-specific, turning on the nature of the communications and the context in which the AI tool was used.

Impact on Employment Matters: Internal Investigations, Agency Charges, and Litigation

While arising from a criminal proceeding, the court's holding in *Heppner* carries significant implications beyond that context. The principles underlying the ruling seemingly apply with equal force to the employment law setting. As employers and human resources professionals increasingly turn to AI tools to manage workplace investigations, assess employee requests (such as for leaves and accommodations), respond to agency charges, and prepare litigation-related documents, the risk of inadvertently waiving or failing to establish privilege grows considerably. Understanding how *Heppner* translates to these everyday scenarios is essential for both practitioners and the clients that they serve.

That risk is most acute when non-attorneys use AI tools for legal matters under the mistaken assumption that their prompts and AI generated materials will go undiscovered. During investigations into employment issues in the workplace, for example, many non-attorneys have long mistakenly assumed that documents created in connection with the investigation are immune from disclosure. This is not necessarily so. With many employers using AI tools to prepare questions, summarize interviews, and draft investigation reports, they should not assume that their prompts and AI-generated materials are protected.

The *Heppner* decision highlights additional risk when employers use AI tools – particularly those that are publicly available, rather than enterprise software (as discussed further below) – to evaluate legal risk surrounding an employee complaint, develop legal strategies to address a problem employee, or even seek cheap or free legal advice, without first consulting an attorney. In any ensuing litigation, the employee's counsel may request disclosure of the prompts and documents fed into an AI tool, as well as non-attorney liability assessments and AI-generated documents. The employee's counsel may then refer to *Heppner* to challenge any objections that such materials are subject to privilege or work product protections.

Rather than proceed directly to the courts, an employment matter may first end up before the EEOC or an equivalent state agency. An employer may elect to respond to the administrative charge without retaining outside counsel. If not at the direction of in-house counsel, using AI tools to prepare a response presents additional risk that all materials prepared, even those not meant for dissemination to the EEOC, are not protected by privilege. If the matter proceeds to litigation, this information may become subject to discovery.

To avoid inadvertently making information discoverable that the employer intended to be confidential, employers should first ensure that their employees do not use consumer-grade versions of AI tools. Publicly available versions of generative AI, such as the free versions of ChatGPT and Claude, typically include notices in their terms of use or privacy policies that user-entered data will be used to train their models, thereby removing confidentiality.

Enterprise versions of AI tools are available and may preserve confidentiality. Employers asserting privilege or work product protections appear more likely to survive a *Heppner*-like challenge by using secure enterprise applications, as opposed to their publicly available counterparts. Confidentiality alone, however, is not enough to establish privilege. Even enterprise tools should be evaluated on a case-by-case basis, as terms of use vary and confidentiality protections are not uniform across all enterprise AI products. Before using enterprise AI tools to generate documents intended to be privileged, employers should consider enacting policies for management that require any AI use for legal matters to be directed or approved by in-house or outside counsel in order to invoke the attorney-client privilege or work product doctrine. Employers may also wish to adopt policies discouraging employees from relying on AI tools alone for legal advice without first consulting in-house or outside counsel. Best practice entails counsel also documenting the attorney's direction of AI use in case the applicable privilege is disputed later. Searches and queries should be clearly labeled as prepared at the direction of counsel.

Because these issues are novel and rapidly developing, employers should stay up to date on when and how AI tools may be used in connection with employment matters. They should ensure that any work product truly reflects legal strategy and direction of counsel to preserve any privilege. Attorneys, in turn, should supervise their clients' use and reliance on AI tools when working on litigation to guard against the possibility that privileges or protections are waived by submitting attorney-client communications and documents into a consumer-grade AI tool. By developing clear protocols prior to the beginning of an employment issue, employers and counsel can leverage AI's benefits while limiting the chances of jeopardizing privilege in the process.

Conclusion

AI tools will undoubtedly continue to enhance communication, streamline document creation, and make legal concepts more accessible to nonattorneys. However, this can create a false sense of legal protection that may not otherwise exist. The Court in *Heppner* makes an important observation: privilege is a function of the attorney-client relationship, not the inherently legal nature of a document or information. Attorneys should work with their clients and human resources partners to establish clear AI governance practices before the next investigation, charge, or litigation arises. Doing so will help increase the likelihood that AI-assisted work product reflects counsel's direction and that privilege is preserved. Counsel should also update their engagement correspondence to reflect AI usage during the representation, documenting that any AI-assisted work product was generated at counsel's direction which will help establish privilege if it is later challenged. ■

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Endnotes

1. *United States v. Heppner*, No. 25 Cr. 503, slip op. (S.D.N.Y. Feb 17. 2026).
2. *Id*. at 2-3.
3. *Id*.
4. *Id*.
5. *Id*. at 4-10.
6. *Id*. at 5-6.
7. *Id*. at 6-7.
8. *Id*. at 7.
9. *Id*. at 9-10.
10. *Id*.
11. *Id*. at 10-11.
12. *Warner v. Gilbarco*, No. 2:24-cv-12333, at 10-11 (E.D. Mich. Feb. 10, 2026).
13. *Id*.
14. *Id*. at 11.
15. *Id*. at 12.

Captive No More: Employer Speech, Worker Choice, and the New Labor Law Landscape

by Arlene Quiñones Perez

I. Introduction

Few labor law labels are as intuitively powerful as the "captive audience" – a workplace gathering where employees must attend (often on paid time) while management delivers a message about unionization or other protected activity. The National Labor Relations Board detonated decades of precedent when it issued *Amazon.com Services LLC and Dana Joann Miller and Amazon Labor Union.*[1] In *Amazon.com Services LLC*, the NLRB held that compelling employees to attend meetings about unionization under threat of discipline or discharge violates National Labor Relations Act § 8(a)(1).[2] The decision overruled the longstanding decision in *Babcock & Wilcox and United Stone and Allied Products Workers of America, CIO.*[3] Simultaneously, the Legislature in New Jersey moved in a similar policy direction – though through state employment law – by enacting A-4429 (2R), P.L. 2025, c. 138, which expanded "political matters" under the Worker Freedom from Employer Intimidation Act (WFEIA) to include labor-organization decisions and tightened the "voluntary" standard for covered communications.[4]

What is often missed in these debates is that "captive audience" concerns are not confined to private-sector union elections. New Jersey's Public Employment Relations Commission (PERC) confronted analogous dynamics in *City of Paterson*,[5] where a police chief allegedly used mandatory roll-call meetings, described as a "captive audience," to speak directly to represented officers about negotiations-related issues in a manner that crossed into direct dealing and potentially chilled protected activity. *City of Paterson*[6] provides a revealing public sector parallel: even where constitutional/managerial speech considerations loom large, labor stability and representative exclusivity can limit employer communications.

This article (1) explains *Amazon Services LLC* and its repudiation of *Babcock & Wilcox*; (2) situates New Jersey's A-4429[7] as a state-law "anti-compulsion" policy; (3) uses *City of Paterson* as a public-sector lens; and (4) provides a compliance playbook for employers with New Jersey operations.

II. The Private-Sector Break: *Amazon.com Services LLC* Overrules *Babcock & Wilcox*

The Case and the Parties: Amazon Services LLC, Dana Joann Miller, and the Amazon Labor Union

In *Amazon.com Services LLC*, the Board addressed multiple alleged unfair labor practices arising from the Amazon Labor Union's organizing campaign at Amazon facilities in Staten Island, New York, including allegations about mandatory meetings and other conduct directed at employee Dana Joann Miller.[8] The Board's public-facing summary is crisp: an employer violates the NLRA by requiring employees under threat of discipline or discharge to attend meetings where it expresses its views on unionization.[9]

During the organizing campaign, Amazon required employees to attend frequent, mandatory meetings during work hours in which management presented its views opposing unionization.[10] Attendance was tracked, meetings were scheduled as part of regular shifts, and employees were subject to discipline for failure to attend.[11] Dana Joann Miller, an Amazon employee at the JFK8 facility, was among the employees subjected to these mandatory meetings and was named in the unfair labor practice charge as an affected employee asserting statutory rights under § 7 of the NLRA.[12]

The Board identified three core reasons mandatory meetings "reasonably tend" to coerce employees: (1) they interfere with employees' NLRA § 7 right to decide whether, when, and how to participate in union debate; (2) they provide a mechanism for employer observation/surveillance; and (3) the threat of discipline/discharge gives the message an inherently coercive character because it demonstrates the employer's economic power over employees.[13] The key analytical move is the shift from content to compulsion - the violation turns on mandating attendance, not on whether the employer's message is pro- or anti-union.[14]

Babcock & Wilcox is Overruled – Prospectively

For decades, *Babcock & Wilcox* stood for the proposition that employers could require employees to attend meetings during work time to hear the employer's views on unionization, so long as the communications contained no explicit threats, promises, or reprisals.[15] The doctrine rested on a thin distinction between speech and coercion – one that treated mandatory attendance as legally neutral despite the employer's economic power over employees.[16] The Board in *Babcock & Wilcox* reasoned that compulsory attendance at such meetings did not, by itself, constitute unlawful interference under NLRA § 8(a)(1).[17] Instead, the legality of employer communications turned on content, not compulsion.[18]

However, the Board in *Amazon.com Services, LLC* emphasized that employers may lawfully hold meetings about unionization if workers receive reasonable advance notice of the subject, attendance is voluntary with no adverse consequences for nonattendance, and no attendance records are kept.[19] This "safe harbor" is critical for compliance planning - it effectively converts the traditional mandatory "captive audience" meeting into an opt-in information session with guardrails against coercion.

III. New Jersey's State-Law Complement: A-4429

When Did A-4429 Take Effect and What Does the Law Do?

A-4429 was signed into law on Sept. 3, 2025 as P.L. 2025, c. 138.[20] The statute expressly provided for a delayed effective date, which allowed the law to take effect on Dec. 2, 2025, 90 days after enactment.[21] The law expands the WFEIA's protections by broadening "political matters" to include decisions to join or support "any…labor organization or association" and imposes a posting requirement.[22] Specifically, the law makes it unlawful for an employer – including state and public entities – to require an employee to attend meetings, trainings, or communications, or to participate in discussions, where the purpose is to convey the employer's views on certain political matters.[23] A-4429 expanded the definition of "political matters" to expressly include an employee's decision to join, not join, support, or oppose a labor organization or association, in addition to traditional political subjects such as elections, political parties, legislation, and regulation.[24]

A-4429 clarifies that employers may hold voluntary meetings or provide communications on covered matters only if employees are told they may refuse attendance/communications without penalty, with enumerated exceptions for legally required communications, job-duty communications, and anti-harassment/anti-discrimination training.[25] In effect, New Jersey now requires a compliance "wrapper" around workplace communications that touch union affiliation decisions – especially where attendance has historically been mandatory.

IV. The Public-Sector Parallel: *City of Paterson*

Why PERC Matters to the "Captive Audience" Conversation

Public-sector labor relations differ from NLRB doctrine but the underlying concern – coercive employer communications that undermine majority representation – can look strikingly similar. In *City of Paterson*, PERC addressed interim restraints related to a police chief's communications with represented officers during negotiations and union meetings.[26] The case illustrates how "captive audience" dynamics can intersect with direct dealing and interference theories in the public sector.[27]

In *City of Paterson*, the unfair practice charge arose during negotiations for a successor collective negotiations agreement.[28] The unions alleged that the city, through its then-chief of police, engaged in impermissible direct dealing with bargaining unit members while the chief was part of the city's negotiations team.[29] Specifically, the record demonstrated that the chief conducted meetings and one-on-one conversations with rank-and-file members and superior officers, questioned employees about union meetings and statements made at those meetings, challenged communications made by union leadership to their membership regarding negotiations, and made statements portraying himself – rather than the unions – as responsible for favorable employment outcomes such as overtime opportunities and disciplinary discretion.[30] However, PERC recognized that employers may communicate with employees during negotiations and may inform employees of a negotiations state/position but concluded that the chief's undisputed conduct went beyond mere information sharing. PERC emphasized that the chief attended roll-call meetings where officers were a captive audience, asked certain supervisors/union officials to leave so he could directly address rank-and-file members, questioned officers about who attended a union meeting, and made statements portraying himself as the source of favorable overtime opportunities and disciplinary leniency – conduct PERC viewed as undermining the union's representation and potentially chilling protected activity.[31]

PERC moved to modify the restraint to ensure it did not unduly interfere with the chief's ability to communicate about terms and conditions of employment while presenting communications "in a manner that appears to be direct dealing."[32] This balancing of interests resembles the *Amazon*/WFEIA standard: not a blanket gag order, but guardrails designed to prevent coercion, retaliation, or undermining or representative status in contexts where employees are not free to disengage.

V. Compliance Playbook (New Jersey-Focused and for Multi-State Employers)

For Private Employers in NJ (WFEIA & NLRB Overlay)

- Audit meeting types: Identify any mandatory sessions that address unionization. Broaden focus to include labor organization support/opposition and electioneering-related political matters.
- Convert to voluntary with advance notice: Mirror *Amazon*'s safe harbor and WFEIA's "no penalty" notice – state topic, voluntary, no adverse consequences, and (for NLRA realignment) no attendance records.
- Segregate job-duty content from persuasion: Do not embed union/political persuasion in meetings you claim are mandatory for operational reasons.
- Update attendance and discipline policies: Eliminate any automatic discipline for declining covered meetings; train supervisors not to pressure attendance informally.
- Post required notices: comply with the WFEIA posting requirements and documents posting (date/location/photos).

For Public Employers/Unions in NJ (PERC Risk Pattern)

- Train staff on direct dealing: Communications that portray management as the source of concessions or undermine union reps – especially in mandatory roll calls.
- Avoid questioning about union attendance/contents: *City of Paterson* underscores that even limited inquiries about who attended union meetings can be problematic.[33]
- Use structured channels: communicate negotiations status through agreed protocols (*e.g.*, via human resources, written updates, or in joint sessions with union leadership, rather than impromptu captive meetings).

VI. Conclusion

The combined effect of *Amazon.com Services LLC* and New Jersey's A-4429 is a decisive shift toward employees' autonomy in deciding whether to listen to employer persuasion about unionization and related associational choices. By overruling *Babcock & Wilcox*, the NLRB rejected the long-standing fiction that employer speech remains non-coercive merely because it avoids explicit threats or promises. Instead, the Board in *Amazon.com Services LLC* acknowledged what employees have long experienced in practice: when speech is backed by the power to compel attendance, monitor compliance, and impose discipline, the coercion lies not in the words themselves, but in the context in which they are delivered.[34]

For employers, the lesson is not that advocacy is forbidden but that authority must be exercised with discipline. The lawful path forward is clear: communicate early, transparently, and voluntarily; inform without compelling; and persuade without surveilling. For employees and unions, *Amazon.com Services LLC* restores a measure of agency that had been eroded by decades of employer-controlled messaging, reaffirming that the decision whether to unionize must be made in an environment free from structural coercion, not merely overt intimidation.[35]

"Captive no more" is not merely a headline; it is a doctrinal and normative shift recognizing that free choice cannot coexist with forced listening. ■

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Endnotes

1. *Amazon.com Servs. LLC*, 373 NLRB No. 136 (2024).
2. *Id.* at *1, *12, *29.
3. *Babcock & Wilcox Co.*, 77 NLRB 577, 578-79 (1948), overruled by *Amazon.com Servs.*, *supra* n.1.

4. P.L. 2025, c. 138, §§ 2, 4, 6-8, *available at* pub.njleg.state.nj.us/Bills/2024/AL25/138_.PDF.
5. *City of Paterson*, P.E.R.C. No. 2021-39, 47 NJPER ¶ 99, 2021 WL 1584247, at *1-*5 (Mar. 25, 2021); *City of Paterson*, P.E.R.C. No. 2025-10, 51 NJPER ¶ 32, 2024 WL 4581127, at *1-*2, *8-*10 (Sept. 26, 2024).
6. *City of Paterson* 2021, *supra* n.5, at *4-*5.
7. P.L. 2025, c. 138, *supra* n.4.
8. *Amazon.com Servs.*, *supra* n.1, at *1-*2.
9. *Id.* at *1, *12, *29.
10. *Id.* at *2.
11. *Id.* at *11-*12.
12. *Id.* at *2; 29 U.S.C. § 157.
13. *Amazon.com Servs.*, *supra* n.1, at *12; 29 U.S.C. § 157.
14. See *Amazon.com Servs.*, *supra* n.1, at *1, *12, *29.
15. *Babcock & Wilcox*, *supra* n.3, at *1-*2.
16. *Id.*; *see also* 29 U.S.C. § 158(c).
17. *Babcock & Wilcox*, *supra* n.3, at *1-*2; 29 U.S.C. § 158(a)(1).
18. *Amazon.com Servs.*, *supra* n.1, at *12; *see also Babcock & Wilcox*, *supra* n.3, at *1-*2.
19. *Amazon.com Servs.*, *supra* n.1, at *29-*30.
20. P.L. 2025, c. 138, *supra* n.4.
21. *Id.* § 5, 8.
22. *Id.* §§ 1, 6.
23. *Id.* § 2.
24. *Id.* § 1.
25. *Id.* § 2(b)(1).
26. *City of Paterson* 2021, *supra* n.5, at *1-*2; *City of Paterson* 2024, *supra* n.5, at *8-*10.
27. *City of Paterson* 2021, *supra* n.5, at *4-*5.
28. *City of Paterson* 2024, *supra* n.5, at *8.
29. *City of Paterson* 2024, *supra* n.5, at *8-*10; *City of Paterson* 2021, *supra* n.5, at *2-*5.
30. *City of Paterson* 2021, *supra* n.5, at *4; *City of Paterson* 2024, *supra* n.5, at *8-*10.
31. *City of Paterson* 2021, *supra* n.5, at *4-*5; *City of Paterson* 2024, *supra* n.5, at *10.
32. *City of Paterson* 2021, *supra* n.5, at *5.
33. *City of Paterson* 2021, *supra* n.5, at *4-*5; *City of Paterson* 2024, *supra* n.5, at *10.
34. *Amazon.com Servs.*, *supra* n.1, at *1, *12, *29-*30.
35. See *id.* at *29-*30.

Muldrow, Materiality, and the Future of Hostile Work Environment Claims

by Nicole M. DeMuro

In 2024, the U.S. Supreme Court issued a landmark decision, *Muldrow v. City of St. Louis*,[1] which has reshaped how courts evaluate discrete discrimination claims under Title VII. By rejecting the long-standing requirement adopted by most circuit courts, including the Third Circuit, that a plaintiff show a "significant" or "materially adverse" employment action to establish discrimination,[2] the Court lowered the threshold for actionable harm. Since then, lower courts have been grappling with the issue of whether and how the *Muldrow* decision affects the standard for hostile work environment claims.

While some circuit courts have limited the holding of *Muldrow* to cases involving discrete claims of discrimination, at least one circuit court has suggested that *Muldrow*'s logic could impact the analysis of hostile work environment claims moving forward. The Third Circuit has yet to reach this issue but the weight of its authority seems to suggest that it will continue to adhere to the "severe or pervasive" standard for hostile work environment claims.

The *Muldrow* Decision

In *Muldrow*, the Supreme Court addressed the issue of whether a plaintiff alleging discrimination in violation of Title VII must demonstrate that the employment action giving rise to the claim was "materially adverse" or caused "significant harm." The case arose from the transfer of a female sergeant in the St. Louis Police Department from the Intelligence Division to a new district.[3] Muldrow's "rank and pay remained the same in the new position" but "her responsibilities, perks, and schedule did not."[4] Both the District Court and the Eighth Circuit agreed that Muldrow had not made out a claim for discrimination because she failed to "show that the transfer caused her a 'materially significant disadvantage,'" meaning there was no "diminution to her title, salary or benefits."[5]

The Supreme Court, in a unanimous decision, reversed the Eighth Circuit's decision.[6] After analyzing the plain language of Title VII, which prohibits discriminating against an individual "with respect to" the "terms [or] conditions" of employment,[7] the Court concluded that "[t]o make out a Title VII discrimination claim, a transferee must show *some harm* respecting an identifiable term or condition of employment."[8] The Court emphasized, however, that "[w]hat the transferee does not have to show . . . is that the harm incurred was 'significant.'"[9] Leaving no question that it intended to do away with any materiality requirement, the Court confirmed that "significant" includes "serious, or substantial, or any other similar adjective suggesting that the disadvantage to the employee must exceed a heightened bar."[10]

The Doctrinal Tension and Circuit Split Following *Muldrow*

Muldrow involved a discrete employment action. It did not directly address hostile work environment claims. But in its wake, the question has arisen: if Title VII requires only 'some harm' to terms or conditions of employment, is the 'severe or pervasive' standard that has applied to hostile work environment claims too demanding under Title VII?

While many circuits have yet to reach the issue of whether *Muldrow* applies to hostile work environment claims,[11] two competing views have grown out of the *Muldrow* decision to answer that question.

On the one hand, the First and Tenth Circuits (and the Fifth Circuit in an unpublished decision) have found that *Muldrow* does not extend to hostile work environment claims.[12] In doing so, the courts relied heavily on prior Supreme Court precedent, including in *Harris v. Forklift Systems*[13] and *National Railroad Passenger Corp. v. Morgan*.[14, 15] In both *Harris* and *Morgan*, the Supreme Court found that for hostile work environment claims, "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult'…that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,'...Title VII is violated."[16] The circuit courts have found, consistent with Supreme Court precedent, that the "severe or pervasive" requirement reflects the need to distinguish actionable harassment from conduct that is merely offensive.[17] And, failing to do so by applying the *Muldrow* standard would "gut[] the very thing that distinguishes hostile-environment claims from discrete-act claims."[18] Eventually, these circuits find that the severe or pervasive standard simply defines what constitutes a change in the "term and conditions" of employment in the harassment context.

On the other hand, the Sixth Circuit has found that, in the wake of *Muldrow*, "courts cannot require a plaintiff to show that he suffered a heightened level of harm to succeed on a hostile-work-environment claim."[19] The Sixth Circuit's adherence to *Muldrow* in hostile work environment claims is rooted solely in the fact that "[b]ecause hostile-work-environment claims arise out of the same statutory language as disparate-treatment claims, *Muldrow*'s holding that Title VII does not require plaintiffs to show 'significant' harm applies to both types of claims."[20] This view creates an approach where conduct that may previously have been dismissed as insufficiently severe or pervasive may survive dismissal, particularly where it has *some* effect on the plaintiff's job responsibilities or standing in the workplace.

With most circuits having failed to address this issue, the split that has developed is not yet stark but it is meaningful. At its essence, it reflects competing views about statutory text, judicially developed standards, and adhesion to Supreme Court precedent. While the current minority view found the fact that the *Muldrow* decision applied simply because hostile work environment claims arise from the exact statutory language as discrete discrimination claims, it seems that the majority of courts will continue to follow earlier Supreme Court precedent expressly addressing hostile work environment claims unless and until the Court makes clear its intent to overturn its own precedent.

The Future of the Third Circuit

The Third Circuit has yet to directly address whether and in what way *Muldrow* affects hostile work environment claims. Yet, even without a reported decision from the circuit, its existing jurisprudence and unpublished case law offers clues into the future rationale of the court.

Prior to *Muldrow*, the Third Circuit consistently applied the "severe or pervasive" standard to hostile work environment claims, relying heavily on Supreme Court precedent.[21] The court also had developed a strong body of case law to evaluate whether conduct was considered "severe or pervasive," looking to "the totality of the circumstances, including 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'"[22] Ultimately, in its earlier jurisprudence, the court sought to confirm that the conduct was sufficiently severe or pervasive so as to "'alter the conditions of [the victim's] employment and create an abusive working environment'"[23] in order to distinguish it from "'simple teasing, offhand comments, and isolated incidents (unless extremely serious).'"[24]

In relying on Supreme Court precedent, the Third Circuit also adheres closely to the notion that "[i]f a precedent of [the Supreme Court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions."[25] Thus, similar to the First and Tenth Circuits, because there are numerous Supreme Court decisions applying the severe or pervasive standard to hostile work environment claims (and many on which the Third Circuit has already relied), the Third Circuit is likely to continue to follow such precedent unless and until the Supreme Court expressly and unequivocally finds a different standard applicable to the same types of claims.

In light of the same, the Third Circuit recently issued two unpublished decisions implicitly addressing the role of *Muldrow* on hostile work environment claims. In each of those cases, the plaintiffs raised claims for both discrete discrimination and hostile work environment.[26] And, while the Third Circuit used the *Muldrow* standard to address the discrete discrimination claims, the court continued to use the severe or pervasive standard to address the hostile work environment claims.[27] While these cases are not binding and neither case directly addressed the question of whether *Muldrow* applies to hostile work environment claims, they are persuasive, especially where the full Third Circuit has not yet spoken.

Until the Third Circuit expressly reaches the issue, employers must be aware of the possibility that, in the wake of *Muldrow*, even "some harm" arising from activities occurring in the workplace, regardless of whether severe or pervasive, may give rise to hostile work environment claims. This uncertainty creates an increased risk of legal exposure for the conduct of employees, whether supervisory or not. Of course, in the Third Circuit, employers may still rely on the *Ellerth-Faragher* defense in certain cases,[28] making it even more important for employers to maintain strong policies prohibiting harassment, to respond to and investigate internal complaints of harassment, and to take appropriate corrective action if an investigation substantiates harassment. Doing so, especially where the allegations involve the conduct of non-supervisory employees, can help to mitigate risk, especially in this period of legal uncertainty.

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Endnotes

1. 601 U.S. 346 (2024).
2. *Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 128 (2d Cir. 2004) ("materially significant disadvantage"); *Cardenas v. Massey*, 269 F.3d 251, 263 (3d Cir. 2001) (defining adverse employment action as one that is "serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment"); *Boss v. Castro*, 816 F.3d 910, 917 (7th Cir. 2016) ("In a discrimination case, a materially adverse employment action is one which visits upon a plaintiff 'a significant change in employment status'" (internal citation omitted)); *Clegg v. Ark. Dep't of Corr.*, 496 F.3d 922, 926 (8th Cir. 2007) ("An adverse employment action is a tangible change in working conditions that produces a material employment disadvantage" (internal citation omitted)); *Crawford v. Carroll*, 529 F.3d 961, 971 (11th Cir. 2008) ("[A] poor performance evaluation that directly results in the denial of a pay raise of any significance clearly affects an employee's compensation and thus constitutes an adverse employment action under Title VII").
3. *Muldrow*, *supra* n.1, at 350.
4. *Id.* at 351.
5. *Id.* at 352-53.
6. *Id.*
7. 42 U.S.C. § 2000e-2(a)(1).
8. *Muldrow*, *supra* n.1, at 354-55 (emphasis added).
9. *Id.* at 355 (quoting *Muldrow v. City of St. Louis*, 30 F.4th 680, 688 (8th Cir. 2022)).
10. *Id.* at 355.
11. *See, e.g.*, *Ziparo v. CSX Transp., Inc.*, 160 F.4th 314, 340 n.16 (2d Cir. 2025) ("We have not yet opined on *Muldrow*'s impact on discriminatory hostile work environment claims, and the question is not before us here"). In *Hansley v. DeJoy*, No. 23-1426, 2024 U.S. App. LEXIS 30433 (4th Cir. Dec. 3, 2024), the Fourth Circuit continued to use the severe or pervasive standard, while recognizing *Muldrow*'s application to discrete discrimination claims but it is unclear whether the application of *Muldrow* to hostile work environment claims was at issue.
12. *Walsh v. HNTB Corp.*, 169 F.4th 330, 340 n.4 (1st Cir. 2026) ("Indeed, at oral argument, Walsh's attorney suggested that following *Muldrow*, courts may no longer distinguish between discrete adverse actions and continuing violations when evaluating anti-discrimination claims. These arguments are unavailing"); *Russell v. Driscoll*, 157 F.4th 1348, 1353 (10th Cir. 2025) ("For all these reasons, we reject Russell's argument that the district court erred when it did not apply *Muldrow* to his hostile-environment claim"); *Dike v. Columbia Hosp. Corp.*, No. 24-40058, 2025 U.S. App. LEXIS 1906, at *14 n.25 (5th Cir. Jan. 28, 2025) ("The Supreme Court has defined the requirements of a hostile work environment claim over the course of many years, making clear the high bar that plaintiffs must meet to make out this claim. There is no suggestion in *Muldrow* that the Supreme Court intended to alter these requirements" (internal citations omitted)).
13. 510 U.S. 17 (1993).
14. 536 U.S. 101 (2002).

15. *Walsh*, *supra* n.12, at 340 n.4 (relying on *Morgan*); *Russell*, *supra* n.12, at 1351 (relying on *Harris*).
16. *Harris*, *supra* n.13, at 21 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 67 (1986); *Morgan*, *supra* n.14, at 116 (quoting *Harris*).
17. *Russell*, *supra* n.12, at 1352 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 76, 81 (1998) and noting that "the severity/pervasiveness inquiry is 'crucial' for 'prevent[ing] Title VII from expanding into a general civility code").
18. *Id.* at 1352-53.
19. *Kellar v. Yunion, Inc.*, 157 F.4th 855, 873 (6th Cir. 2025).
20. *McNeal v. City of Blue Ash*, 117 F.4th 887, 904 (6th Cir. 2004).
21. *Canete v. Barnabas Health Sys.*, 718 Fed. App'x 168, 169 (3d Cir. 2018) ("[F]or his hostile work environment claims, he must show evidence of discrimination 'sufficiently severe or pervasive to alter the conditions of [his] employment'" (second alteration in original) (quoting *Spain v. Gallegos*, 26 F.3d 439, 446 (3d Cir. 1994)).
22. *Nitkin v. Main Line Health*, 67 F.4th 565, 570 (3d Cir. 2023) (quoting *Mandel v. M&Q Packaging Corp.*, 706 F.3d 157, 168 (3d Cir. 2013)).
23. *Id.* (alteration in original) (quoting *Meritor*, *supra* n.15, at 67).
24. *Id.* (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)).
25. *United States v. Cuevas-Almonte*, 156 F.4th 319, 330 (3d Cir. 2025) (quoting *Agostini v. Felton*, 521 U.S. 203 (1997)).
26. *Boston v. Graphic Packaging Int'l LLC*, No. 25-1698, 2026 U.S. App. LEXIS 8453, at *2 (3d Cir. Mar. 20, 2026); *Goodwin v. Univ. of Pa.*, No 23-3211, 2024 U.S. App. LEXIS 28012, at *4 (3d Cir. Nov. 5, 2024).
27. *Boston*, *supra* n.26, at *2, *4 ("To rise to the level of discrimination, he must show that any harassment was so severe or pervasive as to alter the terms and conditions of his employment"); *Goodwin*, *supra* n.26, at *6, *8 ("Goodwin also argues that she was subject to a hostile work environment in violation of the ADA. But she has not pointed to any conduct that was 'sufficiently severe or pervasive to alter the conditions of her employment to create an abusive working environment" (quotations omitted)).
28. "In cases where no tangible employment action has been taken against an employee, the *Faragher/Ellerth* defense allows an employer to escape vicarious liability if: (1) the employer exercised reasonable care to prevent and correct any harassing behavior; and (2) the plaintiff unreasonably failed to take advantage of the preventative or corrective opportunities provided." *O'Brien v. Middle E. Forum*, 57 F.4th 110, 115 (3d Cir. 2023) In *O'Brien*, the Third Circuit narrowed the scope of the *Faragher/Ellerth* defense finding it unavailable "when the supervisor in question is the employer's proxy or alter ego." *Id.* at 119.