LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

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THE GOLDILOCKS PRINCIPLE AND THE ART OF BRIEF-WRITING

Stuart M. Israel

The Goldilocks Principle comes from the story of the blonde burglar and the Bear family. Among other things, the story causes readers to reflect on moderation, a principle important to effective brief-writing.

Goldilocks-principle briefs are not too long or too detailed. They are not too abbreviated or too superficial. They are just right.

Court rules identify some just-rightness standards.

Federal appellate rules, for example, require a principal brief to include "*concise*" facts, the "*relevant"* procedural history, a "*succinct*, *clear*, and *accurate*" argument-summary, a "*concise*" statement of "*applicable*" review-standards, and a "*short*" conclusion specifying "*precise* relief." See Fed.R.App.P. 28 and 32 (italics added).

In bar-journal articles and at CLE events, judges also suggest just-rightness standards. They read mountains of briefs, they say, and advise that briefs are most effective when succinct and simple—no longer or more complicated than *necessary.* In essence, judges say, briefs should be just right to address the issues at hand.

A good brief-writer, then, must be an effective self-editor—and remove from early drafts, for example: superfluous facts, extraneous procedural history, too-lengthy quotations, needless citations, undue wordiness, repetition, and redundancy, ineffective legalese, self-defeating invective, unpersuasive hyperbole, useless adjectives and adverbs, archaic formalisms, and trite sports-metaphors that just don't "move the ball down the field."

Justice Louis Brandeis, known for "endless" revisions of his opinion drafts, reportedly observed: "There is no great writing, only great rewriting." Justice Benjamin Cardozo counseled that the "picture cannot be painted if the significant and the insignificant are given equal prominence." He also warned: "There is an accuracy that defeats itself by the overemphasis of details." Abraham Lincoln's advice to legal advocates: "never plead what you need not, lest you oblige yourself to prove what you can not."

In other words, apply the Goldilocks Principle.

Non-judges say so, too. "Brevity is the soul of wit," the verbose Polonius says, and inadvertently demonstrates, in *Hamlet*. The Aristotelian Mean counsels moderation: "Nothing too much." Mark Twain recommended "plain, simple language, short words and brief sentences." He warned: "don't let fluff and flowers and verbosity creep in."

While just-right brevity and simplicity are the path to persuasion, brief-writers still must include everything the judge needs to know. Albert Einstein reportedly said: "Everything should be made as simple as possible, but not simpler." Oscar Wilde prescribed: "Everything in moderation, including moderation."

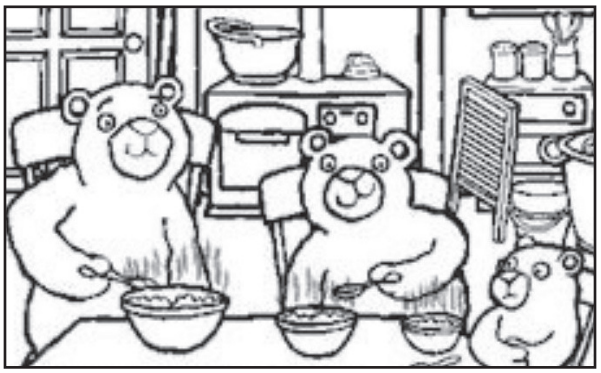
A judge's objective, wrote the late Avern Cohn—a federal district judge for 40 years, following his 30 years in private practice—is to reach a well-reasoned decision, grounded on the governing law applied to the facts. The best briefs, Cohn wrote, are "written to assist" the judge. Too many brief-writers, he lamented, pay insufficient attention to *assisting*—and so fall short on *persuading*—decision-making judges.

Too many briefs, Cohn said, are diminished by "excessive lawyering," needless "contentiousness," "overwriting," and "string citations." He advised brief-writers to omit unnecessary "complication and excessive detail." The litigation process aspires—borrowing from Fed.R.Civ.P. 1—to "secure the just, speedy, and inexpensive determination" of legal disputes. Briefs should be just right for that task.

Writing just-right briefs takes time, editorial attention, and purpose. Mathematician Blaise Pascal explained his letter was long because he did not have "the time to make it short." Henry David Thoreau wrote that a story need not be long, but that it would "take a long while to make it short."

Advocacy is as much art as (legal) science. Brief-writing requires artistic judgments and a red editing-pen or the computer equivalent.

A brief-writer should endeavor to (1) consider all pertinent circumstances—the facts, the law, the competing arguments, client objectives, the resources available, the time constraints, the idiosyncrasies of the judge and the forum, appellate prospects, etc.; (2) distinguish what is necessary from what is not, and include the former and exclude the latter; (3) organize, write, rewrite, edit, and revise; and (4) then file a brief that is just right.■



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Labor and Employment Lawnotes is a quarterly journal published under the auspices of the Council of the Labor and Employment Law Section of the State Bar of Michigan. Views expressed in articles and case commentaries are those of the authors, and not necessarily those of the Council, the Section, or the State Bar. We encourage Section members and others interested in labor and employment law to submit articles, letters, and other material for possible publication.

John G. Adam, *Editor*
Stuart M. Israel, *Editor Emeritus*

PSYCHIATRIC DISABILITY PENSIONS: FLOOD GATE FEARS AND JUSTICE

Sheldon J. Stark
Mediator and Arbitrator (retired)

In the 1970s as a young trial lawyer, I was asked to handle an appeal to the Detroit Police and Fire Retirement System. My client was an African American police officer who suffered total and permanent disability on a psychiatric basis after spending hours on guard duty at a building as the City's bomb disposal unit located and diffused an explosive device. He was never the same afterward and couldn't return to work. His treating psychiatrist determined he was totally and permanently disabled. The department's own in-house psychiatrist agreed. If there was no dispute about the disability, why was he denied? According to what my client was told, no one had ever previously been granted a disability pension on a psychiatric basis. Later, I would be personally informed in a moment of candor that the Pension Board feared "opening the flood gates".

While this was my first and only matter before the Pension Board, I believed in the appeal. Frankly, I thought it would be a slam dunk. I no longer remember the appeal procedure nor what documents I might have filed. I vividly recall appearing in person before the Board along with my client. I believe Detroit City Councilman Billy Rogell was Chair at the time. If he was not, he took the lead in interacting with me during our hearing. If you don't remember Billy Rogell, he was one of the great Detroit Tiger Baseball stars of the 1930s along with All Star greats like Greenberg, Gehringer, Goslin and Cochrane. Today, the highway into Detroit Wayne County Metropolitan Airport is named Rogell Drive in his honor.

"If we award a pension to your client," Councilman Rogell asked, "where will it end?" I assured the Board this was my only client. "This is a serious problem for us," Rogell continued. "We fear there may be a whole lot of cops out there eligible for psychiatric disability pensions. Can you tell us how to screen out applicants to the Department who are pre-disposed to severe psychiatric problems? How about screening out applicants who are *already* psychiatrically disabled but functional?" I didn't have answers. "We have asked many experts," the Councilman continued. "Apparently the test has not and may never be devised to screen for this."

While I could not answer his questions, I did have a cogent argument to support our appeal. The story requires a bit of history.

Oliver Wendell Holmes has written sometimes "a page of history is worth a volume of logic."[1] So, too, in the present instance. At the time of our appeal, Detroit was either on the way to becoming a majority black city or had already reached that milestone. The 1967 Rebellion had resulted in mass "white flight" to the suburbs. The Detroit Police Department did not reflect the changing demographics of the city. To the contrary, many black people in Detroit viewed police officers with alarm, considering the Detroit Police Department a white "occupying army." There were very few black police officers, and police brutality litigation often bore signs of overt racism. The appeal came to me because I had been developing a reputation for litigating police misconduct

cases in both state and federal court. In an effort to remedy racial imbalance, the Detroit Police Department had launched an aggressive marketing campaign to recruit African American officers under the slogan "Being a Cop Is More Than Just a Gig." My client was intrigued. He was the right age. He had a college education. He was community minded. He was an idealist. The campaign appealed to him on many levels. He believed he could make a difference. He applied, graduated from the Police Academy, and successfully passed his probationary period. He was good at the job but there was a problem.

Racism continued to be an issue. He experienced it every day on the job. It weighed heavily on him, causing stress, anxiety and frustration. He began having trouble sleeping at night. He started losing weight. City fathers recognized the need for a racially diverse police department and even insisted cops live in the City as my client did[2]. A lot of white cops didn't agree. They didn't like the new program and they resisted the changes. They made it hard on new African American recruits. Black officers were made to feel unwelcome. That should not have been a surprise to anyone. According to "Arc of Justice," by Kevin Boyle recounting the Dr. Ossian Sweet murder case[3], the Department had had a long history of Ku Klux Klan infiltration and influence. My client's experiences were raw and consistent with that history. No effective mechanism was put in place to assist the new officers coming in.

The stress didn't end when my client left work for the day. His own community did not approve of African Americans signing on to be part of a "racist, occupying army." His levels of anxiety and fear accelerated and grew. He was stressed at work; he was stressed at home. He found no relief anywhere in his life. If he threw himself into his work, he was treated disrespectfully and with hostility. If he tried to relax in the neighborhood, he was isolated and frozen out even by old friends who turned away from him.

On the day of the bomb threat, he was already on the edge of an emotional precipice. He remained vigilant and alert but filled with anxiety as he stood on the job for hours, keeping people away from the building while the bomb was located and defused. The pressure grew unbearable. He broke down and never recovered. Even the department's own staff psychiatrist recognized his disability.

My client's condition was the result of a "perfect storm"[4]. I am proud to say the Detroit Police and Fire Retirement Board came to agree and recognized the justice of our cause. They awarded the claimant a total and permanent disability pension based on his psychiatric condition. It was the first time in historic memory. The "win" was deeply gratifying. If ever there was a deserving beneficiary of the disability pension system, this was it!

Did the flood gates open? If they did, I never saw evidence of it. No new clients came forward seeking my services. None of my colleagues reported handling one of these appeals. I read no account in Detroit newspapers suggesting that cops were lining up in droves claiming psychiatric disability pensions.

As so often happens, anticipatory anxiety about flood gates was exaggerated or overblown. Our case broke the ice and Detroit police officers could thereafter count on drawing their pension if disabled in the course of doing their jobs.

—END NOTES—

[1] *New York Trust Co. v. Eisner,* 256 US 345 (1921)..

[2] White cops, like white people generally, tried but were not permitted to move out of the city. City residency became a huge issue. Departmental regulations at the time mandated City of Detroit residency – a rule often honored in the breach. Moving out of the city was a dischargeable offence.

[3] Boyle, who was from Madison Heights, Michigan, spoke to the Labor and Employment Law Section in about 2004 when his book was first published. He received a standing ovation.

[4] "The Perfect Storm" by Sebastian Junger.■

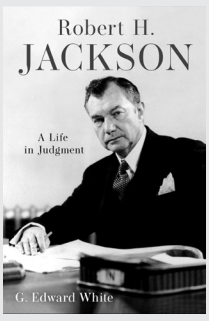
ROBERT JACKSON (1892-1954): THE SOLICITOR GENERAL, ATTORNEY GENERAL, JUSTICE, AND CHIEF NUREMBERG PROSECUTOR WHO NEVER WENT TO COLLEGE

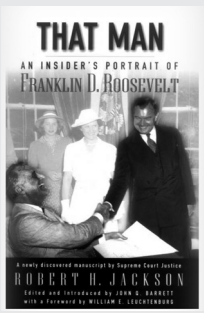
I look forward to reading Law Professor Edward White's book, *Robert H. Jackson: A Life in Judgment* (2025). Robert Houghwout Jackson is a unique American. As White explains, Jackson "was the last justice on the Supreme Court who did not attend college and whose law school experience consisted of only one year. He was also the last Supreme Court justice whose admission to a state bar was primarily based on his having 'read for the bar.'"

Jackson was an FDR man and defended court packing and many New Deal laws. Chief Justice William Rehnquist was a Jackson law clerk. This book will be a great way to learn law, history and politics.

Jackson's posthumous memoir published in 2002 is also worth reading. *Robert H. Jackson. That Man: An Insider's Portrait of Franklin D. Roosevelt* (2002).

John G. Adam





BIG LAW CONFLICTED

Thomas G. Kienbaum
Kienbaum Hardy Viviano Pelton & Forrest, PLC.

Within weeks of being sworn in, President Donald Trump issued a flurry of executive orders ("EOs") targeting America's most prominent law firms, claiming they "weaponized litigation to obstruct or undermine lawful executive actions." The acknowledged reason was the firms' representation of political adversaries and causes deemed antithetical to the new Administration. Unabashedly retaliatory, the EOs were intended to inflict economic pain on the law firms through tactics like barring the firms' attorneys from maintaining security clearances or from even accessing federal courthouses.

The unconstitutionality of the EOs was and is obvious. They violate the First and other Amendments. Several firms nevertheless yielded to extortion, "settling" legally baseless disputes because they feared the impact of the EOs on their business. Some firms went so far as to say that their very existence was threatened. In return for withdrawal of the EOs, they committed to tens of millions of dollars of free legal work – dubbed "pro bono" -- despite the unspecified nature of the anticipated work. President Trump even admitted to the extortionate nature of the EOs, stating that "I agree, they've done nothing wrong. But what the hell, they've given me a lot of money considering they've done nothing wrong."

Other firms refused to be extorted, filing lawsuits. As of this writing, all of these lawsuits have been successful, with judges granting the firms relief in strong language describing the clear unconstitutionality of the EOs. The reputational damage to law firms that yielded to unlawful conduct for economic gain may abate eventually. But did these firms consider the potential conflicts created by their actions?

The firms that settled entered into a strange form of retainer agreement with the Administration. In return for the withdrawal of the EO, they promised millions of dollars in free legal services, including at the behest of the government. But the potential for conflict had to be obvious since the firms, presumably, did not forfeit their ability to represent clients adverse to the government in the future. Such representations could subject them to future EOs.

Imagine a major client with a significant issue before a federal agency that must decide what law firm to retain. If one of the firms that settled would have been the initial choice, the client now must consider the impact of that firm's relationship with the Administration, and its known willingness to cave to threats from the Administration. What if the firm were told that the Administration is not pleased with its vigorous representation of an issue that counters the Administration's "national policy"?

ABA Model Rule of Professional Conduct 1.7 prohibits a lawyer's representation of a client if the representation will be directly adverse to another client, or if the lawyer's own interests may materially limit the representation (unless the lawyer reasonably believes the conflict will not adversely affect the representation and the client consents). Under ordinary circumstances, no serious concern would exist if a firm were to represent, for instance, the Justice Department as special counsel and simultaneously argue before the Securities and Exchange Commission on behalf of another client. After all, the federal government is vast and typically not homogeneous. But these are different times. The current Administration has concentrated extraordinary power in the Chief Executive, who has demonstrated a willingness to be involved in every aspect of the Administration. A law firm that settles a dispute of this nature with that Executive must be concerned about future dealings with that Executive and his Administration. That law firm's clients likely will share that concern.

Any such client, at a minimum, is entitled to full details of the circumstances and nature of the settlement between the law firm and the Administration. Perhaps the client will conclude that it nevertheless wishes to retain the settling law firm because the conflict is remote and it is thought unlikely that the Administration would try to interfere in pending litigation. But is that realistic? Why would a major client take any chance with a bet-the-company litigation, if there are other good firms who have shown a willingness to stand up even to the President of the United States. That is a concern that several major law firms will now have to deal with. ■

CHESSING AND LAWYERING

To improve your legal skills, learn chess. As in the law, you need to know the rules. You need discipline and focus, as well as the ability to sit for hours! You need to know precedent, so you study the games of great players, to see patterns, the "common law of chess."

To understand the connection, I suggest a book by chess master and attorney Alisa Melekhina, *Reality Check: What the Ancient Game of Chess Can Teach You About Success in Modern Competitive Settings* (2017). In addition to great web sites and apps—*e.g.*, chess.com; chessable.com—below are other interesting books.

David Shenk, *The Immortal Game: A History of Chess* (2006).

Gary Kasparov, *How Life Imitates Chess: Making the Right Moves, from the Board to the Boardroom* (2008).

Levy Rozman, *How to Win at Chess: The Ultimate Guide for Beginners and Beyond* (2023).

Susan Polgar, *Rebel Queen: The Cold War, Misogyny, and the Making of a Grandmaster* (2025).

John G. Adam

LESSONS FROM THE NEWS: FEDERAL CONTEMPT STANDARDS

Benjamin L. King
Jessa Mueller
McKnight, Canzano, Smith, Radtke & Brault, P.C.

The Trump Administration's deportation of immigrants to a foreign prison in violation of a federal court's order captured the attention of national media and legal experts. These actions, and the resulting criminal contempt order, raise questions about the power of the courts to enforce their will, and what recourse is available when a coequal branch does not comply. On April 16, 2025, Judge Boasberg, Chief Judge of the D.C. District Court published an opinion finding probable cause to hold the government in criminal contempt. *J.G.G. v. Trump*, No. CV 25-766 (JEB), 2025 WL 1119481 (D.D.C. Apr. 16, 2025), stayed, *J.G.G. v. Trump*, No. 25-5124, 2025 WL 1151208 (D.C. Cir. Apr. 18, 2025) (per curium). Since then, the Supreme Court vacated the underlying orders on procedural grounds. *Trump v. J.G.G.*, 145 S. Ct. 1003, 221 L. Ed. 2d 529 (2025). However, under the collateral-bar rule, a contempt order still stands even if the underlying law is invalid. *See e.g.*, *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

1. On March 15, 2025, the Trump Administration sought to deport a group of Venezuelan nationals from the United States to El Salvador. *J.G.G.*, at *2. The government planned to do so under the authority of the "Alien Enemies Act." The ACLU filed a lawsuit challenging these deportations on behalf of five named plaintiffs and the class of noncitizens impacted by the government's proclamation. *J.G.G.*, at *2. At 9:40 a.m., the D.C. District court granted a temporary restraining order, halting the deportations of the named plaintiffs. *Id.* The District Court scheduled an emergency hearing for a class-wide temporary restraining order that evening at 5:00 p.m. *Id.* at *3. During that time, the Trump government was actively loading individuals in the proposed class, onto planes. *Id.* When sources informed plaintiffs that the government may have scheduled flights for take-off during the hearing, the court adjourned to investigate. *Id.* At 5:22 p.m., the court directed government counsel to discover if flights were, in fact, set to take off during the hearing; government counsel did not inform the court of the status of the flights and the hearing continued. *Id.* The court later discovered that during that recess, two of the planes took off from Texas and ultimately El Salvador. *Id.* On April 16, 2025, the District Court published an opinion, finding probable cause to hold the government in criminal contempt. On April 18, 2025, the District Court denied the government's motion for a stay on the contempt order. *J.G.G. v. Trump*, 2025 U.S. Dist. LEXIS 88481 (D.D.C. Apr. 18, 2025). The government appealed. *J.G.G. v. Trump*, 2025 U.S. App. LEXIS 9386 (D.C. Cir. Apr. 18, 2025). The Appellate Court voted 2-1 to stay the order. *Id.* As a result, an administrative stay of the contempt order has been in effect for several months.

2. Federal courts have the power to punish uncooperative parties with contempt in the form of a fine or imprisonment. 18 U.S.C. § 401. A party can be held in contempt criminally or civilly, depending on the court's purpose. *Int'l Union v. Bagwell*, 512 U.S. 821 at 12 (1994). Civil contempt is issued to coerce a party into complying, typically to rectify a present issue. *Id.* Criminal contempt, by contrast, is punitive in nature. *See, e.g.*, *Gnesys, Inc. v. Greene*, 437 F.3d 482 (6th Cir. 2005). In order to be convicted of criminal contempt, a jury must find beyond a reasonable doubt that "(1) that the court order was clear and reasonably specific; (2) that the defendant violated the order; and (3) that the violation was willful…" *J.G.G.* at *8 (D.D.C. Apr. 16, 2025) (quoting *United States v. NYNEX Corp.,* 8 F.3d 52, 54 (D.C.Cir.1993)) (citation modified).

First, the court noted that its order was "sufficiently clear to the Government that the Court was prohibiting it from transferring class members into another country's custody." *Id.* at *10. The order stated, in relevant part, that "As discussed in today's hearing, the Court ORDERS that the government "is ENJOINED from removing members of [the] class (not otherwise subject to removal) pursuant to the Proclamation for 14 days or until further Order of the Court." *Id.* at *11 (alterations in original). Government counsel argued that flying the class members into El Salvador and relinquishing them to foreign government did not constitute, "removing" the class members. *Id.* According to the government, "removal" only constituted the planes departing from the U.S., and as the first two planes had already left the U.S. at the time of the order being issued, said removal had already occurred. *Id.* The government maintains that the third plane, which departed after the court published the class-wide temporary restraining order, contained only non-class members. *Id.* at *4. The court rejected the government's argument as an unreasonable interpretation, given the context of the order and the clear intentions of the temporary restraining order. *Id.* *11-12. The statement "As discussed in today's hearing" notably clarified the meaning of "removal" in the written order. *Id.* *12-13.

Second, the court addressed the government's violation of the order. In response to the court's inquiry as to why it had not complied, Government counsel did not dispute it violated the court's order. *Id.* at *15 ("Defendants do not dispute that, if the Order indeed proscribed transferring class members out of U.S. custody, they plainly violated it hours after it issued"). Rather, the government challenged the jurisdiction of the court. *Id.* It argued that it acted from direct Article II executive power once outside of U.S. airspace, rather than a congressional grant from the proclamation invoking Congress's will. *Id.* Thus, it would follow, that at the point the planes left the U.S., the government had full authority to remove the individuals because the court only prohibited actions "pursuant to the proclamation." *Id.* The court again rejected this as an unreasonable interpretation of the text of the order, as the only reasonable interpretation was an order for the government to not relinquish custody of the class members to a foreign entity. *Id.* The court also pointed out that this, again, merely attacks the legal validity of the order, which does not negate the obligation to comply with the order. *Id.*

Third, the court found that evidence of the government's willful defiance was plentiful. To demonstrate a party acted willfully, the court must find that the contemnor "acted with deliberate or reckless disregard of [their] obligation." *United States v. Young*, 107 F.3d 903 (D.C. Cir. 1997) (citation modified). The court points to several reasons the government's actions were clearly deliberate and willful. For example, the court noted that the government attempted to evade the its order by rushing proposed class members onto planes before President Trump officially issued the proclamation giving them the authority to

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LESSONS FROM THE NEWS: FEDERAL CONTEMPT STANDARDS

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deport the individuals. *J.G.G.* at *20. The government continued to board individuals onto planes and directed the planes to depart during the hearing, just minutes before the court's oral order. *Id.* ("Such conduct suggests an attempt to evade an injunction and deny those aboard the planes the chance to avail themselves of the judicial review"). The court pointed out that the government rushed the deportations "deliberately and gleefully." *Id.* at *4. The Secretary of State reposted a social media post written by the President of El Salvador which read: "Oopsie … Too late (laughing emoji)" in response to an article about the District Courts order to halt deportations. ■

The D.C. Circuit Court of Appeals has since stayed the contempt proceedings in this case for months, leaving an open question as to whether there are meaningful checks on a government unwilling to bend to the will of the courts. However, for the rest of us this case, while unique, presents a good reminder that there are there are serious consequences for most parties that ignore court orders.

WRITER'S BLOCK?

You know you've been feeling a need to write a feature article for *Lawnotes*. But the muse is elusive. And you just can't find the perfect topic. You make the excuse that it's the press of other business but in your heart you know it's just writer's block. We can help. On request, we will help you with ideas for article topics, no strings attached, free consultation. Also, we will give you our expert assessment of your ideas, at no charge. No idea is too ridiculous to get assessed. You have been unpublished too long.

Contact editor John Adam at jgabrieladam@gmail.com.

CLAIMS-SPLITTING

John G. Adam

Claim splitting is when a plaintiff files multiple lawsuits based on the same transaction or cause of action, instead of combining them in a single case. Claim splitting is disfavored, among other reasons, so as **(1)** to prevent inefficient use of court resource and **(2)** to protect defendants from repetitive litigation, and is a ground for dismissal.

Generally, a plaintiff "must bring all claims arising out of a common set of facts in a single lawsuit[.]" *Colorado River Water v. United States*, 424 U.S. 800, 817 (1976). *See also Stone v. Dep't of Aviation*, 453 F.3d 1271, 1278 (10th Cir. 2006) ("A plaintiff's obligation to bring all related claims together in the same action arises under the common-law rule of claim preclusion prohibiting the splitting of actions"). Further, "courts have discretion to enforce that requirement as necessary to avoid duplicative litigation." *Colorado River,* 424 U.S. at 817 (quotation omitted).

Waad v. Farmers Insurance, 762 Fed.Appx. 256, 260 (6th Cir. 2019) addresses claim splitting (case citations and parenthetical omitted and paragraph breaks added):

> Claim-splitting and duplicative litigation are variations of res judicata. Res judicata—more specifically here, claim preclusion—bars subsequent litigation of causes of action where a court has already issued a final decision on the merits in an earlier case and the causes of action were, or should have been, litigated in the earlier case between the same parties.
>
> "[T]he test for claim splitting is not whether there is finality of judgment, but whether the first suit, assuming it were final, would preclude the second suit." Essentially, claim splitting is the same as res judicata, but with a presumption of a final judgment instead of an actual final judgment.
>
> In a similar vein, the doctrine of duplicative litigation allows "a district court [to] stay or dismiss a suit that is duplicative of another federal court suit" using "its general power to administer its docket." The difference between claim splitting and duplicative litigation is in name only.

See, *e.g.*, *Vanover v. NCO Fin. Servs., Inc.*, 857 F.3d 833, 841 (11th Cir. 2017) (Claim splitting is "concerned with the district court's comprehensive management of its docket," while "res judicata focuses on protecting the finality of judgment") and *Blendtec Inc. v. Blendjet Inc.*, 2025 WL 1455803, at *2 (D.Utah, 2025)("As a general rule, plaintiffs cannot split their claims, and must instead bring all related claims together in the same action."). ■

WORKDAY DISCRIMINATION AND GENERATIVE BIAS – WHO IS RESPONSIBLE WHEN AI GOES BAD?

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Anyone who doubts the rapid integration of artificial intelligence into the workplace, official or unofficial, need only look to the events of June 10, 2025. A nearly day-long ChatGPT outage prompted more than 500,000 Google searches and thousands of social media posts from office workers so reliant on the technology they couldn't imagine doing their jobs the old-fashioned way. It's no surprise, then, that AI is now increasingly used for fundamental human resources functions, including decisions about who gets hired and who doesn't. But this new technology has inherited old problems, chief among them the risk of discrimination in hiring.

Courts are now beginning to grapple with claims of algorithmic discrimination. One of the most high-profile cases is *Mobley v. Workday*, *Inc.*, currently pending in a California federal court. Workday offers a subscription-based AI hiring platform that it promotes as "reducing time to hire by automatically dispositioning or moving candidates forward in the recruiting process." Derek Mobley—a Black man over 40 with disabilities—allegedly applied more than 100 jobs through companies using Workday's system and was rejected every time, sometimes within an hour. He claimed that Workday's algorithm, functioning as an agent of its client employers, has a disparate impact on job seekers who are over 40, have disabilities, or are Black.

The court found that Mobley's allegations were sufficient to state a legal claim. It accepted the argument that Workday's AI could be considered an agent implementing its customers' HR policies. And the *Mobley* court recently conditionally certified a collective action under the Age Discrimination in Employment Act for individuals over 40 who were rejected by Workday's algorithm. According to Workday's briefing, this group could include millions of people. Although Workday is the defendant here, there's no reason that a rejected candidate couldn't bring a lawsuit against the employer itself for using these tools.

Similar, if smaller, lawsuits are emerging elsewhere. A Massachusetts job applicant sued CVS in federal court after learning that the company secretly used HireVue, Inc. to perform an AI-based analysis of a video interview before rejecting him. CVS settled the suit late last year. A different lawsuit against HireVue is now pending in Colorado, filed by a deaf applicant who was denied employment after an AI analysis concluded, among other things, that she was not "practicing active listening" during a video interview.

The regulatory landscape remains fragmented. The Biden Administration had issued executive guidance requiring the development of AI safeguards, including policies "consistent with the advancement of equity and civil rights." On January 21, 2025, the Trump Administration rescinded that guidance. The EEOC promptly removed related resources from its website, including its recommendations for responsible use of AI in hiring.

Still, some states are stepping in. As of October 2024, the Michigan Civil Rights Commission has adopted *Guiding Principles for the Elimination and Prevention of AI Bias*, which highlight the risk of algorithmic discrimination and calls for legislation to ensure transparency, human oversight, and fairness in the use of workplace AI.

As the *Workday* and *CVS* cases show, existing anti-discrimination laws are already being used to challenge AI-driven employment decisions. Employers should not assume that automating hiring insulates them from legal liability. AI systems are designed by humans, and they are only as reliable as the data, assumptions, and algorithms that shape them. Employers must audit these tools for disparate impacts, just like any other business process. And they need to be ready to defend their use of these tools in terms that judges and juries can understand. That's not a task to hand off to a vendor or an IT team; it requires legal analysis and judgment. Otherwise, the only thing AI may streamline is the path to a costly verdict. ■

WILLIAM "BILL" WERTHEIMER (1947-2025)

John G. Adam

Union attorney William Arthur Wertheimer Jr., passed away in August 2025.

Bill had a distinguished legal career as an advocate for union and workers' rights. Out of Wayne law school, Bill clerked for U.S. District Judge James P. Churchill (1924-2020). He then worked at NLRB Region 7. See, *e.g.*, *L & L Shop Rite*, 285 NLRB 1036, 1041 (1987). Bill then worked at the UAW. I was his law clerk while at law school. Bill later went into private practice at the firm that Stuart Israel and I were working and he left to specialize in personal injury cases and trial work. Bill later came to specialize in retiree class action cases.

Stuart and I worked with Bill on many significant labor cases. See, *e.g.*, *UAW v. Honeywell*, 954 F.3d 948 (6th Cir. 2020); *UAW v. Kelsey-Hayes*, 872 F.3d 388 (6th Cir. 2017); and *Fletcher v. Honeywell*, 892 F.3d 217 (6th Cir. 2018). Stuart and Bill had a ten week jury trial in what we called the rail mill case, out of Chicago. *USW v. U.S. Steel Corp.*, 1986 WL 3016, at *2 (N.D.Ill.1986).

Bill volunteered to handle cases for the American Civil Liberties Union. In one notable case, in 2005, he obtained a federal court decision that invalidated a restrictive Dearborn ordinance regulating demonstrations as unconstitutional. *American-Arab Anti-Discrimination Committee v. City of Dearborn,* 418 F.3d 600 (6th Cir. 2005).

Bill was a book lover. I would loan him books on all kinds of topics. He was also an avid traveler, bicyclist and hiker. Bill climbed Mt Kilimanjaro, the mountains of Nepal, the John Muir Trail, and Spain's Camino de Santiago among his many travels.

I will miss him.

ADMINISTRATIVE LAW: HEARINGS AND PRACTITIONER CONSIDERATIONS

Bryan Davis, Jr.

Pre-hearing considerations in the context of administrative law are vital to a practitioners' success within not only the subsequent administrative hearing, but also post-hearing matters, including appeals of administrative decisions.

Certain pre-hearing considerations, including motion practice, discovery, and depositions, were examined in a previous writing, with such writing also emphasizing the quasi-legislative and judicial attributes bestowed upon administrative agencies.

This article dedicates itself to exploring certain aspects of the administrative hearing itself.

Contested Cases Under Michigan's Administrative Procedures Act

Importantly, Michigan's Administrative Procedures Act (MAPA), MCL 24.201 et seq., defines a "contested case" as a proceeding in which "a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing." MCL 24.203(3). As not all statutes require an evidentiary hearing, review of applicable statutes can provide guidance as to whether a proceeding is a contested case. *McBride v. Pontiac School Dist*, 218 Mich App 113, 121-22 (1996).

Here, a contested case hearing, or administrative hearing, will generally require that parties be provided with an opportunity to present evidence as well as call witnesses, among other things. These hearings will generally result in a decision which is based upon both fact and law. Under MAPA, "[a]n agency, 1 or more members of the agency, a person designated by statute or 1 or more hearing officers designated and authorized by the agency to handle contested cases, shall be presiding officers in contested cases." MCL 24.279.

The Michigan Office of Administrative Hearings and Rules (MOAHR) is staffed with administrative law judges (ALJs) which handle a wide-array of contested cases. An "ALJ" is "any person assigned by [MOAHR] to preside over a contested case or other matter, including, but not limited to, a tribal member, hearing officer, presiding officer, referee, or magistrate." R 792.10103(c). The administrative hearing generally entails a proceeding conducted by an ALJ and pertains to disputes between parties regarding regulatory actions taken by an agency. Again, such hearings are similar to, though certainly not identical to, judicial proceedings.

Chapter 4 of MAPA details certain procedures applicable to contested cases. MCL 24.271-.288. Additionally, Part 1 of the Michigan Office of Administrative Hearings and Rules Administrative Hearing Rules (MOAHR Rules) govern the general practice and procedure applicable to administrative hearings conducted by MOAHR, excluding those hearings specifically exempted. R 792.10101-.10137. And while this writing focuses on Chapter 4 of MAPA and the MOAHR Rules, it is important to note that the MOAHR Rules cannot conflict with and/or displace a statute which prescribes certain mandated procedures. R 792.10102(2).

Notably, MAPA is "designed to satisfy modern-day notions of due process while at the same time not placing an undue burden on the day-to-day operation of governmental agencies." *Bd of Ed of Rochester Community Schools v. Michigan State Bd of Ed*, 104 Mich App 569, 580-81 (1981). And, generally, an administrative hearing requires "rudimentary due process." See *Sponick v. Detroit Police Dep't*, 49 Mich App 162 (1973); see also *Bd of Ed of Rochester Community Schools*, 104 Mich App 569.

"Rudimentary due process" demands (i) timely written notice detailing the reasons for proposed administrative action; (ii) an effective opportunity to defend by confronting any adverse witnesses and by being allowed to present in person witnesses, evidence, and arguments; (iii) a hearing examiner other than the individual who made the decision or determination under review; and (iv) a written, although relatively informal, statement of findings.

Sponick, 49 Mich App at 189 (citations omitted).

Here, MAPA and the MOAHR Rules address each of the above requirements and, while subsection (i) above has been largely addressed in the previous article in this series, subsections (ii)-(iv) will be explored further below.

General Overview of Administrative Hearings Under MAPA and the MOAHR Rules

At the outset, MAPA mandates that parties "be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact." MCL 24.272(3). And, pursuant to MAPA, the presiding officer is empowered to "[r]egulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents." MCL 24.280(1)(d). As such, the ALJ holds a large degree of control over the tenure and structure of the administrative hearing.

Notably, MAPA does not place the burden of proof upon a given party in the context of contested cases. However, the MOAHR rules provide that "[u]nless otherwise directed by the administrative law judge, the party having the burden of proof shall go forward first with presentation of evidence." R 792.10124(2). And, "[e]xcept as otherwise provided for by statute or rule, the complaining party has the burden of proving, by a preponderance of the evidence, the basis for the requested relief or action." R 792.10124(3).

1. Opening Statements

With respect to the administrative hearing itself, while not explicitly addresses within the MOAHR Rules, parties will often be afforded the opportunity to provide an opening statement. This opening statement can be valuable for parties in attempting to frame their case, not only allowing the parties to note the facts that the party intends to present during the course of the administrative hearing, but also the evidence that the party intends to utilize to support its position.

2. Evidence

MOAHR Rules provide that "The Michigan rules of evidence, as applied in a civil case in circuit court shall be followed in all proceedings as far as practicable, but an administrative law judge may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs." R 792.10125(1).

Additionally, MAPA provides that, "[i]n a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. MCL **24.275.** In light of such language, evidence may be admitted in an administrative hearing which otherwise might not be admitted in court.

Notably, the MOAHR Rules and MAPA are identical in that they provide for the ability of a party to raise objections to offers of evidence, and that "[i]rrelevant, immaterial, or unduly repetitious evidence may be excluded." R 792.10125(2), (4); MCL 24.275.

It is further noted that "Evidence in a proceeding must be offered and made a part of the record if

admitted by the administrative law judge. Other factual information must not be used as the basis of the decision of the administrative law judge, unless parties are provided notice. Documentary evidence may be received in the form of a copy or excerpt, if the original is not readily available," and, pursuant to MCL 24.276, documentary evidence "may be incorporated by reference, if the materials so incorporated are available for examination by the parties." R 792.10126(1); see also MCL 24.276. "If materials and exhibits offered, but not admitted, are made part of the record for purposes of appeal, they must be clearly marked by the administrative law judge as 'rejected.'" R 792.10126(2).

3. Official Notice of Facts

ALJs are permitted to "take official notice of judicially cognizable facts, and general, technical, or scientific facts within an agency's specialized knowledge. R 792.10127; see also MCL 24.277. It is noted that MAPA further provides that "[a]n agency may use its experience, technical competence and specialized knowledge in the evaluation of evidence presented to it." MCL 24.277. Often times, such facts will not require formal proofs and may be generally known facts or may be readily determinable facts. Notably, however, ALJs are required to "notify parties at the earliest practicable time of any officially noticed fact which pertains to a material disputed issue," and, "[o]n timely request before issuance of a final decision, the parties shall be provided an opportunity to dispute the fact or its materiality." R 792.10127.

4. Witnesses

Witnesses are often called to provide testimony in a hearing and aid the ALJ in establishing the applicable facts at issue in a given case, with witnesses providing testimony "upon oath or affirmation." R 792.10128(1). However, ALJs are permitted to "limit the number of witnesses to prevent cumulative or irrelevant evidence, and to prevent unnecessary delay." R 792.10128 (5)

While not always occurring, witnesses will often be sequestered by the ALJ either on the ALJs own action, or upon request of a party. R 792.10128(2). It should further be noted that opposing parties are entitled to cross-examination of witnesses. R 792.10128 (3). Here, MAPA further provides that "[a] party may cross-examine a witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence," and "[a] party may submit rebuttal evidence." MCL 24.272(4).

5. Record

In each administrative hearing, MOAHR is required to "maintain an official record of each case or proceeding." R 792.10120(1). Here, the official record is required to include: "

a. Notice of hearings and orders of adjournment.

b. Prehearing orders.

c. Motions, pleadings, briefs, petitions, requests, agency rulings and intermediate written rulings.

d. Evidence presented.

e. A statement of matters officially noticed.

f. Offers of proof, objections, and rulings.

g. An official recording of the proceeding prepared by the administrative law judge.

h. Transcripts, if ordered by the administrative law judge or submitted by a party prior to issuance of a final decision.

i. Final orders or orders on reconsideration.

j. Written notation of any ex parte communications referred to on the record.

R 792.10120(2).

Note also MAPA, which requires an agency to prepare an official record of a hearing and include the following:

a. Notices, pleadings, motions and intermediate rulings.

b. Questions and offers of proof, objections and rulings thereon.

c. Evidence presented.

d. Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose.

e. Proposed findings and exceptions.

f. Any decision, opinion, order or report by the officer presiding at the hearing and by the agency.

MCL 24.286(1).

On certain occasions, the ALJ "may specify corrections to an official hearing transcript or make provisions for any party to request relevant corrections of the official hearing transcript." R

(Continued on page 10)

ADMINISTRATIVE LAW: HEARINGS AND PRACTITIONER CONSIDERATIONS

(Continued from page 9)

792.10108(1). However, if the ALJ "specifies the corrections, the [ALJ] shall provide 7 days notice to all parties and a reasonable time for responses in support of or in opposition to all or part of the proposed corrections." 792.10108(2).

6. Default Judgements

It is noted that MOAHR Rules provide for default judgments, stating that, in the event that "a party fails to participate in a scheduled proceeding after a properly served notice, the administrative law judge may conduct the proceeding without participation of the

absent party," and "if a party fails to participate in a proceeding, the administrative law judge may issue a default order or other dispositive order." R 792.10134(1). After a default order has been issued, the party against whom such order was entered may, within seven days following service of such order, request, via written motion, that the order be vacated, however, the party will be required to demonstrate "good cause for failing to participate in [the] scheduled proceeding after a properly served notice or failing to comply with an order." R 792.10134(2).

It is also noted that MAPA provides, "[i]f a party fails to appear in a contested case after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party." 24.272(1).

7. Post-Hearing Briefs

Conclusion to the administrative hearing will likely include either closing oral statements from the parties, or submission of post-hearing briefs. See R 792.10124; .10130. Here, MOAHR Rules provide that "[a] party may make or waive a closing statement. If a party elects to make a closing statement, the [ALJ] may order closing arguments to be submitted in writing and may require written proposed findings of fact and conclusions of law." MOAHR Rules also provide that "[a] party may request an opportunity to submit a post-hearing brief," and that the ALJ "may grant or deny the request based on the nature of the proceedings." R 792.10130. It is further noted that the ALJ themselves may require submission of post-hearing briefs. R 792.10130.

8. Requests for Rehearing

MOAHR Rules provide for requests for rehearing, stating that, "[w]here for justifiable reasons the record of testimony made at the hearing is found to be inadequate for purposes of judicial review, the [ALJ] on [their] own initiative, or on request of a party, shall order a rehearing." R 792.10136(1); See also MCL 24.287. Notably, however, requests for rehearing must be filed "prior to submission of a proposal for decision to the final decision authority or prior to issuance of a final decision by the administrative law judge." R 792.10136(2). Here, if the request for rehearing is granted, the subsequent rehearing will be "noticed and conducted in the same manner as an original hearing," and "[t]he evidence received at the rehearing shall be included in the record for any further department, agency, or judicial review." *Id*. Also, "[a] decision from the original hearing may be amended or vacated after the rehearing." *Id*.

9. Proposals for Decision

Importantly, absent "authority conferred by statute, administrative rule, or delegation to issue a final decision, the [ALJ] who conducted the hearing or who has read the complete record shall issue a proposal for decision." R 792.10131(1). Here, the proposal for decision "shall contain findings of fact and conclusions of law, including rationale for conclusions reached." R 792.10131(3); see also 24.281(2).

Notably, in the event a final decision is made by an individual "who did not conduct the hearing or review the record, the decision, if adverse to a party other than the agency itself, shall not be made until a proposal for decision is served on the parties and an opportunity is given to each party adversely affected to file exceptions and present written arguments to the person who will make the final decision." R 792.10131(2); see also 24.281(1). And, a proposal for decision will becomes "a final decision in the absence of the timely filing of exceptions or review by an agency with final decision authority." R 792.10131(4); see also MCL 24.281(3).

10. Final Decision and Order

Importantly, MAPA provides detailed requirements for final decisions, especially as it pertains to findings of fact and conclusions of law, as such must be included in the final decision or order of an agency in a contested case. See MCL 24.285. Notably, "[f]indings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. If a party submits proposed findings of fact that would control the decision or order, the decision or order shall include a ruling upon each proposed finding." *Id*. And, "[e]ach conclusion of law shall be supported by authority or reasoned opinion." *Id*.

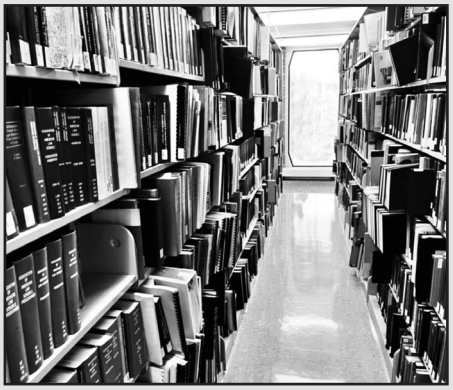
A decision or order of an agency may not be made absent "consideration of the record as a whole or a portion of the record as may be cited by any party to the proceeding and as supported by and in accordance with the competent, material, and substantial evidence." *Id*. Copies of administrative decisions or orders are required to be delivered to the parties or their attorneys of record." *Id*.

Here, it should also be noted that Michigan's Constitution provides, in relevant part, that "[a]ll final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law," and "[t]his review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record." Mich Const 1963, art 6, §28.

For practitioners within the administrative realm, strategy and preparation with respect to administrative hearings is

essential and must be formulated based upon the facts at issue in a given case, the issues before the administrative tribunal, and the applicable administrative law at hand. And, again, while the administrative hearing is not identical to a judicial proceeding, it should be handled with no less care, diligence, and professionalism. Certainly, post-administrative hearing matters, including potential appeals, may very well be directly impacted by a practitioners' preparation for and handling of the administrative hearing itself. ■

AUTHOR'S NOTE: The views and opinions expressed herein are my own and may not reflect the views and opinions of the Michigan Department of Attorney General nor the Attorney General themselves.



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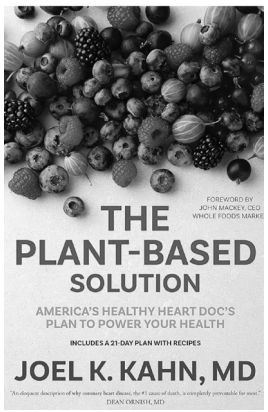

WEIGHTY MATTERS

Dr. Joel Kahn

In my experience as a cardiologist caring for many lawyers, the demands of the job may be an impediment to managing optimal health. I wrote a book called Dead Execs Don't Get Bonuses but I have lectured to law firms and changed the word Execs to Lawyers and it resonated.

Most of us need some short cuts, often called biohacks, to optimize our health. A standing desk is a biohack. A treadmill desk is even a more advanced biohack. Another one to know about, discussed here, are lightly weighted vests that can be worn during the day at the office and provide some extra exercise on the body. I do this at my office and maybe you will too.

A new study suggests that wearing a weighted vest during much of the day may facilitate a leaner and more muscular body.

A sample of 18 older adults (70 years, 83% women, 78% white) with obesity participated in a 6-month weight loss intervention and were followed after the 6-month low-calorie program. At the end of 6 months, half were selected at random to wear a weighted vest and half just tried to manage their weight on their own. By 24-months, the group wearing the weighted vest regained approximately half of lost body weight while the control group sadly regained all of their body weight.

This fascinating pilot study suggests that wearing a weighted vest use during caloric restriction may be associated with reduced weight regain. The authors suggested that there is a mechanism wherein our bodies sense the extra weight and suppress appetite to lower the body weight.

I am now wearing an attractive 7.5 lb weighted vest while I see patients. Many ask me why I am wearing a vest and it is an opportunity to discuss "biohacks" for optimal health. The scales of justice, often depicted in imagery of Lady Justice, represent the legal principle of weighing evidence and arguments to ensure fairness and impartiality in legal proceedings. They symbolize the idea that justice should be applied objectively, with both sides of a case considered before a decision is made.

Unfortunately, the scale of body weight is also objective and can identify lawyers who are overweight and obese and prone to premature diabetes, heart disease, cancer, and dementia. Adding "biohacks" like a weighted vest might tip the scales of health towards healing and longevity. ■

SHOULD YOU USE A PERFORMANCE IMPROVEMENT PLAN?

Timothy H. Howlett
Dickinson Wright PLLC

A Performance Improvement Plan ("PIP") is a long-standing HR tool for managing underperforming employees. Employers often use a PIP to document deficiencies and outline specific goals the underperforming employee must reach within a specific timeframe.

While PIPs sound good in theory, PIPs have come under criticism recently—by employees, HR professionals, and even employment lawyers. A primary criticism is that PIPs are used as a check-the-box step before an employee is fired. Employees often view them as a sign their job is already lost, leading to disengagement rather than improvement. Because of this, they are often viewed as a cost cutting measure used in an effort to get employees to resign rather than go through a PIP.

From a legal standpoint, a PIP can help defend against wrongful termination claims—but only if truly fair and well-documented. Indeed, if an employee is terminated for performance issues, their counsel may claim they weren't given an opportunity to improve and often argue that a PIP should have been used as a last step before termination.

Practical Considerations. PIPs can serve a useful purpose, but do not necessarily fit every situation. The following are points that should be considered when considering if a PIP is the right performance-management tool:

1. **Determine if the issue with the employee is a performance issue or a misalignment of expectations.**

2. **Have there been discussions with the employee regarding performance issues prior to the PIP?**

3. **Has the employee received clear and consistent feedback before the PIP?**

The employer must examine each situation to determine whether to engage in a PIP. If that examination leads to a conclusion that the specific performance issues or the personality of the employee or the supervisor make it highly unlikely that the PIP will be successful, then it should not be used.

If a PIP is not appropriate, the employer should instead consider terminating the employee at the time, providing it is confident that termination is justified.

If a PIP is determined to be advantageous to the situation, the PIP should be aligned to identify specific, measurable, objective, and realistic performance goals. The PIP should also allow for a reasonable time to ensure the employee is given proper time to adjust the employee's work to meet the performance expectations. Improvement takes time. If it is not reasonable, it will be negative evidence rather than positive evidence if the employee is terminated or demoted.

HR should be involved, if not also legal, to ensure consistency and to monitor the conduct of both the supervisor and the employee during the PIP. It is also important to ensure supervisor buy-in and to also determine whether the supervisor is doing their share to properly manage the employee.

Employers should also ensure that PIPs are fairly applied among all employees to avoid allegations of discrimination and unfair treatment.

The PIP should provide for regular meetings and feedback. The employer should be committed to those dates, and if for some reason a meeting has to be moved, it should be rescheduled as soon as possible.

There should be a record kept providing information regarding the feedback on the PIP and the meetings that occurred during the PIP. The feedback should acknowledge any improvement that is made.

At the end of the PIP, the employer should evaluate the employee's performance under the PIP. The employer can remove the employee from the PIP with a communication that the improved level of employment needs to continue; choose to extend it if there has been improvement but not enough for satisfactory completion; or terminate the employee if appropriate in consultation with HR and Legal.

Consider alternatives. Some companies have moved away from PIPs and instead use:

1. **Regular feedback loops and coaching sessions.**

2. **Collaborative performance plans where the employee and supervisor create an improvement strategy together.**

3. **Severance agreements, if both parties agree that parting ways is the best option or it is determined that the performance issues cannot be corrected.**

In short, a PIP can be a useful tool to address performance issues. It is not a one-size-fits-all tool. As a result, the employer should carefully evaluate the situation and seek legal counsel, as appropriate, before and at the end of the PIP. ■

MERC ADDRESSES UNION PLACEMENT ISSUES

Lauren A. Nicholson
White Schneider PC

Kalamazoo Valley Community College -and- Kalamazoo Valley Community College Faculty Association, AAUP/AFT, Case No. 23-E-1033-CE & 23-F-1060-UC (June 10, 2025)

In this case, the union filed an unfair labor practice charge (ULP) against the public employer alleging that the employer violated PERA by unilaterally removing the position of Museum Programs Coordinator from its bargaining unit. Shortly thereafter, the union also filed a unit clarification petition, seeking an order to clarify its bargaining unit to include the positions of Accessibility and Accommodations Liaison, Planetarium Specialist, and Program Coordinator. The proceedings were consolidated and a hearing was held before the Administrative Law Judge (ALJ) Travis Calderwood.

The union argued that the College violated its duty to bargain under PERA by unilaterally reclassifying and excluding the Program Coordinator position, allegedly renaming the union-represented Museum Programs Coordinator role. The employer contested this claim, and the ALJ agreed, finding the Program Coordinator was a newly created position, not merely retitled. The ALJ emphasized that while the roles shared some duties and qualifications, the Program Coordinator lacked many of the key responsibilities central to the Museum Program Coordinator position. The pay scales for the two roles also varied significantly.

Nonetheless, the ALJ approved the unions unit clarification petition to include both the Planetarium Specialist and Program Coordinator positions. The ALJ ruled that despite the differences from their predecessor positions, the roles shared a sufficient community of interest with existing unit members, including the Museum Programs Coordinator and Planetarium Coordinator roles. The ALJ relied on long-standing precedent that when addressing petitions involving higher education, the Commission has consistently found a community of interest between teaching faculty and supportive professional staff who may do little or no actual teaching based upon the integration of their functions and their "synergistic efforts aimed at the education of university students." *Wayne State Univ*, 1972 MERC Lab Op 140, 144-146.

The employer also argued that the union acquiesced to the exclusion of the positions due to the length in time between the positions' posting in July and August 2022 and the filing of the petition on May 26, 2023. The ALJ rejected this argument, relying upon union testimony that it did not become aware of the new roles until early 2023. Additionally, the employer failed to present any evidence that the union was aware of the new roles or even had access to the job postings.

Ultimately, while the ULP was denied, the ALJ's decision provided the union with the opportunity to expand its representation to include the Program Coordinator and Planetarium Specialist position. Further, it underscores the Commission's preference to avoid leaving isolated position unrepresented where a community of interest exists. No exceptions were filed, and the Commission adopted the ALJ's Recommended Order.

Pontiac Public Schools -and- Michigan Education Association, Case No. 23-L-1895-RC (May 16, 2025)

In this case, the union filed a Petition of Certification of Representative against the employer, arguing that the new positions of Police Authority Officers (PAOs) and Safety and Security Officers (SSOs) must be given the option to join the district's existing Pontiac Paraeducators Instructors Association (PPIA) bargaining unit, represented by the MEA/NEA.

In this quasi-unit clarification proceeding, the union presented evidence that the 70 teacher assistants and paraeducators already represented by the PPIA unit share a sufficient community of interest with the PAO and SSO positions, such that the new roles should be eligible to join. The public employer argued that the PAOs and SSOs were fundamentally different from other unit members due to their security focused roles, distinct uniforms, specialized training, and "quasi-military" chain of command.

In its analysis, the Commission determined that the PAOs and SSOs shared a sufficient community of interest with the existing bargaining unit to justify holding an election. The Commission emphasized that the day to day responsibilities of PAOs and SSOs – interacting with students, de-escalating conflicts, and ensuring a safe school environment – overlapped significantly with the student-centered goals of existing unit members.

The Commission also rejected the employer's argument that the officers are the equivalent of guards under the National Labor Relations Act (NLRA), and should therefore be excluded from a mixed unit. Relying upon *Beecher Community School District*, 8 MPER 26044 (1995), the Commission reasoned that, unlike the NLRA, PERA does not prohibit "guard" and non-guard employees from being represented in the same bargaining unit.

The Commission also dismissed concerns about differences in pay scales, work rules, or discipline procedures. While acknowledging that PAOs and SSOs have different uniforms and chains of command, the Commission noted that differences in duties or structure alone do not preclude inclusion in a bargaining unit when other community of interest factors are met. All PAOs, SSOs, and PPIA unit members work at district schools, report to central administrators, and receive similar employment benefits.

Lastly the Commission emphasized its policy to create broad, inclusive units rather than leave isolated positions unrepresented. The Commission concluded that there was a valid question of representation and directed that an election be held among the PAOs and SSOs to determine whether they wish to represented by MEA. ■

THE CENTENNIAL OF THE FEDERAL ARBITRATION ACT: A CENTURY OF DISPUTE RESOLUTION

Lisa W. Timmons
Arbitrator and Mediator

The Federal Arbitration Act (FAA), enacted on February 12, 1925, has been a cornerstone of American dispute resolution for a century. It transformed arbitration from a seldom-used alternative into a central feature of the U.S. legal system. Over the past 100 years, the FAA has evolved through legislative amendments, judicial interpretations, and policy shifts, solidifying arbitration as a preferred method for resolving disputes in commercial, labor, and consumer contexts. This article explores the origins of the FAA, its legislative history, and recent U.S. Supreme Court cases that may shape its future.

Historical Origins of the FAA

1. Pre-FAA: Hostility Toward Arbitration in Early America

Before the FAA's enactment, arbitration faced significant resistance in the United States. Influenced by English common law, the U.S. legal system was often hostile toward arbitration agreements, viewing them as attempts to bypass judicial authority. Courts frequently refused to enforce arbitration clauses, compelling parties to litigate despite prior agreements to arbitrate disputes.

This reluctance was rooted in concerns that arbitration lacked procedural safeguards and that private dispute resolution should not supplant formal judicial processes. Many state laws rendered arbitration agreements unenforceable, making arbitration an impractical alternative to litigation.

2. The Need for Reform: Rise of Commercial Arbitration

In the early 20th century, the rapid expansion of commerce and industry in the U.S. led to increased litigation, congesting court dockets and creating inefficiencies in contract enforcement. Business leaders and trade organizations advocated for arbitration reform, viewing it as a more efficient and cost-effective method for resolving commercial disputes.

The American Bar Association (ABA) and the New York Chamber of Commerce spearheaded efforts for federal legislation to ensure the enforceability of arbitration agreements. These efforts culminated in the drafting of the United States Arbitration Act, later known as the Federal Arbitration Act.

Passage of the Federal Arbitration Act

3. Congressional Sponsors and Presidential Signing

The Federal Arbitration Act was enacted on February 12, 1925, and became effective on January 1, 1926. It was introduced by Senator Charles L. Bernheimer, who was also a dry goods merchant in Manhattan, and supported by members of Congress who viewed arbitration as essential for American commerce. President Calvin Coolidge signed the Act into law, marking a significant shift in the legal landscape regarding arbitration agreements. The FAA aimed to:

1. Make arbitration agreements legally enforceable, preventing courts from arbitrarily invalidating them.

2. Reduce judicial hostility toward arbitration.

3. Promote efficiency and finality in dispute resolution by diverting disputes from congested courts.

Initially, the FAA applied primarily to maritime and commercial contracts, leaving employment and consumer arbitration largely unregulated at the time. This changed gradually over the decades, largely due to judicial interpretation rather than legislative amendments. The expansion of the FAA's reach, particularly into employment contracts, occurred through a series of Supreme Court decisions that broadened its scope beyond its original intent. Examples include:

***4. Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) – Employment Arbitration Expansion.**

In *Gilmer* the Supreme Court ruled that employment arbitration agreements were enforceable under the FAA unless Congress had explicitly stated otherwise. This decision marked a significant shift in how the FAA applied to workers, effectively allowing employers to compel arbitration of employment disputes. The ruling encouraged employers across industries to adopt mandatory arbitration clauses in employment contracts.

***5. Circuit City Stores v. Adams*, 532 U.S. 105 (2001) – Narrowing the FAA's Employment Exemption.**

Held that the FAA contains a transportation worker exemption in 9 U.S.C. § 1, excluding "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

***6. AT&T v. Concepcion*, 563 U.S. 333 (2011)– Consumer Arbitration Expansion.**

The Court held the FAA **preempts California's Discover Bank rule**, which invalidated **class-action waivers** in consumer arbitration agreements because that rule "stands as an obstacle" to the FAA. This ruling overturned state laws that had attempted to restrict forced arbitration, leading to widespread enforcement of arbitration agreements in consumer contracts. After this case, businesses increasingly included class action waivers in arbitration agreements, limiting consumers' ability to bring collective lawsuits.

***7. Epic Sys. Corp. v. Lewis*, 584 U.S. 497 (2018)– Class Action Waivers Upheld**

. The Supreme Court ruled that employers could enforce arbitration clauses that require employees to waive their right

to collective or class action lawsuits. This decision further strengthened employer-controlled arbitration, limiting workers' ability to pursue legal claims collectively.

Legislative inaction also played a key role in the expansion of arbitration, as Congress has not amended the FAA to limit its scope, effectively allowing the courts to determine its application. Additionally, pro-business policy shifts contributed to this expansion, as arbitration became increasingly favored by businesses due to its cost-effectiveness and efficiency compared to litigation. Finally, preemption of state laws further solidified arbitration's dominance, with the Supreme Court consistently striking down state attempts to restrict arbitration agreements in employment and consumer contracts.

8. Worker Exemptions Under the FAA

Certain classifications of workers are exempt from the FAA, despite its broad applicability to most private-sector employees. **Section 1** of the FAA excludes **"contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."** This exemption covers transportation workers (including independent contractors) and, per *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246 (2024), does **not** depend on the employer's industry. These exemptions highlight a congressional intent to exclude certain workers reach of the FAA due to the presence of other statutory frameworks that govern their labor rights, such as the Railway Labor Act (RLA) (railroad and airline employees), Civil Service Reform Act (CSRA)(federal employees), and 9 U.S.C. § 1(seamen and maritime workers).

9. Restoring Choice: The End of Forced Arbitration in Sexual Misconduct Cases

On March 3, 2022, President Joseph Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFASHA). This landmark legislation amended the FAA rendering pre-dispute arbitration agreements unenforceable for claims involving sexual assault or sexual harassment. The Act empowers survivors to choose between pursuing their claims in court or through arbitration, rather than being compelled into private arbitration proceedings. Notably, the law applies to any dispute or claim that arises on or after its enactment date, regardless of when the underlying conduct occurred. This ensures that individuals who experience such misconduct have the autonomy to decide the forum in which to seek justice.

Recent U.S. Supreme Court Cases Impacting the FAA

- ***Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022)**: Clarified that a party does not have to prove prejudice when arguing that another party has waived their right to arbitration.

- ***Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022**): The Supreme Court ruled that California's Private Attorneys General Act (PAGA) claims can be subject to arbitration, limiting employees' ability to bring representative labor law claims. After ***Viking River***, the **California Supreme Court** in ***Adolph v. Uber Techs., Inc.*, 14 Cal. 5th 1104, 310 Cal. Rptr. 3d 668, 532 P.3d 682 (2023)** held plaintiffs retain standing to pursue **non-individual PAGA claims in court.**

- ***Coinbase, Inc. v. Bielski*, 599 U.S. 736 (2023):** Held that when a federal district court denies a motion to compel arbitration, the losing party has a statutory right to an interlocutory appeal. 9 U.S.C.S. § 16(a). The district court must stay its pre-trial and trial proceedings while an interlocutory appeal is ongoing.

Then in 2024 alone, the Supreme Court issued several significant decisions regarding arbitration:

- ***Smith v. Spizzirri*, 601 U.S. 472 (2024):** The Court unanimously held that under Section 3 of the FAA, federal courts are required to stay proceedings when a dispute is referred to arbitration, rather than dismissing the case. This decision emphasizes the mandatory nature of staying proceedings pending arbitration, ensuring that parties can return to court if necessary, after arbitration concludes.

- ***Coinbase, Inc. v. Suski*, 602 U.S. 143 (2024):** The Court stressed the contractual foundation of arbitration agreements, ruling that disputes over the applicability of arbitration clauses should be resolved based on traditional contract principles. The decision underscores that parties are bound by the terms to which they have mutually agreed, reinforcing the importance of clear and explicit arbitration provisions in contracts.

- ***Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246 (2024):** In a unanimous decision, the Court clarified that transportation workers do not need to be employed within the transportation industry to qualify for the FAA's exemption. This ruling broadens the scope of workers who can seek exemption from mandatory arbitration under the FAA, focusing on the nature of the work performed rather than the employer's industry classification.

Lastly, the following petition is pending for the Court's September 29, 2025 Conference:

***Live Nation Ent., Inc. v. Heckman* (U.S. – pending). Cert petition filed May 5, 2025 (No. 24-1145)**: asks (1) whether the **FAA protects only "traditional, bilateral" arbitration** or **all** arbitration agreements, and (2) whether **California's severability doctrine** is **preempted** because it targets arbitration agreements.

Conclusion

For the last century, the Federal Arbitration Act has shaped the way Americans resolve disputes. Initially enacted to promote efficiency and fairness in commercial transactions, the FAA has since expanded to nearly all areas of law, including employment, consumer rights, and international commerce. As arbitration continues to evolve, debates over its fairness and accessibility remain at the forefront. The next century will determine whether arbitration remains dominant or faces greater regulation. ■

THE SOCIAL CONTRACT AND THE SHADOW DOCKET

Barry Goldman

Suppose we have two groups of citizens. Let's call them the Shirts and the Skins. The Shirts believe homosexuality is an abomination that stinketh in the nostrils of the Lord, and abortion is baby murder. The Skins believe homosexuality is perfectly normal and natural, and abortion is a woman's right. How can we build a society where those groups can get along without killing each other?

One approach might be to encourage the two sides to leave each other alone. You think homosexual sex is wrong? Fine, don't engage in it. You think abortion is wrong? Fine, don't have one. But don't tell me what to do. This produces some familiar formulations. Everyone is to have the greatest amount of freedom compatible with similar freedom for everyone else. Your right to swing your arm ends where my nose begins. Live and let live.

But that answer doesn't work for Shirts and Skins. If I really believe abortion is baby murder, it isn't enough that I don't do it. I also have a moral duty to prevent you from doing it. I can take a live and let live attitude about what color you paint your house. It's none of my business. But I can't let you murder babies. And I can't compromise. I might accept some strategic compromise on a temporary basis, but I can never permanently accept anything short of complete abolition.

The same is true for people who really believe homosexual behavior is terribly wrong. It's like slavery. Or cannibalism. Or human sacrifice. I can't allow you to throw any virgins into the volcano. None. You also can't engage in ritual cannibalism. Even on special holidays. Compromise is not an option.

The negotiation literature calls these "sacred issues." It is insulting even to suggest compromise on a sacred issue. Sacred issues are incommensurable. If you think I might be persuaded by, say, an offer of money to compromise on a sacred issue, you simply don't understand what a sacred issue is.

So now what?

The answer is politics. The Skins go out and try to convince people to vote for politicians who support Skin policies. The Shirts try to convince people to vote for politicians who support Shirt policies. Then we have an election. The side that gets the most votes wins, and it gets to write the laws. We all live under those laws for a while, and then we have another election.

Naturally, both sides try to cook the books. They gerrymander the voting districts to give their side an advantage. They try to suppress the vote of groups they think will support the other side. Of course they do. And not just because each side wants to maximize its money, power and influence, but because they take their sacred issues seriously.

So far, so good. If we can't agree on substance, at least we can agree on procedure. But we would want some constraints on the law-making power even of our freely, fairly and duly-elected representatives. We would want something like a constitution and a bill of rights. We may be willing to give our law makers plenty of power, but we still need to prevent them from changing the law to the point where it permanently entrenches one side or the other. They can't install a hereditary monarchy. They can make no law abridging freedom of speech or of the press or of the right of the people peaceably to assemble. They can't establish a religion or interfere with the free exercise thereof. They can't deprive people of life, liberty or property without due process of law.

When there are disputes about the application of the laws, we would want them resolved by an independent judiciary, after full briefing and argument, in reasoned, written, publicly available opinions. No Star Chambers. No secret tribunals.

Of course, there are legitimate reasons to keep some information confidential, and there are legitimate emergencies when time is of the essence and ordinary procedures need to be abbreviated. But the default condition in judicial decision making should always be transparency and reasoned discourse.

That is why the explosive growth of the Supreme Court's shadow docket is so alarming. According to Stephen Vladeck, Georgetown law professor and author of *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic,* the number of full court decisions on emergency applications that are not signed, not explained, not argued, and not fully briefed: "went from one every other year during Bush and Obama to almost one a month during the first Trump administration. The Biden administration averaged five per year. And now we're at basically one a week."

Vladeck quotes Justice Kagan: "this Court's shadow-docket decision-making every day becomes more unreasoned, inconsistent, and impossible to defend."

He quotes Adam Serwer's 2021 Atlantic article, *Five Justices Did This Because They Could*:

> The shadow docket has begun to look less like a place for emergency cases than one where Republican-appointed justices can implement their preferred policies without having to go through the tedious formalities of following legal procedure, developing arguments consistent with precedent, or withstanding public scrutiny.

Vladeck's book came out in 2023. Since the beginning of the second Trump term, the situation has gotten far worse. The shadow docket's proliferation of "emergency" decisions has dramatically increased not only in number but in scope. The exception has swallowed the rule. Major decisions on central legal questions are being made in unsigned, unexplained orders. This undermines an essential component of the social contract. The public has a right to expect the Supreme Court to show its work and sign its opinions. We can't expect politicians to be anything other than politicians. But we have a right to expect judges to act like judges and not just politicians in robes.

Justice Kagan, along with Justices Sotomayor and Jackson, has been a fierce critic of the shadow docket. Her dissents in shadow docket cases make for inspiring reading. But a troubling new wrinkle has appeared. Justice Kagan concurred with the majority in *Department of Homeland Security v. D.V.D.* Here is her concurrence (citations omitted):

> I voted to deny the Government's previous stay application in this case, and I continue to believe that this Court should not have stayed the District Court's April

18th order enjoining the Government from deporting non-citizens to third countries without notice or a meaningful opportunity to be heard. But a majority of this Court saw things differently, and I do not see how a district court can compel compliance with an order that this Court has stayed. Because continued enforcement of the District Court's May 21, 2025 order would do just that, I vote to grant the Government's motion for clarification.

That left only Justices Sotomayor and Jackson in dissent. Here are the first few sentences of their dissent:

> The United States may not deport non-citizens to a country where they are likely to be tortured or killed. International and domestic law guarantee that basic human right. In this case, the Government seeks to nullify it by deporting non-citizens to potentially dangerous countries without notice or the opportunity to assert a fear of torture.

And here is their last sentence:

> Today's order clarifies only one thing: Other litigants must follow the rules, but the administration has the Supreme Court on speed dial.

The divergence between Justice Kagan and the other two progressive justices is important here. Vladeck wrote a Substack about it. Kagan's is a lawyerly approach. This is not surprising. Before she was appointed to the Supreme Court, Kagan was the dean of Harvard Law School and the solicitor general of the United States. She is a lawyer to the bone. For her, the Law is sacred. She is also perhaps the sharpest knife in the drawer.

Justices Sotomayor and Jackson's approach is not so legalistic. They refuse to lose sight of the real-world consequences of their actions. Real people will be tortured and killed as a result of this decision. It is a mistake to bring a knife – even a very sharp one – to a gunfight.

One hundred years ago, H.L. Mencken described the view out the window of a train traveling east from Pittsburgh. The essay is called "The Libido for the Ugly" It is appropriate to borrow Mencken's phrase to describe the Trump administration's policies. Trump and his appointees, Stephen Miller in particular, have a libido for the cruel. Adam Serwer wrote a justly famous essay on the subject, *The Cruelty is the Point*. In a fight with an adversary like that, the dainty rules of legal formalism are grotesquely out of place. ■

"IMPEACHABLES" AND EXPLANATIONS

Stuart M. Israel

"The demonstration that a witness has previously made statements that contradict her trial testimony is often one of the most dramatic, and damning, aspects of cross examination. Unless you can provide an extremely good explanation of why the witness has changed, or seems to have changed, her story, it is usually best to omit "impeachables" from direct testimony."

Steven Lubet, *Modern Trial Advocacy—Analysis and Practice* (2d ed. 1997) at 55.

Cross-examination that exposes witness inconsistency—revealing the witness's previous contradictory statements and conduct—can demonstrate that the witness is unreliable—mistaken, confused, or lying. As Professor Lubet suggests, it usually is best that a witness avoid "impeachables." Often less is more—in the courtroom and out.

1. "Impeachables."

Ray Charles provides memorable examples of impeachment. He sings them in "I've Got News For You," on *Genius + Soul = Jazz* (1961). Listen on YouTube:

You said before we met/
That your life was awful tame/
Well, I took you to a night club/
And the whole band knew your name…

Well, baby, baby, baby/
I've got news for you/
Oh, somehow your story don't ring true…

Well, you phoned me you'd be late/
'Cause you took the wrong express/
And then you walked in smiling/
With your lipstick all a mess…

Oh, you wore a diamond watch/
Claimed it was from Uncle Joe/
When I looked at the inscription/
It said "Love from Daddy-O"…

Ah, if you think that jive will do/
Let me tell you, oh/
I've got news for you…

"Impeachables" exposed in the courtroom harm the inconsistent witness's credibility, and may destroy the case for the witness's side. "Impeachables" can be similarly fraught when exposed in politics and other human endeavors. Everyone pays attention when someone else is "hoist with his own petard," as Shakespeare put it.

Of course, lawyer, you may try to explain away contradictions. If so, as Professor Lubet counsels, you better have an "extremely good explanation."

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"IMPEACHABLES" AND EXPLANATIONS

(Continued from page 17)

2. Good and bad explanations.

A good explanation might be that after-acquired information or later events changed everything. Good explanations for trial-contradictions may be presented during the cross-examination or in re-direct and argument. Good explanations for political contradictions might be presented in media statements and "clarifications." But your explanation better be "extremely good." I've got news for you—if your explanation don't ring true, that jive won't do.

The "two simple words" explanation, for example—suggested by Steve Martin—is confident and versatile, but likely to do the explainer more harm than good. Martin said (on Saturday Night Live, season 3, episode 9, in 1978, italics and punctuation added):

> Now you say, "Steve, what do I say to the tax man when he comes to my door and says 'You have never paid taxes'?" Two simple words. Two simple words in the English language: "I forgot!"
>
> How many times do we let ourselves get into terrible situations because we don't say "I forgot"?
>
> Let's say you're on trial for armed robbery. You say to the judge, "I forgot armed robbery was illegal." Let's suppose he says back to you, "You have committed a foul crime. You have stolen hundreds and thousands of dollars from people at random, and you say, *I forgot*?!"
>
> Two simple words: *Excuuuuuse me*!!

3. Life imitates art.

Here is a life-imitates-art bad-explanation case in point. It is provided by Claire Shipman, once board of trustees co-chair and, as of March 2025, acting president of Columbia University. Perhaps Shipman's effort was assisted by Columbia's legal mavens.

Some background. Events at Columbia since October 2023 drew the attention of the federal government. The Equal Employment Opportunity Commission charged that after "the Oct. 7 Hamas terror attacks," the university violated Title VII of the Civil Rights Act of 1964 by engaging in "a pattern or practice" of unlawful "harassment" against "a class of all Jewish employees." Two not-Jewish custodians also filed EEOC charges against Columbia and, as well, sued "protesters" who, during the April 2024 "occupation" of a campus building, the custodians allege, threatened, assaulted, battered, injured, and "terrorized" them in their workplace, called them, among other things, "Jew-lovers," and held them "against their will" for hours.

In addition the Department of Health and Human Services and Education found that Columbia displayed "deliberate indifference toward the severe and pervasive harassment faced by Jewish students." And the House Committee on Education and Workforce investigated whether the university engaged in violations of Title VI of the Civil Rights Act of 1964.

The House Committee investigation exposed Shipman's late 2023 and 2024 written communications which (1) disparaged government investigation as "capital [sic] hill nonsense"; (2) diminished the fear, felt by "people," of recurring antisemitic violence and harassment, as "not necessarily rational"; (3) denigrated as a "mole" and a "fox in the henhouse" fellow trustee Shoshana Shendelman, whose outspoken support for Jewish students made Shipman "so, so tired"; (4) opined that Shendelman—a neurobiologist and Columbia PhD who, the *Columbia Daily Spectator* reports is "Persian and Jewish," and whose family fled the Islamic Republic of Iran—should "just" not be "on the board"; and (5) prescribed that Columbia needed—"quickly" and "somehow"—"to get somebody from the middle east or who is Arab on our board."

The House Committee leadership wrote on July 1, 2025 asking Shipman for "clarity regarding" her "disturbing" writings which "appear to downplay and even mock the pervasive culture of antisemitism on Columbia's campus" and which raise questions about Columbia officials' "willingness or ability to comply with Title VI."

Shipman explained: "I should not have written those things, and I am sorry." Those "things" do "not reflect how I feel." She wrote "those things" in "a moment of frustration and stress" and "immense pressure," as Columbia "navigated some deeply turbulent times," and she was "wrong." Shipman explained she actually has "tremendous respect and appreciation" for trustee Shendelman, whose "voice on behalf of Columbia's Jewish community" really is not mole-like, or fox-in-henhouse-ish, or tiresome; actually, Shipman explained, it is "critically, important." "I promise to do better," Shipman assured.

A Columbia "spokesperson" similarly explained to the *New York Post* that Shipman's earlier communications "reflect a particularly difficult moment in time for the University" and, despite what she wrote, Shipman actually is "vocally and visibly committed to eradicating antisemitism on campus," that recent "work underway at the university to create a safe and welcoming environment for all community members makes that plain."

Well, excuuuuuse Claire Shipman. She wrote "wrong" things that "do not reflect" how she really feels. Under "immense pressure," during a "moment" that spanned 22 months or so, Shipman apparently forgot that she actually feels that "all community members"—even Jewish students and staff, and even not-Jewish custodians—are entitled to "a safe and welcoming environment" that does not tolerate bigotry, threats, intimidation, or violence.

Or don't excuse her. The *Post* called Shipman's apologetic explanation "groveling." Representative Elise Stefanik and others called on Shipman to resign.

In late July 2025, the EEOC announced an "historic" agreement with Columbia, the "largest EEOC settlement for victims of antisemitism to date, as well as the most significant EEOC settlement for workers of any faith or religion." Columbia agreed "to a $21 million class claims fund to compensate employees who may have experienced antisemitism on Columbia's campus" after October 7, 2023. And, "as part of a multi-agency agreement," Columbia agreed "to a $200 million fine, as well as robust monitoring and other injunctive relief" to

ensure future university compliance with anti-discrimination and civil rights laws.

Perhaps to address those who voice concerns about "academic freedom" and "free speech," the EEOC pointed out that frequent and serious discriminatory workplace harassment is "illegal" and, specifically: "Severe or pervasive antisemitic conduct—like vandalism, assaults, death threats, violent slogans and symbols, disruptive and violent protests in violation of campus policies, and preventing faculty and staff from accessing their place of work and other privileges of employment—can violate college and university employees' Title VII rights."

Shipman explained the $221 million agreement: "While Columbia does not admit to wrongdoing," university "leaders" recognize "that Jewish students and faculty have experienced painful unacceptable incidents, and that reform was and is needed."

4. Explanation testing.

Do you have an "extremely good explanation" for "impeachables"? Does your story ring true? To test your explanation, hypothesize. For example:

Q. [cross-examiner] Your lawyer just now asked on direct examination about the January 2024 events and you testified "XYZ." Correct?

A. Correct.

Q. You gave a March 2024 deposition about the January 2024 events, just a couple months after the events. Your lawyer was there. I asked questions and you answered under oath. You swore to tell the truth. Correct?

A. Yes.

Q. I am going to read your March 2024 testimony from transcript page 47, line 16. Take a look. I asked about the January 2024 events. You answered—I am quoting—"ABC." Did I read your testimony accurately?

A. Yes.

Q. ABC is the *exact opposite* of XYZ, isn't it?

A. Well, I suppose so, but I can explain. I gave my deposition in a moment of frustration, stress, immense pressure, and deeply turbulent times. I should not have said ABC. I am sorry. ABC does not reflect how I feel. While I do not admit wrongdoing, I promise to do better.

Q. Your *exact* deposition testimony was "ABC." Isn't that so?

A. Well, excuuuuuse me! ■

AUTHOR'S NOTE: The Columbia events and settlement are the subject of much on the Internet that may be of particular interest to labor, employment, and civil rights lawyers, including material from the EEOC, the House Committee on Education and Workforce, and other government agencies; material from Columbia and Acting President Shipman; and the lawsuit filed by the two janitors, *Mariano Torres and Lester Wilson v. James Carlson, et al.,* U.S.D.C., S.D.N.Y civ. action no. 25-cv-3474 (filed 4/25/25).

SIXTH CIRCUIT ON (1) ESTIMATED UNFORESEEABLE INTERMITTENT FMLA AND (2) AGE DISCRIMINATION

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1.

Can a medical certification that gives a specific number of days in each month an employee might need intermittent, unforeseeable leave operate as a barrier for the employee to take additional days of FMLA leave? On August 25, 2025, the Sixth Circuit held that it cannot—so long as the leave is truly unforeseeable. *Jackson v. USPS*, ___ F.4th ___, 2025 WL 2417014 (6th Cir.).

Kristopher Jackson was diagnosed with sickle cell anemia at birth. The symptoms he experiences vary from day to day. On some days, Jackson's symptoms include fatigue, pain, and numbness. On worse days, his symptoms can cause temporary paralysis.

In November 2011, the United States Postal Service ("USPS") hired Jackson as a mail clerk. During his employment, Jackson had regular unexcused absences. USPS issued a notice of removal to terminate Jackson's employment in July 2018, relying on seventeen unscheduled absences, two notices of suspension, and a prior warning letter. Through his union, Jackson avoided termination by agreeing to a Last Chance Agreement ("LCA"), which was his "final opportunity" to correct his attendance issues. The LCA would apply for two years and limited Jackson to three unscheduled absences (*i.e.*, absences that were not scheduled or approved in advance) in a six-month period and required him to call a USPS hotline in the case of an unscheduled absence. Jackson also could not have any absence without leave ("AWOL") for the duration of the LCA. Finally, the LCA included a provision that any absences under the Family and Medical Leave Act ("FMLA") would not count towards these limits if the absence met "all the qualifications and documentation requirements."

Even before the LCA, USPS had approved Jackson for FMLA related to his sickle cell anemia. Jackson renewed his FMLA certification form in July 2018. At that time, his provider indicated that Jackson could experience "flare-ups" twice per month. But on April 30, 2019, USPS terminated Jackson's employment for violating the LCA because he had allegedly incurred six unexcused absences and one AWOL. Jackson contended that four of the unexcused absences and the one AWOL were for reasons covered by the FMLA and, therefore, should not have counted against him. Four of the relevant absences were in March 2019.

(Continued on page 20)

SIXTH CIRCUIT ON (1) ESTIMATED UNFORSEEABLE INTERMITTENT FMLA AND (2) AGE DISCRIMINATION

(Continued from page 19)

The district court granted summary judgment to USPS based in part on a finding that Jackson exceeded the amount of leave his FMLA certification entitled him to by taking FMLA leave on four occasions in March. Jackson appealed, arguing with respect to this finding that a medical certificate's estimation of intermittent leave did not create a ceiling for monthly FMLA leave.

On appeal, the Sixth Circuit concluded that an estimate on a medical certification form of the intermittent, unforeseeable FMLA leave an employee might need does not create an absolute limit on the amount of leave the employee can take. In so ruling, the Court reasoned that *unforeseeable* leave is just that—unforeseeable. When an employee's condition causes random and unpredictable flare-ups, as is the case with Jackson, such a condition requires intermittent unforeseeable leave for which there cannot be a hard limit. Because the symptoms can be unpredictable, this tends to lead to a medical certification that cannot give a clear, consistent number of days an employee might need off each month. Therefore, in such a situation, a listed number of expected days per month that an employee might need to take unforeseeable, intermittent FMLA leave should be interpreted as an approximation or estimate.

This case underscores the distinction between leave that is foreseeable and leave that is truly unpredictable. In cases such as Jackson's, the Sixth Circuit stated that an FMLA certification does not establish a "hard cap" but rather serves to give an employer notice of how unavailable its employee might be. For employers managing employees who need unpredictable, intermittent leave, the Court noted that such employers can request recertification if they believe their employee is exceeding the estimated number of unforeseeable leave days under the FMLA. As the Court noted, the burden of how to handle an incorrect estimate is on the employer.

2.

In another case the Sixth Circuit tosses jury verdict in age bias case. Comments like "let the old guy do it," "old man," and "are you ready to retire?" were at the heart of Kenneth Lowe's claim that Walbro terminated him because of his age. Lowe, who had worked for the company for over 40 years, alleged that his supervisor made repeated ageist remarks leading to his termination in 2018. A jury agreed, awarding him over $2.3 million in damages under the Michigan's Elliott-Larsen Civil Rights. But on August 5, 2025, the U.S. Court of Appeals for the Sixth Circuit confirmed what the district court already ruled: those comments weren't enough to justify the verdict. *Lowe v. Walbro, LLC,* No. 24-2011 (6th Cir. Aug. 5, 2025).

What Happened? Lowe alleged his supervisor made ageist comments over a period of time, starting in 2016. Lowe beat summary judgment due largely to his deposition testimony quoting his supervisor allegedly saying during the termination meeting in June 2018: *"You're getting up there in years, you're getting close to retirement age, and the company is going and you are going in a different direction."* That statement, the Sixth Circuit said back in 2020, constituted direct evidence of discriminatory animus. 972 F.3d 827, 831 (6th Cir. 2020). But at trial in the federal district court in fall 2023, Plaintiff's counsel never introduced that testimony—or any version of it—as substantive evidence. Instead of putting Lowe's testimony about those specific words into the trial record, Plaintiff's counsel relied on a backdoor reference: an expert report from Walbro's forensic psychiatrist, which quoted Lowe as allegedly saying those exact words to her during his psychiatric evaluation. At trial, the psychiatrist denied on the stand that Lowe ever told her that statement. On cross-examination, Plaintiff's counsel attempted to impeach her by reading directly from her report, which contained the quote:

"You're getting up there in years, you're getting close to retirement age. We, the company, are going to go in a different direction." Plaintiff's counsel agreed the report was hearsay and was being used only for impeachment purposes—not as substantive evidence. Neither side argued for a hearsay exception. As a result, the most compelling age-based comment in the case—the one that got the plaintiff past summary judgment—was not part of the evidence the jury could consider. The court called this a "materially different" evidentiary record from summary judgment and concluded that without that direct evidence, there was no legally sufficient basis for the jury's verdict. With the psychiatric report excluded as substantive evidence, the (largely) isolated remarks such as "let the old guy do it" and "old man" during team meetings were deemed insufficient to establish a discriminatory motive.

Furthermore, the plaintiff's supervisor did not make any age-related remarks during the termination itself, and the plaintiff expressly admitted that no such comments were made in that meeting at trial. The record also lacked any evidence that a younger employee replaced the plaintiff or that similarly situated younger employees were treated more favorably. To the contrary, the Company had recently hired other managers in their 50s. Moreover, Lowe's position was eliminated altogether, rather than filled by someone else. Thus, despite a jury verdict awarding: (a) $443,418 in back pay; (b) $561,472 in front pay; and (c) $1,300,000 in emotional damages, the appellate court found that Lowe failed to meet his respective burden of proof. As a result, the district court granted—and the Sixth Circuit affirmed—the motion for judgment as a matter of law post-jury trial.

Lowe v. Walbro serves as a cautionary tale for employment litigators: a case built on seemingly strong (and direct) evidence of discriminatory animus can unravel if that evidence is not properly presented to the jury. Despite earlier success on appeal, Lowe's failure to introduce his supervisor's alleged age-related comments as **substantive** evidence left the jury with too little to legally support its verdict. ■

AFFIRMATIVE DEFENSES, *TWOMBLY* AND *IQBAL*, AND FAILURE TO STATE A CLAIM

John G. Adam

What are affirmative defenses? Do the pleading standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), apply to affirmative defenses? Ahead I briefly address some affirmative defense issues.

1.

Fed. R. Civ. P. 8(c) states that a party must "affirmatively state any avoidance or affirmative defense" and identifies eighteen affirmative defenses. A "party must affirmatively state any avoidance or affirmative defense, including":

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- •contributory negligence;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

The Rule contemplates that lawyers may make mistakes so (c)(2) states that if "a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so." So if a party files a counterclaim that is really an affirmative defense, the court may relabel it.

2.

Greenberger v. Bober, Markey, 343 F.R.D. 375, 377 (N.D. Ohio, 2023)(paragraph breaks added) explains that the *Twombly-Iqbal* standards do not apply to affirmative defenses:

> Unlike Rule 8(b)(1)(A), which governs admissions, denials, and defenses to the plaintiff's claims and which mandates that a party responding to a pleading "state in short and plain terms its defenses to each claim," Rule 8(c) requires no short and plain statement supporting any affirmative defense.
>
> Unlike Rule 8(a)(2) governing the complaint, Rule 8(c) requires no showing to support any affirmative defense.
>
> Because *Twombly* and *Iqbal* rely on the text of Rule 8(a)(2), the pleading standard that governs a complaint under that Rule simply does not apply to affirmative defenses.

Judge Laurie Michelson in *Kamal v. Ford*, 2025 WL 2408196 at *2 (E.D. Mich.) agrees that *Twombly* and *Iqbal* do not apply to affirmative defenses.

See Marks and Gadson, *Text, Fairness, And Efficiency: The Case Against The Plausibility Standard For Affirmative Defenses*, 17 The Federal Courts Law Review, 1, 8 (2025) (perma.cc/P6RZ-F98S) (Only the Second Circuit in *GEOMC Co. v. Calmare*, 918 F.3d 92, 98 (2d Cir. 2019) has "held that the plausibility standard does apply to affirmative defenses, albeit with the caveat that applying the plausibility standard is a 'context specific' task.'… With no guidance from the U.S. Supreme Court and little from courts of appeals, district courts have struggled with the question of whether to apply the plausibility standard to affirmative defenses.").

3.

Courts are split on whether failure to state a claim is an affirmative defense or not. See, *e.g.*, *Price v. Woddbury Cty. Jail Adm't*, 2015 WL 8677951, at *2–3 (N.D. Iowa) (discussing split and noting that the Eighth Circuit has not resolved the issue).

But even if failure to state is not an affirmative defense, courts generally do not strike such defenses because there is no prejudice to plaintiff. See *Brewer v. Holland*, 2022 WL 608178, at *2 (W.D.Ky.) (citations omitted, brackets omitted):Defendants' first affirmative defense, i.e., failure to state a claim, is "not an affirmative defenseat all," although "mistakenly categorizing a negative defense as an affirmative defense is not grounds to strike the defense from the Answer.").

In short, defendants are not subject to the pleading standards for their affirmative defenses and it is better as a defendant to err on the side of too many defenses.

If plaintiffs believe an affirmative defense is improper, they can seek to dismiss but must first seek concurrence which may result in voluntary dismissal if the defendant is guilty of affirmative defense inflation. Also, plaintiffs can engage in discovery about the affirmative defenses. ■

MERC NEWS

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Expanding e-Filing & Digital Methods at the Bureau

The Michigan Employment Relations Commission (MERC) continues to modernize its services by expanding electronic case filing options to better serve the public and workplace stakeholders across Michigan. As part of our ongoing commitment to improving the case filing and processing experience, MERC has recently revised its Electronic Filing Policy, launched new Online Web Filing Forms and created a Case Search Tool within MERC eFile. These enhancements will streamline case processing and reduce duplicate filings. Below are key highlights:

1. Revised Policy on Electronic Filings to MERC

The updated policy outlines four acceptable e-filing methods with the agency:

- **MERC eFile System**
- **Designated Email Filing Addresses**
- **Online Web Filing Forms**
- **Designated Fax Filing Numbers**

Electronic filings under this policy allow parties to serve documents electronically to other parties in the case and eliminate the need to submit original or extra copies required under hard copy filing.

Beginning **October 1, 2025**, **electronic filing and electronic service will be mandatory** for the following matters:

- Contract Bargaining and Grievance Mediation
- Grievance Arbitration
- Work Stoppage

Further details on electronic filing methods are available below and on MERC's website: **www.michigan.gov/merc**.

2. New Online Web Forms for Faster, Easier Case Initiations

MERC has introduced several new web-based filing forms, providing parties with a simpler and faster way to initiate cases. These forms allow users to submit all required case information directly through a web browser without downloading or printing anything. Key features include:

- Requires submission of each party representative's name and email address.
- Sends confirmation emails to all listed representatives and the submitter.
- Creates a faster record of event filings, reduces delays and eliminates duplicate submissions.
- Streamlines communication between MERC, labor organizations and employers

The new online forms can be accessed on the **MERC Forms webpage**. For example, the direct link to the contract bargaining form is: **Notice of Status of Negotiations Form**.

Future online forms being released soon include:

- Grievance Mediation Requests (GM cases)
- Grievance Arbitration Appointment Requests (GA cases)
- Unfair Labor Practice (ULP) Charges (CE and CU cases)
- Representation and Unit Clarification Petitions (RC, RD, RM, SD, UC cases)
- Work Stoppage Notifications (WS, SL, SS cases)

3. MERC eFile Case Search Tool

Public users will soon have a **new Case Search feature** that is accessible from the agency's public website. The tool will be within MERC eFile and will not require any password or login to perform basic system searches on: **MERC Cases** by case type, **Parties** or **Party Representatives** and **case status**. This user-friendly tool will make it easier to obtain basic case information from MERC eFile without having to contact the agency. The added functionality is expected to be launched around mid-October 2025.

4. Three Other Convenient e-Filing Methods

In addition to Online Web Filing Forms noted above, the revised Electronic Filing Policy lists three approved options for e-filed case submissions:

1. MERC eFile System
The primary electronic filing platform, accessible via the MERC website, allows parties to submit and manage filings quickly and securely.

2. Designated Filing Email Addresses
Parties can submit filings based on case type:

- merc-mediations@michigan.gov – Mediation filings

- mercpanel@michigan.gov –
  Act 312 and Fact Finding filings
- merc-ulps@michigan.gov –
  Unfair Labor Practice filings
- merc-elections@michigan.gov –
  Election filings
- merc-grievance-arb@michigan.gov –
  Grievance Arbitration filings
- ber-info@michigan.gov –
  General inquiries and training requests

3. Fax Submissions
Fax filing remains an option at **313-456-3511**. All fax submissions are securely received electronically, ensuring the same speed and documentation as other digital methods.

By offering multiple digital filing options, introducing new online tools, and planning additional upgrades, MERC continues its mission to increase efficiency, remove barriers, and make services more accessible to Michigan employees, employers, and labor organizations. For the latest updates on e-Filing methods, online forms, the new Case Search tool and the MERC eFile system, visit **www.michigan.gov/merc**. For questions about case submissions, email **ber-info@michigan.gov** or the designated email address for your case type. ■

UPDATES TO MICHIGAN PREVAILING WAGE SURVEY AND TRADE CLASSIFICATIONS

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Michigan's prevailing wage law (2023 PA 10) has been in effect since February 13th, 2024. Prevailing wage laws are designed to level competition among employers and support local employers in an area by protecting locally established wage and benefit standards among employers and workers.

The Michigan Department of Labor and Economic Opportunity (LEO) has listened to comments and ideas from contractors, unions, and working folks about making prevailing wage more streamlined and user-friendly. The overwhelming majority of comments referred to the complexity and length of the official rate schedule documents.

Without a standardized set of classifications, rates were submitted for a wide variety of trades, and oftentimes, multiple rates for the same type of work. For example, a sign installer in Kent County has three classifications currently available that are all related to sign installation, however, they carry vastly different wage rates. If a contractor does not receive guidance, any of those submitted rates would be acceptable wage rates for any given project, which would result in a wide discrepancy in the rates.

With consultation from labor leaders, LEO developed a narrowed field of 55 trade classifications that surveys will be submitted under. This will help to ensure that official rate schedules will be manageable and easily understood documents.

In addition to the narrowed scope of the survey, the State of Michigan is also moving to an annual update. Rather than issuing new rates throughout the year, surveys will be updated once a year and new rates will be issued annually on November 1st.

Official rates are now available at any time on the agency's website at www.michigan.gov/wagehour. Previously, rates were assigned on a project-by-project basis and had to be requested from the State before a project could be placed out for bid. Having rate schedules accessible online has proven invaluable for expediting the request for proposal process.We believe these changes will help to ensure that Michigan's prevailing wage law can be more effectively implemented.■

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