

LABOR AND EMPLOYMENT LAWNOTES



Volume 36, No. 1

Spring 2026

AND VERSUS OR: SMALL WORDS, BIG CONSEQUENCES IN CONTRACT INTERPRETATION

John G. Adam

Let's say an imaginary guy named Jerry Signfield orders a frozen yogurt from a Manhattan shop promising "toppings and sprinkles." He gets sprinkles. Jerry protests: "It says and!" The cashier shrugs: "Yeah, but we read it like or." Jerry calls his friend Elaine to complain. She says, "What do you expect. You can't trust yogurt shops with disjunctives. They can't even handle lactose."

In labor law, as in ordering frozen yogurt, the choice between the words *and* and *or* can determine if a contract imposes multiple or alternative requirements. As my imaginary Jerry might say, *and* is generally conjunctive, meaning that all listed conditions must be satisfied. *Or*, by contrast, is typically disjunctive, indicating that any one of the listed alternatives will suffice. In the contract business you can't claim *and* means *or*!

The difference between *and* and *or* arose in a recent presumption-of-arbitrability case I handled, *Graphic Packaging v. USW*, — F. Supp. 3d —, 2026 WL 352350 (W.D. Mich.). The CBA arbitration language provided:

All differences as to the meaning and application of the provisions of this agreement, or as to any question relating to wages, hours of work, or other conditions of employment of any employee shall be taken up as hereinafter set forth.

The key lay in the disjunctive *or*. The *or* signaled to reasonable people (those on my side) that there were three arbitrable categories:

1. All differences as to the meaning and application of the agreement, or
2. questions relating to wages, hours, or
3. other employment conditions of any employee.

The company argued that arbitration was limited to disputes involving any "employee," reading *or* as if it meant *and*. The union argued that *or* controlled and that *any dispute* concerning the meaning of the CBA, including those involving retirees, was arbitrable.

Fortunately, the frozen yogurt cashier was not the judge. United States District Judge Paul Maloney applied the disjunctive canon, holding that the sentence supplies categories of disputes separated by the word *or*.

The first and second—differences over the meaning or

application of the agreement or questions relating to wages, hours—contains no employee limitation. The third—other employment condition—does. *Graphic Packaging*, 2026 WL 352350, at 2. Judge Maloney concluded that the arbitration provision covered the dispute involving retiree benefits, and so ordered arbitration.

Indeed, federal courts routinely presume *or* is disjunctive, creating independent alternatives. See, e.g., *OfficeMax, Inc. v. United States*, 428 F.3d 583, 588–89 (6th Cir. 2005). Judge Maloney cited *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), which explains that "terms connected by a disjunctive" should be "given separate meanings."

This principle is also widely recognized in legal writing. In *Reading Law: The Interpretation of Legal Texts* (2012) at 116, Antonin Scalia and Bryan A. Garner explain: "The conjunction 'or' is almost always disjunctive; that is, the words it connects are to be given separate meanings."

Secondary authorities echo the same rule. 17 *C.J.S. Contracts* § 428 (updated 12/25) explains that *and* is ordinarily conjunctive while *or* signals a choice between alternatives, and the two terms are generally not interchangeable.

Our Founding Fathers knew the difference. The Declaration of Independence promises "Life, Liberty and the pursuit of Happiness." It is not Life, Liberty *or* the pursuit of Happiness. Nor is it Life, Liberty, *and/or* the pursuit of Happiness." See my article "The Greatest Sentence: 'We Hold These Truths To Be Self-Evident'" Vol. 35, No. 4 *Labor and Employment Lawnotes* 23 (Winter 2026).

The takeaway is simple:

- *And* requires all listed conditions.
- *Or* creates alternative conditions, each capable of standing alone.
- Order two frozen yogurts, one with toppings and one with sprinkles.

Two small words—but sometimes the difference between winning and losing a contract dispute and getting toppings and sprinkles on your frozen yogurt. ■



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STATEMENT OF EDITORIAL POLICY

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.

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IMAGINARY CITATIONS, VERY REAL SANCTIONS

John G. Adam

Whiting v. City of Athens, — F.4th —, 2026 WL 710025 (6th Cir.) (Judges Stranch, Bush, Murphy), is an unbelievable sanctions case involving a frivolous case that produced more sanctions on appeal and a stiff rebuke of Whiting’s counsel.

Judge Bush’s well-written opinion affirms the district court sanctions on plaintiff’s attorneys under 28 U.S.C. § 1927, 42 U.S.C. § 1988, and other authorities. Ordinarily that would be the end of the matter. But the Sixth Circuit was not finished. Judge Bush noted that Whiting’s appeal brief contained “significant irregularities and deficiencies, including citations to fake cases and misrepresentations of the record” which would be addressed in a separate opinion issued the same day.

This companion decision—*Whiting v. City of Athens*, — F.4th —, 2026 WL 710568 (6th Cir.)—found that Whiting’s appeal briefs “repeatedly misrepresented the record, cited non-existent cases, and cited cases for propositions of law that they did not even discuss, much less support.”

“All told,” the court wrote, it found over “two dozen fake citations and misrepresentations” in the briefs, the fake cites were listed in a lengthy and detailed appendix” to the opinion. The appendix caused Westlaw to add an Editor’s note: “This decision contains discussion of citation references that are incorrect or do not actually exist. These invalid citations appeared in the original court opinion and have been preserved as written since they are part of the official record. Any links to these invalid citations have been removed.”

Finding a mistaken citation in a brief is not unheard of. Finding more than two dozen suggests a research method not commonly taught in law school.

The court ordered counsel to show-cause why they should not be sanctioned, directing counsel to answer seven specific questions. But counsel ignored the questions, claiming the show-cause order was “void on its face for failing to include a signature of an Article III judge,” claimed it was “motivated by harassment,” and alleged “illegal ex-parte communications within this Court.”

This disrespectful and outrageous response did not improve counsel’s position.

No surprise, the Sixth Circuit imposed significant sanctions under Federal Rule of Appellate Procedure 38 and the court’s inherent authority. The opinion provides an excellent guide on what type of sanctions are available.

As Lincoln might have said (fake quote alert), if a “lawyer has to cite imaginary cases, the lawyer might consider a different career.” Another lesson from *Whiting* is that appellate judges and their law clerks do read the cases and check the record. ■

CROSS-EXAMINATION TECHNIQUES IN EMPLOYMENT LITIGATION

Sheldon J. Stark
Arbitrator and Mediator (Retired)

The great John Reed, former dean of the University of Michigan School of Law and trial advocacy instructor, liked to say: “you can’t teach an old dog new tricks, but there are some tricks only an old dog knows.” I hope in this article to share a couple of cross examination techniques that worked well for me when I was a plaintiff-side employment discrimination lawyer - now more than a quarter century ago. The techniques described below should assist in establishing the righteous discrimination claim and warding off the inevitable dispositive motion.

In virtually every wrongful discharge employment case brought filed back in my day, defendants submitted a well-briefed and deeply researched motion for summary judgment/disposition in state or federal court. Dismissal was especially dangerous with conservative judges but, alas, such motions were also granted by judges considered sympathetic by the plaintiff’s bar, as well. Today that practice seems to continue. The AI platform Perplexity reports the percentage of employment cases dismissed on motion could be as high as 77% or more.

To overcome a dispositive motion, plaintiff’s counsel must present sufficient evidence of material facts to warrant jury submission. Uncovering such evidence is often challenging. Clients seeking representation in wrongful discharge cases rarely knew the details of their termination nor did they have a full understanding of the process leading to their termination. Rarely was there a smoking gun remark or direct evidence of discrimination on which to build a persuasive argument. Hence, to overcome a motion for summary judgment, the “ammunition” had to be discovered and developed through cross examination of adverse witness decisionmakers in pre-trial depositions. Easier said than done. Adverse witness depositions could be frustrating and counter-productive, especially when the witness is deliberately hostile, adversarial, argumentative or evasive.

In this article, I share two cross examination techniques that served me well over the years as an employee advocate. They are not unique to me. I do not claim to have developed them entirely on my own. There’s an old saying: “Steal from one is plagiarism; but steal from many is research.” These techniques are the result of years of research.

“I Don’t Recall”

Let’s begin with the adverse witness conveniently asserting memory lapses. Such witnesses often demonstrate little difficulty recalling incidents alleged to be “cause” for plaintiff’s discharge. Yet, they draw a blank when it comes to remembering essential elements of the plaintiff’s claim. In a sex discrimination case, for example, plaintiff’s manager may have said something damaging to the defense. At deposition, counsel might ask the manager to corroborate making the remark: “Did you tell [plaintiff] she was operating in a man’s world and should be more grateful she had a job?” The expected reply is “yes.” When instead the answer is: “I don’t recall” or “I don’t remember,” the approach is to explore what the witness means by “I don’t remember” or “I don’t recall.”

Q.: Are you saying you don’t remember because it never happened; or are you saying you just don’t remember one way or the other?

When the answer is “I don’t remember one way or the other,” the follow up looks like this:

Q.: When you say ‘I don’t remember one way or the other’ you’re saying you can’t admit it and you can’t deny it. Is that right?

A.: Yes. I don’t remember one way or the other.

Sometimes, the witness will say “I don’t remember because it never happened.” If so, I might leave the answer alone and move on to the next topic. Depending on how I’ve sized the witness up, however, I might continue:

Q.: You did not initially deny making the remark when I if asked if you said it, right?

A.: That’s right.

Q.: If you truly never made the remark, why didn’t you simply deny it in the first place?

A.: [There could be any number of answers]

Q.: Is it true you were not as certain when you were first asked about the remark as you were when you denied saying [repeat testimony clearly denied by the witness]?

Ultimately, during dispositive motion arguments where the witness testified he didn’t remember “one way or the other”, plaintiff counsel is entitled to assert “the facts are uncontested.” What are those facts? “Plaintiff, a female, testified emphatically under oath that her manager told her she was working in a man’s world and should be grateful to have a job. The witness doesn’t admit it, but could not and did not deny it, either. Plaintiff’s testimony makes it more likely than not gender was indeed a factor that made a difference in determining her discharge. And, since plaintiff is entitled to have all facts and reasonable inferences viewed in a light most favorable to her as the non-moving party, the motion for summary dismissal should be denied. A jury should be permitted to determine whether defendant employer maintained a male dominated workplace and considered plaintiff a female interloper terminated when a man would not have been under the same or similar circumstances.”

If the witness asserts he doesn’t remember because it never happened, the court can be reminded that the witness originally replied with the much weaker “I don’t remember.” Significantly, deciding whether the remark was made or not requires resolving an issue of credibility. It is for a jury, not the court, to resolve issues of credibility concerning material facts.

“We Don’t Fire People Arbitrarily”

Another approach to establishing a claim of discrimination is to show that defendant failed to follow its own clearly established policies in terminating the plaintiff. While the so-called Toussaint doctrine – enforcing oral promises of job security absent cause for discharge – is no longer a viable cause of action, overcoming the defendant’s assertions of “just cause” is vital to surviving a dispositive motion and to persuading the jury at trial. In discrimination cases, plaintiff bears the burden of showing

CROSS-EXAMINATION TECHNIQUES IN EMPLOYMENT LITIGATION

(Continued from page 3)

there was no just cause, the reasons proffered were not cause for termination, or that the reasons asserted are merely a pretext to mask discrimination. The employer may be “at will”, but even an at will employer doesn’t fire people without a good reason or cause.

Q.: Is it true that hiring and training new employees is time consuming and expensive?

A.: Yes.

Q.: Is it true that as an employer you’ve made an investment of time and energy in each employee in order to benefit from their experience performing the work?

A. Yes.

Q.: Is it true then that as an employer you want to retain competent employees who perform their job?

A.: Yes.

Q.: It’s also true, is it not, that [name defendant employer] has adopted policies for dealing with performance and termination issues?

A.: Yes.

Q.: Showing you what I’ve had marked as Plaintiff’s Exhibit _____. Are these the performance and termination policies in effect when [plaintiff] was terminated?

A.: Yes.

Q.: Is it true these policies were adopted to avoid terminating employees arbitrarily and without cause?

A.: Yes.

Q.: And though [name defendant employer] retains the right to terminate at will, you do not do so as a matter of policy. Isn’t that correct?

A.: Yes.

The argument to combat the dispositive motion is that where an at will employer has established policies and practices for discipline and termination to avoid arbitrary and costly terminations, failure to do so raises an inference something other than a reasonable business judgment was at work. Accordingly, an employer’s failure to follow its own policies may constitute evidence of pretext, an intent to discriminate, or retaliation. *Hobgood v. Illinois Gaming Bd.*, 731 F.3d 635 (7th Cir. 2013); *Fabiniak v. Wal-Mart Stores*, 2023 WL 2592358 (6th Cir.). Hence, if this line of cross examination is a success, the defendant’s admissions represent another basis for denying summary dismissal.

While I was never able to convince the Standard Jury Instruction Committee to adopt a jury instruction to this effect, I was able to persuade a number of trial court judges to instruct the jury. With or without a jury instruction, defendant’s failure to follow its own policies can be a highly persuasive argument as to whether the employer engaged in unlawful discrimination practices or not.

Conclusion

Employment discrimination cases are difficult. Direct evidence is rarely available, resulting in reliance on circumstantial evidence and inference. These cases generally demand a serious investment of time and energy to develop. They require extensive and probing discovery. They need substantial time and effort to respond to dismissal motions. Dismissal motions are all too frequent and can bring an abrupt end to the litigation locking the courthouse door and denying plaintiff their day in court. In my experience, the challenge of summary dismissal requires intense preparation and a thoughtful litigation strategy. When effective cross examination techniques are employed, they can provide solid evidence for meeting and overcoming the threat presented by a well drafted motion for summary judgment. ■

HOW WRITING SHARPENS THINKING AND LAWYERING

John G. Adam

Fear of writing is common—but, like any professional skill, it improves with deliberate practice and attention to technique. Three books I discuss ahead can reduce that hesitation while strengthening both clarity of thought and effectiveness on the page. They may even prompt you to write for *Lawnotes*.

In *Writing to Learn*, William Zinsser advances a straightforward but important idea: we write to discover what we know and what we mean to say. He observes that writing about a subject—sentence by sentence—often produces understanding not there at the outset. The same principle applies in legal practice. As Stuart Israel has noted in *Lawnotes*, even drafting a statement of issues can bring coherence to ideas that were previously only partially formed. Writing, in this sense, is not just a means of communication; it is a method of analysis. *Writing to Learn: How to Write - and Think - Clearly About Any Subject at All – The Essential Book for All Learners* (1988).

One of the most reliable ways to improve is through imitation of accomplished practitioners. Ross Guberman provides practical guidance by examining how leading advocates and judges write. His books, *Point Made* and *Point Taken*, distill effective writing into concrete, usable techniques, supported by examples from briefs and judicial opinions. They offer a useful framework for lawyers seeking to write—and think—with greater precision. *Point Made: How to Write Like the Nation's Top Advocates* (2d ed., 2014) and *Point Taken: How to Write Like the World's Best Judges* (2015).

In practice, writing is not merely the final step in legal analysis; it is the key to the advocacy process itself. Lawyers who write regularly and thoughtfully do more than communicate their arguments or views—they refine them to serve clarity, precision, and persuasion. ■

SHORTENED LIMITATION PERIODS SUFFER ANOTHER BLOW

John Runyan

In *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824 (6th Cir. 2019), the United States Court of Appeals for the Sixth Circuit refused to enforce a shortened, six-month limitation period to which plaintiff employee had contractually agreed in an action brought under Title VII of the Civil Rights Act of 1964, 42 USC 2000e, *et seq.* The Court found that “[t]he limitation period of Title VII is part of an elaborate pre-suit process that must be followed before any litigation may commence. Contractual alteration of this process abrogates substantive rights and contravenes Congress’s uniform nationwide legal regime for Title VII lawsuits.” *Id.* at 826.

In *Mayberry v. Acrisure Wallstreet Partners, LLC*, et al., Court of Appeals No. 367352 (February 17, 2026), the enforceability of shortened statute of limitations suffered yet another blow. At the time he was hired by Defendant Acrisure Wallstreet Partners, LLC [AWP] on April 1, 2018, Plaintiff Ty Mayberry executed both an employment application and an employment agreement. The application included a contractually shortened limitation period requiring Plaintiff to file “any and all” claims arising out of or relating to his employment within six months of the event giving rise to the claim. The employment agreement, in contrast, did not contain a shortened limitation period but did contain an “integration clause,” stating (1) that it represented the parties’ complete and final agreement concerning the terms and conditions of employment; (2) that it superseded all prior employment agreements; and (3) that it could not be varied or supplemented except by a written modification signed by the parties that expressly referenced the employment agreement.

Plaintiff Mayberry brought suit for breach of a written modification to the terms of his employment agreement allegedly entered into by the CEO of AWP in March 2019, purporting to alter Mayberry’s salary and other compensation. Defendants moved for summary disposition arguing that Mayberry’s claim was time-barred by the six-month contractual limitation period contained in his employment application. The Kent County Circuit Court denied the motion, concluding that the employment agreement was fully integrated, that the application was inadmissible parol evidence and that the application’s limitation provision was therefore unenforceable.

Upon appeal by leave granted, Defendants argued that the application and employment agreement were read together as a single contract inasmuch as they were executed by Mayberry in connection with the same hiring transaction. In the alternative, Defendants argued that even if the application and employment agreement must be considered separately, the application’s limitation provision is not inconsistent with the employment

agreement and may therefore be enforced without violating the parol evidence rule. Lastly, Defendants also argued that the shortened limitation period is not a term of Plaintiff’s employment within the meaning of the integration clause but instead a term of his *application for employment*.

The Court of Appeals addressed each of these arguments in turn. With respect to the argument that the application and employment agreement should be read together, the Court concluded that reading the two together as a single contract would nullify the express integration and modification provisions of the employment agreement: “It would permit a separate writing that neither references the employment agreement nor satisfies the agreement’s modification requirements to add a material term governing the employment relationship.... Even if the application and agreement were executed on the same day as part of the same onboarding process, the employment agreement expressly declares itself to be the parties’ complete and superseding agreement regarding employment and forecloses supplementation absent a qualifying written modification.” (slip opinion at 4). The Court also noted that inasmuch as the application was signed first, it constitutes a prior agreement that employment agreement expressly supersedes.

With respect to the argument that the application’s limitation provision may be enforced because it is not inconsistent with the employment agreement which is silent as to the limitation period, the Court of Appeals observed that Defendants’ argument misunderstands both the parol evidence rule and the role of an integration clause. The Court concluded that “[s]ilence as to a particular term does not invite extrinsic additions where the contract affirmatively states that it is the parties’ entire agreement and may not be supplemented except in a specified manner.” (slip opinion at 5).

Finally, the Court of Appeals also rejected Defendants’ argument that the shortened limitation period was not a term of employment within the meaning of the agreement’s integration clause. The Court noted that by its terms, the shortened limitation provision applies to all claims arising out of Mayberry’s application for employment, *employment or termination of employment*. The Court concluded that “[a] contractual provision that governs an employee’s ability to bring claims arising from his employment or termination regulates the employment relationship itself [and] therefore constitutes a term of employment within the scope of the integration clause.” *Id.*

In summary, the Court of Appeals concluded that the employment agreement between the parties is a fully integrated contract that expressly supersedes prior agreements and prohibits supplementation by extraneous writings absent a signed written modification expressly referencing the agreement. Because the application’s shortened limitation provision was never incorporated into the employment agreement in the manner the agreement requires, it is not a term of the parties’ employment contract and cannot bar Plaintiff’s breach of contract claim. ■

SIXTH CIRCUIT CRUSHES CEMEX AND OVERRULES THE NLRB'S REMEDIAL BARGAINING STANDARDS

Benjamin L. King

McKnight, Canzano, Smith, Radtke & Brault, P.C.

The Sixth Circuit in a 2 to 1 ruling overturned the National Labor Relation Board's landmark 2023 decision *Cemex Construction Materials*, 372 NLRB No. 130 (2023). The Sixth Circuit rejected the standard set forth in *Cemex* on the basis that it "was created through an improper exercise of the Board's adjudicatory authority." *Brown-Forman Corp. v. NLRB*, 2026 WL 632679 at 1(6th Cir.)(Judges McKeague, Griffin, Mathis).

In *Cemex*, the Biden-Board expanded the standard for issuing a remedial bargaining order after an organizing campaign. In *Cemex*, the Board adopted a new standard in which "an employer violates Section 8(a)(5) and (1) by refusing to recognize, upon request, a union that has been designated as Section 9(a) representative by the majority of employees in an appropriate unit unless the employer promptly files a petition pursuant to Section 9(c)(1)(B) of the Act (an RM petition) to test the union's majority status or the appropriateness of the unit, assuming that the union has not already filed a petition pursuant to Section 9(c)(1)(A)." *Cemex Construction Materials*, 372 NLRB No. 130 (2023). Under *Cemex*, a union could file a failure to bargain charges against an employer where the union did not file a RC petition and the employer did not file a RM petition. In that circumstance, the Board indicated that it would issue a remedial bargaining order if majority status and appropriateness of the unit are established. *Id.* at *26. The Board held that an employer who "who commits an unfair labor practice that requires setting aside the election" "will be subject to a remedial bargaining order." *Id.* at *25.

The facts in *Brown-Forman Corp.* involved a unionizing drive at the employer's distillery in Versailles, Kentucky where the employer distills, bottles, and distributes Woodford Reserve Bourbon. The union filed a representation petition and prior to a Board-run election the employer instituted a "\$4-per-hour raise went into effect, and one week before the election, Brown-Forman gave employees bottles of bourbon. The election failed with 14 votes cast in support of the union and 45 votes cast in opposition. The union objected, claiming Brown-Forman and its managers committed unfair labor practices that interfered with the union election." *Brown-Forman Corp.*, at *3. Later an administrative law judge determined that *Brown-Forman* committed unfair labor practices and interfered with its employees' efforts to unionize. The ALJ recommended issuing a bargaining order under the standards articulated in *Cemex* and *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The Board adopted the ALJ's factual findings and recommended remedy, but it modified the reasoning. "Rather than consider whether a new election could be held by applying the *Gissel* standard, the Board relied solely on the standard articulated in *Cemex* (a previous Board decision that upended over 50 years of precedent and called for the Board to issue a bargaining order as the default remedy once it set aside an election)." *Id.*

On review, the majority opinion by Judge McKeague

rejected the *Cemex* standard, stating "the Board announced this significant policy change via an adjudication, and it did so without respecting the bounds of its adjudicatory authority. The *Cemex* standard was not derived from the case-specific facts of the contemporaneous adjudication, and the *Cemex* Board did not create the standard in furtherance of resolving the parties' dispute." *Id.* at *6.

The majority explained that the "Board has two different processes by which it can exercise this policymaking responsibility: rulemaking and adjudication. 29 U.S.C. § 156 (rulemaking); 29 U.S.C. § 160 (adjudication)." *Id.* at *7. In rejecting, the Board's exercise of its adjudicatory authority in creating the *Cemex* standard the Sixth Circuit reasoned that the Board exceeded its authority when it "created a new standard for issuing future bargaining orders that was neither derived from the case-specific facts nor in furtherance of fashioning a remedy that resolved the parties' dispute. In doing so, the *Cemex* Board exceeded its adjudicatory authority." *Id.* at *13.

The Sixth Circuit found that the *Cemex* standard was not derived from case-specific facts. The Court's rationale was premised on the *Cemex* Board's rejection of the *Gissel* standard. The Court found that the *Cemex* decision was premised on the Board's reliance on "[d]ecades of experience administering the *Gissel* standard [which] have persuaded us that *Gissel* bargaining orders are insufficient to accomplish the twin aims of effectuating ascertainable employee free choice' and deterring employer misbehavior." *Id.* at *15 (internal citations and quotations omitted). As such the Court found that "the *Cemex* Board admitted that its new standard was based not on the case-specific facts, but on general observations from [d]ecades of experience administering the *Gissel* standard in other adjudications." *Id.* (internal quotations and citations omitted).

Similarly, the Sixth Circuit held that the *Cemex* standard was not created to resolve the parties' dispute. The Court stated that "The *Cemex* Board said the quiet part out loud, proclaiming that the value in the new standard was its deterrent effect on future, hypothetical preelection violations of the Act... And by fixating on the general deterrent effect of preelection conduct, the *Cemex* Board made clear that it created the new standard not as a case-specific means to provide a remedy to the parties (which would be a proper exercise of its adjudicatory authority under 29 U.S.C. § 160), but as a general rule it deemed "necessary to carry out the provisions of [the Act]" on a macro scale (which is a proper exercise of its rulemaking authority under 29 U.S.C. § 156)." *Id.* at *16.

The Sixth Circuit held that it could not sustain the enforcement of a bargaining order based on *Cemex* because the *Cemex* "standard was an improper exercise of the Board's adjudicatory authority that cannot serve as the basis of a remedial order; it has no precedential value." *Id.* at 17. 4.

In dissent, Judge Andre Mathis stated that the *Cemex* standard "bears all the hallmarks of a proper adjudication." *Id.* at *27. Judge Mathis noted that the *Cemex* standard flows from a long-line of adjudication and is logical next iteration. He explained that the "Board changes its policies all the time. And the Board is notorious for switching its standards back and forth. But through it all, the Board has confidently stood on one bedrock principle: it has the authority, with limited exceptions, to choose how to create and change its own policies." *Id.* at 19.

Judge Mathis cited the *Cemex*'s decisions rational that its "application of the new standard to different facts in future cases will refine its contours in an evolutionary process that could not be achieved through notice-and-comment rulemaking." *Id.* at *27, citing *Cemex*. at 4. Judge Mathis wrote that the Court "must give weight to the Board's determination that adjudication best suited its policymaking needs." *Id.* at *25.

Judge Mathis opined that the "Board checked all the boxes necessary in announcing its change in policy in *Cemex*." *Id.* He found that the *Cemex* decisions represented the product of reasoned decisions, was consistent with the Board's authority to remedy violations of the NLRA, and appropriately applied to the facts and circumstances in *Cemex*. *Id.*

Judge Mathis wrote "Congress gave the Board broad discretion to choose how to create its policies. The Board chose to adjudicate a new standard to govern the issuance of a bargaining order for a violation of § 8(a)(5) of the NLRA. The Board did so in an adjudicative proceeding at the request of the parties before it and in response to the facts of the case. It properly considered the competing policies at issue and its experience in administering the NLRA. Its adjudication of this policy change is consistent with its adjudication-based evolution of this standard. This is how agency adjudication works: case-by-case development of complex, fact-bound determinations. I would therefore uphold the Board's decision as a proper exercise of its policymaking authority." *Id.* at *25 (internal citations omitted).

Brown-Forman is the first instance where any Court of Appeals has reviewed the validity of *Cemex*. I hope that *Cemex* will not receive similar scrutiny in other circuits and will survive the Supreme Court. ■



Beth M. Rivers

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presented to
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AWARD PRESENTATION TO BETH M. RIVERS

Robert Palmer

Pitt McGehee Palmer Bonanni & Rivers PC

I, along with my partner, Channing Robinson Holmes, have the privilege of introducing Beth Rivers, my partner and this year's recipient of the Distinguished Service Award. I was told to be brief and not talk about myself. Two rules, which I will have great difficulty following, but I'll do my best to abide.

Beth Rivers was born in Newark, New Jersey in 1956. She was born to be a defender of civil rights. While in junior high school, she was temporarily suspended from Hebrew school for wearing pants to her class and eating a Slim Jim. In high school, Beth led a school-wide walkout protesting the fact that female students were not allowed to wear pants. This protest was in her junior year and was successful in that Ms. Rivers was allowed to enjoy her senior year in high school wearing slacks.

Following high school, Beth chose Rutgers University, the traditional state university of New Jersey, which until the previous year had not allowed women to attend. Ms. Rivers was a member of only the second class of women to attend and graduate from Rutgers College. Upon graduating with a degree in history and hoping to help those individuals put upon by society, primarily older persons, Beth sought out a law school in an urban setting, at least 500 miles from home, which she believed had a program in elder law. Ms. Rivers moved to Detroit and attended the University of Detroit, which met the first two qualifications. It was in an urban setting and was at least 500 miles from her home. Unfortunately, what she believed to be an elder law program was merely one class offered every other year.

However, Beth settled in Detroit and attended the University of Detroit, where she met my partner Peggy Pitt, who most of you are aware passed away in 2023. They discussed civil rights issues and formed an important bond. While still going to school, Ms. Rivers clerked for Ron Reosti, a heavyweight in the field of employment law that I'm sure you all know and was involved in the massive class action against AAA, challenging AAA's employment practices on the basis of both race and gender.

Upon graduation, she continued with Ron Reosti as an attorney and assisted in finalizing and administering the settlement in that major class action. In October of 1981, she joined the law office of V. Paul Donnelly, a local employment lawyer who had a national reputation in the field of age discrimination. Beth has informed me that Mr. Donnelly appeared on several occasions on the Phil Donahue show discussing age discrimination.

As a result, his firm secured clients from all over the country. Ms. Rivers, along with Jerry Wahl, Rudy Huiwenga, and John Hergt, traveled all over the country litigating and trying age discrimination cases. She tried cases in such places as New Jersey, California, Nebraska, Illinois, Idaho, and Montana.

In 1996, she and Jerry Wahl formed their own firm. That firm confined its practice to employment discrimination, but pursued all types of discrimination including age, race, gender, and disability discrimination. During these experiences and while in these positions, Beth Rivers honed her writing and research skills, becoming an expert in the field of employment

law. Her reputation as a skilled writer became known throughout the legal community. In 2001, Ms. Rivers was asked by several firms including the Pitt firm, to assist in the Segal v Ford Motor Company case (the ABC forced ranking class action). As her skill revealed itself to the then partners of the Pitt firm, a decision was made to offer her employment as an associate and ultimately to make her a full equity partner in 2005.

I joined the firm as a partner in 2002 and had the privilege of working closely with Beth from the moment I joined the firm. Her writing skills are amazing. I was impressed with her writing skills and deferred to her on numerous occasions. In law school, everyone is taught to follow the blue book when doing legal writing. In our firm, we follow the "Beth Book." Such things as excessive commas and starting sentences with prepositional phrases are strictly forbidden. Biting and oftentimes sarcastic comments are to be always left to pithy footnotes. I believe my partner, Channing Robinson-Holmes, is going to address some of the significant cases that Ms. Rivers has been involved in which have forged and created employment law in this state and in this circuit.

Although her writing skills are exceptional, Ms. Rivers has always also demonstrated a degree of flexibility. As her wife and soulmate of 37 years, Connie Webb, a Marine, tells her, it is important in life to, "keep your knees bent" and be flexible and open, and analyze before acting. In addition to her substantive legal skills, Ms. Rivers' flexibility finds its way into the administration of our firm. She's involved in human resources, personnel, mentoring, public relations, and technical support. Most importantly, she along with me, are the firm's Christmas elves that run our Firm Holiday party every year. Unfortunately, she retired from the elf position this year, naming Ms. Holmes as her successor. In addition to providing expertise in the field of employment law, Ms. Rivers has assisted me both at trial and by providing legal research, support, analysis, and briefing in many other types of cases, such as criminal matters, personal injury matters, and medical malpractice cases. She has always been able to show flexibility and shift gears to assist myself and other members of the firm with respect to any other type of legal matter that come her way.

She is the creator and is responsible for writing the chapter on age discrimination in the ICLE publication, Employment Litigation in Michigan.

She has been recognized by Michigan Lawyers Weekly as a "Woman in the Law," and as a "Leader in the Law." She is a Fellow in the College of Labor and Employment Lawyers. Her contribution to our firm's success, and to the laws of this state in the field of employment litigation is far-reaching. In the words of William Shakespeare, "though she be but little, she is fierce".

We at Pitt, McGehee, Palmer, Bonanni, and Rivers are lucky to have her as a partner as is the employment section of State Bar of Michigan, lucky to have her as a member and contributor. She is certainly deserving of this award, and I wish her the best. At this point, I'd like to introduce my partner, Channing Robinson-Holmes, who I believe will address some of the specific contributions she has made to the law in this state. ■

AWARD PRESENTATION TO BETH M. RIVERS

Channing Robinson-Holmes
Pitt McGehee Palmer Bonanni & Rivers PC

I am so pleased to be one of the two people introducing Beth this evening. Beth is beloved at our office, so Beth had a laundry list of people vying for this opportunity.

What, perhaps, only Bob and I are now in a position to appreciate is that introducing Beth Rivers is actually a pressure-filled situation to be in. We are here talking to you about a woman who hates to talk about herself. She is incredibly humble and, I'm positive of this, would rather spend her time on stage talking about anyone but herself.

Beth is incredibly smart, creative, collaborative, and, as Bob mentioned, an amazing writer.

She has the ability to distill a complicated scenario or legal argument to its essence.

Her writing is persuasive because it is clear, concise, straight-forward, and devoid of extraneous adverbs and legalese.

Over the course of four decades, Beth has written countless briefs on behalf of plaintiffs. And through her brief writing, she has secured victories for thousands of people.

Beth's briefing has resulted in powerful precedent in employment law and beyond:

- In *Raczak v Ameritech*, Beth's briefing resulted in the first 6th Circuit opinion to discuss requirements of the Older Workers Benefits Protection Act and to provide guidance about the requirements for layoff disclosures;
- In *Howlett v. Holiday Inn*, Beth secured two critical holdings in the 6th Circuit: First, that employees could piggyback on a timely EEOC charge, which did not allege class-wide allegations but stated that other similarly situated employees were affected, and Second, that if the Older Workers Benefits Protection Act is violated, an employee need not return consideration paid for the invalidated release.
- In *Robinson v. Ford*, Beth secured a published Michigan Court of Appeals decision holding that the Elliott-Larsen Civil Rights Act provides a cause of action for same-sex harassment claims and further, that a plaintiff need not demonstrate sexual desire as part of that prima facie case;
- In *Doe v. MDOC*, Beth secured a published decision from the Michigan Court of Appeals holding that an amendment to the Elliott-Larsen Civil Rights Act excluding incarcerated individuals from its protections was unconstitutional;
- In *Cooper-Reid v. State of Michigan*, Beth secured a ruling from the Michigan Court of Appeals holding that a defendant's filing of a counterclaim supported a claim for retaliation;
- In *Redlin v. Gross Pointe*, Beth secured a ruling from the Sixth Circuit holding that transfer to a less distinguished position, despite no loss in salary, constituted a retaliatory adverse action, and
- In *Mays v. Snyder*, Beth's briefing resulted in the Michigan Supreme Court finding an actionable inverse condemnation claim arising out of the Flint Water Crisis, based on

allegations that the State had authorized the change in water source and concealed and misrepresented the data regarding its safety. Ultimately, Beth's briefing helped pave the way to a historic settlement, in which thousands of Flint residents are now being paid for the property damage they suffered in the Crisis.

These decisions are simply a snapshot of the tangible impact Beth has made for our clients and on our jurisprudence.

However, Beth's impact goes beyond even these remarkable accomplishments.

Beth is a go-to source for legal questions, strategic insight, as well as writing and editing, earning her the moniker "Little Professor" or "LP."

She is the original author of the Age Discrimination chapter in ICLE's Employment Litigation in Michigan book and has been updating that chapter for over 25 years.

Her breadth of knowledge, shrewd instincts, and writing skills are constantly called upon by everyone in our firm who seek her out for projects and questions large and small.

Asking Beth's opinion on a case has become so routine and automatic within our office that Beth is aware of the cases we are working on at virtually any moment.

Beth's wife, Connie, can attest that a good example of our reliance on Beth occurred recently when Beth and Connie were traveling. Within a span of just a few hours, Beth had received missed calls from almost everyone at our office seeking her help or opinion on a case.

We are entirely reliant on Beth, and thankfully, she is extremely generous with her time and wisdom.

Consequently, the majority of our clients achieve success, at least in part because of Beth. Because she has worked directly or indirectly on the case. Because she has been the principal brief writer, or because she helped shape strategy, edited pleadings, or provided legal resources.

As if this were not enough, Beth has mentored dozens of clerks and young associates that have come through our office – a number of whom are in this room, including myself.

I first met Beth more than 10 years ago when I started as a law clerk at Pitt McGehee. I had just started my 3L year at law school and had, what I like to think of, as a healthy fear of bombing.

The fact that I didn't, is due entirely to Beth.

Fairly immediately, Beth became my go-to person on ALL things. Substantive legal questions, procedural questions, basic logistical questions, writing feedback and so on.

I particularly appreciate that Beth has graciously pretended over the years that my many stupid questions were legitimate.

I know that it was critical to me as a young lawyer to have someone who believed in my potential and to teach me the power of a pithy footnote.

I would not be the attorney I am today without Beth Rivers. ■

REMARKS OF BETH M. RIVERS

I first want to thank the LELS Council for this recognition. As I celebrate my 70th birthday and 46th year as a lawyer, I fear what most distinguishes me is just my longevity. But I am truly honored to be awarded the distinguished service award as many of the prior awardees are my personal role models and true titans in labor and employment law. I am humbled to be considered worthy of joining that list.

Although a bit trite, it is true that no one succeeds or becomes distinguished on their own – it is a group effort. So bear with me as I thank the folks who have had a part in my distinguished service,

First my parents – Donald and Harriet – who instilled in me the lesson that standing up and fighting for your beliefs, even if success is unlikely, is worthwhile and important. They always supported me as I tilted at windmills, celebrated my successes and encouraged me after failures.

My wife – Connie Webb – who many of you probably know better in her former role as Kathy Bogas' secretary – has patiently (most of the time) put up with the late-night brief writing and endless phone calls and meetings. And she has tolerated having to hear about the law, not only at her job, but at home too.

In addition to Connie, my thanks to the entire Webb clan who supported me for over three decades, including my sister-in-law, Leslie Harris, who is here tonight. No mention of family love and support would be complete without mention of my daughter, Rebecca, who passed away unexpectedly in September. She was my biggest fan and if she were here tonight, would be cheering loudest and making sure everyone knew “that’s my ma.”

As a lesbian, chosen family plays an important role in my life. And the Pitt Crew is that family. We work hard, play harder, laugh a lot and take care of each other. For that I am eternally grateful.

As one who shies from attention, I am shocked but honored to receive this recognition. But, in truth, I must share it with my Pitt McGehee family who have had my back in hard times and raised me up on the good days. My partners – Michael Pitt – who gave me a home when I was orphaned - Cary McGehee – our moral center who reminds us all why we do this work, Megan Bonanni – the emotional heartbeat of the firm who keeps us all centered, Kevin Carlson – always ready with a helpful citation and reminder of the cases I worked on over the decades, Channing Robinson Holmes, a fellow cynic and introvert, with whom I share a love of reading, travel and Disney villains and Bob Palmer – my brother by another mother – who is always there for an evidence lesson as well as a conversation about music and sports.

Thanks also to Pitt McGehee associates – Danielle, Bayan and Juliet – and our paralegal, Noelle, who listen patiently believing I have some wisdom to impart, our fearless and dedicated staff including our office administrator Renee, adept at technology as well as fixing toilets, Laronda, who generously provides me

with afternoon snacks to keep my strength up and Regina, my assistant, who never panics despite my chronic procrastination and who actually can read my handwriting and sometimes my mind. Thank you all – I would not be here without you.

Distinguished service – 46 years of practicing plaintiff side employment law- takes not only tenacity and hard work, but also a lot of luck. I am so grateful for my good fortune.

I arrived in Detroit in 1977, a Jersey kid trying to adjust to the Midwest. I knew no one. Nor did I know any lawyers or have any understanding of the mysteries of law school. At orientation at the University of Detroit, I was assigned a student advisor. That job went to Peggy Pitt – which was the start of my almost 50 year relationship with Peggy and Michael – and which has led me to my present circumstances.

Then as a law clerk I was lucky enough to be introduced to employment law by two early practitioners. Jeanne Mirer who very dramatically explained to me that lawyers are social architects and Ron Reosti who helped me understand litigation could be used as a tool to achieve social justice. Ron also helped me refine my writing – teaching me to express complex concepts succinctly.

Once exposed to employment law, I was hooked. The practice was in its infancy. Elliott-Larsen had just been enacted in 1976 and there was little case law. The opportunity to establish and develop the law, while helping people who suffered discrimination was both challenging and exhilarating. Thanks to the inspiration of Jeanne, Ron, Michael and others, I have continued to practice Plaintiff's side employment law for the last 46 years. I am certain that if I had not been fortunate enough to discover this area of the law, I would have been on a different career path.

And coming full circle, I was hired and have spent the last 25 year working with Peggy, Michael and the rest of the Pitt McGehee family. What has been most remarkable is that the firm has given me the opportunity to be a subject matter expert and expand the definition of trial attorney. Given the moniker LP (Little Professor), I consult about potential cases, help develop legal theories and case strategies, craft complaints, draft and argue summary judgment responses and appeals, conduct depositions, provide trial assistance and just generally maintain an open door and available ear. I essentially touch very case that emanates from our office. Described by one partner as the firm's glue, I am truly the “back office” of Pitt McGehee.

Since I have been given this platform, let me take a few minutes to share some lessons from my Distinguished or simply long career.

Recognize that your assistant is a valuable partner. It is a relationship that should be nurtured. Especially for newer attorneys, assistants are likely to have a better handle on court rules and procedures, as well as the practical aspects of lawyering, things we were never taught in law school.

Mentoring – Having been both mentor and mentee, I cannot overstate the value of this relationship. I stand on the shoulders of many of the attorneys who have previously been honored by this

section and others who deserve recognition and I hope that can be the shoulders to raise up the next generation of employment lawyers. To that end, I encourage an open-door policy so that law students and new associates feel comfortable asking what they fear are “stupid” questions and seeking advice. I even have a stash of amazing desk toys to encourage visitors.

Collegiality – Good relationships with clients, colleagues, judges and opposing counsel are essential. Having litigated discrimination cases throughout the country earlier in my career, I can assure you that the generally positive relationship between plaintiff and defendant counsel here in Michigan is not a universal concept. While we toil in an adversarial system, it is important to maintain positive working relationships with opposing counsel, who are your colleagues not your enemies.

Collaboration – Often we do not have all the answers. My best experiences have been when I have had the opportunity to work as part of a team – with other attorneys at Pitt McGehee, other firms or organizations like Public Justice or the ACLU. The perspective offered by others often allows you to see and approach issues differently and develop creative answers to thorny questions.

And most importantly, don’t settle. Find a work environment in which your unique talents are appreciated and you are accepted without needing to hide or change to meet others expectations. After several failed starts, I joined Pitt McGehee – which created a niche for me to further develop my skills so that I could reach the pinnacle for a Michigan employment attorney – the Distinguished Service Award from LELS, which I accept with both surprise and gratitude. Thank you! ■



**Attorneys and staff from
Pitt McGehee Palmer Bonanni & Rivers**

MERC NEWS

Sidney McBride, Director
Ashley Rahrig, Department Analyst
Bureau of Employment Relations

Pursuant to changes in Title II of the Americans with Disabilities Act (ADA), the State of Michigan will soon require all digital content to comply with Web Content Accessibility Guidelines (WCAG) 2.1 Level AA. This mandate will cover certain content accessible by users from an agency’s website and mobile application, and will include electronic documents such as PDFs, Word, and Excel files.

In April 2024, the U.S. Department of Justice issued a final ADA Title II rule establishing WCAG 2.1 Level AA as the technical accessibility standard for state and local governments. Under this rule, state and local governments serving a population of 50,000 or more must ensure that all web content and mobile apps they operate comply with WCAG 2.1 Level A and AA requirements no later than April 24, 2026. The purpose of the rule is to ensure that individuals with disabilities have reliable and equal access to essential government services and information, such as filing forms, accessing public records, and viewing public proceedings.

To comply with the new requirements, MERC’s website content is being reviewed. Some materials may be removed and not replaced for several reasons, including outdated or redundant information, or based on web content limitations. By year’s end, all web posted filing forms will be converted into web forms, that once completed and submitted, the material is filed directly with this agency and e-served to the listed party representatives.

MPER Ends-- Replacement Underway

Since 2000, the decisions of the Commission have been regularly published in and cited by the Michigan Public Employer Reporter (MPER). Regrettably, Thomson Reuters ceased publication of the MPER and future Commission decisions with the final MPER publication of Volume 39, issue 6 in mid-August 2025. This action was sudden and without warning, and also precludes the inclusion of future MERC decisions into Westlaw’s legal search engine.

While we actively seek an alternative solution to MPER, this agency continues to regularly post the Commission’s decisions on the website at www.michigan.gov/merc. Most complicated is securing the means to have the newly published MERC decisions added to Westlaw. If you have any suggestions, please email us at berinfo@michigan.gov

Staff Retirements

Beginning March 1, 2026, two long-time MERC team members officially retired—Micki Czerniak and Tracy Marr. Micki retires with 38 years of State Service with the last 28 years as a MERC Labor Mediator. She leaves her MERC career well respected by labor and management representatives, as well as neutral practitioners.

Tracy Marr retires with 24 years of overall State Service including the most recent 15 years as MERC Mediation Secretary stationed in Lansing, MI. Prior to coming to MERC, she served in the predecessor to the Michigan Office of Administrative Hearings and Rules (MOAHR) as a Legal Secretary to several Administrative Law Judges in the Hearings Division.

Tracy and Micki will be missed by many, including our staff and Commissioners. We wish them well in retirement. ■

WORKPLACE ARTIFICIAL INTELLIGENCE AND THE TRUMP ADMINISTRATION

Adam S. Forman,
Epstein Becker & Green, P.C.

Executive Order 14179 “Removing Barriers to American Leadership in Artificial Intelligence”

On January 23, 2025, as one of the first actions of his second term, President Donald J. Trump signed Executive Order (EO) 14179, “*Removing Barriers to American Leadership in Artificial Intelligence*,” making good on a campaign promise to rescind Executive Order 14110, “*Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*” (known colloquially as the Biden AI EO). It was not surprising that AI was at the top of the agenda for President Trump’s second term, as in his first term, Trump was the first president to issue an EO on AI. On February 11, 2019, he issued Executive Order 13859, “*Maintaining American Leadership in Artificial Intelligence*.” This was a first-of-its-kind EO to specifically address AI, recognizing the importance of AI to the economic and national security of the United States. In it, the Trump Administration laid the foundation for investment in the future of AI by committing federal funds to double investment in AI research, establishing national AI research institutes, and issuing regulatory guidance for AI development in the private sector. The first Trump Administration later established guidance for federal agency adoption of AI within the government.

EO 14179 gave the Assistant to the President for the Office of Science and Technology Policy (“OSTP”), the Special Advisor for AI and Crypto, and the Assistant to the President for National Security Affairs, in coordination with agency heads they deem relevant, 180 days—until July 22, 2025—to prepare an AI Action Plan to replace the policies that have been rescinded from the Biden Administration. Shortly thereafter, on behalf of OSTP, the National Science Foundation’s Networking and Information Technology Research and Development National Coordination Office issued a Request for Information on the Development of an Artificial Intelligence Action Plan.

New Federal Agency Policies and Protocols for Artificial Intelligence Utilization and Procurement

Building on EO 14179, on April 3, 2025, the Office of Management and Budget (“OMB”) issued two Memoranda regarding the use and procurement of artificial intelligence (AI) by executive federal agencies: (1) M-25-21 “*Accelerating Federal Use of AI through Innovation, Governance, and Public Trust*”; and (2) M-25-22 “*Driving Efficient Acquisition of Artificial Intelligence in Government*”—build on President Trump’s Executive Order 14179 of January 23, 2025, “*Removing Barriers to American Leadership in Artificial Intelligence*.”

The stated goal of the memoranda is to promote a “forward-leaning, pro-innovation, and pro-competition mindset rather than pursuing the risk-adverse approach of the previous administration.” Each aims to lift “unnecessary bureaucratic restrictions” while rendering agencies “more agile, cost-effective, and efficient.” Further, they will, presumably, “deliver improvements to the lives of the American public while enhancing

America’s global dominance in AI innovation.” The memoranda rescinded and replaced the corresponding M-24-10 and M-24-18 memos on use and procurement from the Biden era.

Although the memos relate exclusively to the activities of U.S. federal agencies regarding AI, they contain information and guidance with respect to the acquisition and utilization of AI systems that is transferable to entities other than agencies and their AI contractors and subcontractors with respect to developing and deploying AI assets. In this connection, the memos underscore the importance of responsible AI governance and management and, interestingly, in large measure mirror protocols and prohibitions found in current state AI legislation that governs use in AI by private companies.

Key Points from M-25-21 – *The AI Use Memo*

- **Purpose:** Encourages innovation and reduces bureaucratic barriers, framing AI as a driver of national competitiveness.
- **Governance:** Retains the role of Agency Chief AI Officer, now focused on advocacy and change rather than bureaucracy.
- **Scope:** Applies to new and existing AI developed, used, or acquired by federal agencies (excluding national security).
- **Innovation:** Agencies must develop an AI strategy within 180 days, including use cases, maturity assessments, and plans for improvement.
- **Procurement:** Emphasizes treating data and improvements as critical assets, evaluating AI performance, and promoting competition.
- **Workforce:** Focuses on building an AI-ready federal workforce through training and accountability.
- **Governance Structure:** Requires appointment of Chief AI Officers, establishment of AI Governance Boards, and regular updates to policies and inventories.
- **Risk Management:** Agencies must identify “high-impact” AI use cases (those affecting rights, safety, or access to critical services) and implement minimum risk management practices, including pre-deployment testing, impact assessments, ongoing monitoring, human oversight, and public feedback.

Key Points from M-25-22 – *The AI Procurement Memo*

- **Scope:** Applies to AI systems/services acquired by agencies, excluding incidental use by contractors.
- **Requirements:** Agencies must update policies, maximize use of American AI, ensure privacy compliance, and standardize IP rights and data use in contracts.
- **Data Handling:** Contracts must prohibit vendors from using non-public agency data to train commercial AI without explicit consent.
- **Transparency:** Vendors must provide documentation for transparency and explainability.
- **Acquisition Practices:** Agencies should conduct market research, ensure transparency in solicitations, and include terms to reduce vendor lock-in and protect IP rights.

- **Contract Administration:** Provisions guard against dependency on specific vendors and ensure ongoing access to data after contract closeout.
- **Guidance:** OMB and the General Services Administration will release playbooks and guides for AI procurement, including standard contract clauses and best practices.

White House AI Action Plan

On July 23, 2025, the White House released the *AI Action Plan* and delivered remarks on it during an AI summit, setting forth the Trump administration's policy recommendations to achieve the goal of "global AI dominance." The same day, President Trump signed three AI-related Executive Orders to further the *AI Action Plan*, relating to: (1) "*Accelerating Federal Permitting of Data Center Infrastructure*"; (2) "*Promoting the Export of the American AI Technology Stack*"; and (3) "*Preventing Woke AI in the Federal Government*." It remains unclear whether and how successfully the *AI Action Plan* will unfold—particularly with respect to impacts on incongruous state regulatory action.

Likening the global AI race to the space race during the Cold War, the introduction to the 28-page *AI Action Plan* emphasizes the need "to innovate faster and more comprehensively than our competitors in the development and distribution of new AI technology across every field and dismantle unnecessary regulatory barriers that hinder the private sector in doing so." To achieve these goals, the *AI Action Plan* establishes three pillars:

Pillar One: Accelerating AI Innovation

Perhaps most notably, the *AI Action Plan* seeks to quash "burdensome" state regulation of AI. This policy stance comes at the heels of the unsuccessful attempt to include a statutory moratorium on state regulation of AI, a proposed part of the *One Big Beautiful Bill Act* (HB 1) ("OBBBA") legislative process.

While the proposed moratorium did not survive that process, the *AI Action Plan* takes a proverbial "second bite at the apple." The plan discourages the federal government from directing AI-related federal funding towards states with burdensome AI regulations, while simultaneously directing the federal government to avoid interfering with states' rights to pass "prudent laws that are not unduly restrictive to innovation." The plan calls for the identification, revision, or repeal of regulations, rules, guidance, and the like, that "unnecessarily hinder AI development or deployment" and calls for federal agencies to consider a state's AI regulatory climate when making funding decisions. It also calls for the Federal Communications Commission to determine whether state AI regulations interfere with its work under the Communications Act of 1934.

Touting a model of "free speech and American values," the *AI Action Plan* also calls for the rejection of "social engineering agendas"—by ordering the revision of the National Institute of Standards and Technology ("NIST") *AI Risk Management Framework* to "eliminate references to misinformation, Diversity, Equity, and Inclusion, and climate change." Large language model ("LLM") developers who contract with the government must ensure that systems are "objective and free from top-down ideological bias."

To that end, the new Executive Order, "*Preventing Woke AI in the Federal Government*," mandates that agencies shall only

procure LLMs that are both truthful and ideologically neutral. The OMB, in consultation with others, was directed to issue guidance to agencies regarding "unbiased AI principles" within 90 days.

To spur AI innovation, the *AI Action Plan* pushes for the investment in: (1) the development and sharing of open-source and open-weight AI models; (2) building world-class, high quality training datasets; (3) investing in scientific breakthroughs related to AI interpretability, control and robustness; and (4) establishing an ecosystem to support scientific progress in evaluating AI system performance and reliability. This will likely be the most immediate boon for AI developers and the investment community focused on AI-driven companies and assets.

Also notably, the *AI Action Plan* calls for the establishment of "regulatory sandboxes"—known as AI Centers of Excellence—where researchers, startups, and established enterprises can test AI tools freely, something we covered in a previous post.

Pillar Two: Building American Infrastructure

The *AI Action Plan* advocates for the development of American infrastructure—including factories, data centers, and alternative energy sources—by expediting projects under environmental, transportation, and related legislation that might otherwise impede progress. Among other things, the *AI Action Plan* directs federal lands to be made available for data center construction; the upgrading of the U.S. electric grid to support data centers; the restoration of American semiconductor manufacturing; high-security data centers for military and intelligence community usage; training the U.S. workforce for AI infrastructure; and measures to bolster critical infrastructure cybersecurity.

The new Executive Order on "Accelerating Federal Permitting of Data Center Infrastructure" revokes Executive Order 14141 of January 14, 2025, "*Advancing United States Leadership in Artificial Intelligence Infrastructure*." The administration announced a policy of "bold, large scale industrial plans" for AI data and infrastructure through the necessary transmission lines and equipment; the ease of regulatory burdens that could hinder this expansion; and the use of federally owned land and resources for the development of data centers. The Secretary of Commerce is directed to launch an initiative to provide financial support for qualifying projects, which could include loans, grants, tax incentives, and offtake agreements, while other respective agencies are directed to take actions to expedite environmental reviews and authorize federal lands for the purpose.

Pillar Three: Leading in International AI Diplomacy and Security

The *AI Action Plan* promotes exporting American AI to meet global demand and criticizes China's role in setting international standards. It seeks to deny foreign adversaries access to "AI Compute" (resources needed to train AI models) by imposing export controls and assessing the national security risks in American frontier models.

Meanwhile, the new Executive Order, "*Promoting the Export of the American AI Technology Stack*," calls for the establishment of an American AI Exports Program to support the development and deployment of U.S. full-stack AI export packages, within 90 days. The Secretary of Commerce is directed to issue a public

WORKPLACE ARTIFICIAL INTELLIGENCE AND THE TRUMP ADMINISTRATION

(Continued from page 13)

call for proposals from industry-led consortia, with requirements as outlined in the order, also to be submitted within 90 days. The Executive Order also directs actions to mobilize federal financing tools.

Key Takeaways

Consistent with the policy expressed in EO 14179, and the revocation of the Biden AI EO, the *AI Action Plan* outlines a new approach to AI policy focused on reducing regulatory barriers, promoting innovation, and accelerating private-sector adoption of AI tools. With regard to federal funding to states, particularly in light of the *AI Action Plan's* goal of building data centers and semiconductor facilities, it remains unclear whether current state AI-related consumer protection, disclosure, and privacy laws will be deemed “prudent” or “burdensome”—and whether the determination will turn on the law’s text, or on how aggressively a state elects to enforce its law.

The White House is also clearly intent on outpacing other countries in the AI race so that the U.S. benefits from any gains provided by AI.

The impacts on the American workforce also remain to be seen. Under the first pillar, the *AI Action Plan* includes six recommended policy actions centered around the empowerment of American workers in the age of AI. These recommendations include promoting the integration of AI skill development into training programs, funding the retraining of individuals impacted by AI-related job displacement, and studying the impacts of AI on the American workforce. The *AI Action Plan* also aims to enable AI adoption throughout many industries, which will allow more workers to utilize AI in their day-to-day activities. Relatedly, under the second pillar, the *AI Action Plan* seeks to train a skilled workforce that will be tasked with developing the national AI infrastructure. The *AI Action Plan*, however, noticeably steps back from the Biden administration’s attempts to identify and mitigate potential risks and pitfalls of the incorporation of AI into the workplace. With the failure of the OBBBA to institute a moratorium on state and local legislation of AI, whether the private sector must continue to engage in the exercise of identifying and mitigating such risks will now largely depend on what happens at the state and local level.

The *AI Action Plan* marks a decisive pivot toward deregulation as the key driver for rapid innovation in pursuit of global AI leadership, centered on national infrastructure investment, diplomatic assertiveness, and a vision of AI systems aligned with “American values.” Yet, its long-term impact hinges on uncertain state-federal dynamics and the practical outcomes of policies that prioritize speed over safeguards.

The EEOC’s Shift Away from Disparate Impact Liability

On April 23, 2025, President Trump issued EO 14281, “*Restoring Equality of Opportunity and Meritocracy*,” characterizing the disparate impact theory of discrimination as “wholly inconsistent with the Constitution” and a threat to “the commitment to merit and equality of opportunity that forms the

foundation of the American Dream.” Accordingly, the EO directed the Equal Employment Opportunity Commission (“EEOC”) and other federal agencies to deprioritize enforcement of statutes and regulations related to disparate impact liability and to reexamine all pending investigations and suits relying on disparate impact. Subsequently, in late September 2025, the EEOC closed all pending disparate impact discrimination charges and issued right-to-sue letters allowing claimants to file their case in federal court.

To date, employers using workplace AI have focused on whether the AI tool’s output unintentionally discriminates against individuals based on their protected category. If, for instance, a workplace AI developer trains its tool on biased data, the tool may disproportionately and unintentionally subject applicants and/or employees to employment decisions based on their race, gender, age, disability status, or other protected categories. When a workplace AI tool relies on protected categories to generate outputs, it may have engaged in “algorithmic discrimination,” often defined as the use of an AI system that results in a violation of any applicable federal, state, or local discrimination law. Employers may be liable when they use AI that algorithmically discriminates, even if done so unintentionally. The cases of *Mobley v. Workday*, currently pending in the U.S. District Court for the Northern District of California, and *Harper v. Sirius XM*, currently pending in the U.S. District Court for the Eastern District of Michigan, serve as reminders that AI tools used to make employment decisions could be evaluated under a disparate impact theory if there is a plausible inference that an AI algorithm relies on protected characteristics.

While the EEOC has ceased investigating disparate impact claims, civil plaintiffs may still file a charge with the EEOC, receive a right-to-sue letter, file a complaint in court, and potentially prevail on disparate impact claims against employers. Therefore, employers may still be liable for disparate impact discrimination when a plaintiff successfully challenges discriminatory employment practices in federal court.

Further, any EEOC action does not affect disparate impact liability under the numerous local and state laws. Indeed, several current and pending laws expressly require employers using AI in employment-related decision-making to conduct disparate impact analyses to ensure that such systems do not result in disparate outcomes. States and local jurisdictions will likely play a leading role in shaping the foreseeable future AI regulatory landscape. Employers must still comply with applicable state and local laws that prohibit employers’ use of AI and automated employment decision making tools that unintentionally discriminate.

Executive Order 14365 “Ensuring a National Policy Framework for Artificial Intelligence”

On December 11, 2025, President Trump signed Executive Order 14365 entitled, “*Ensuring a National Policy Framework For Artificial Intelligence*.” Aimed at establishing a unified national policy framework for AI, the EO attempts to significantly restrict states from independently regulating AI in “onerous and excessive” ways or that conflict with federal priorities, including America’s AI innovation, leadership, and global dominance. The EO’s stated goal is to reduce “cumbersome” state regulation that “stymie innovation.”

Targeting of State Laws

The main objective of the EO is to prevent a patchwork

of state laws, which may introduce overlapping, incongruous, or burdensome compliance requirements that could slow AI innovation, hinder U.S. competitiveness, and impose costs that may be particularly challenging for start-up companies. These state level requirements, according to the President, place U.S. companies at a disadvantage, compared with their international competitors.

Through the EO, the Administration also intends to challenge the legality of state laws on a variety of bases:

1. The EO targets state laws that arguably “require[e] entities to embed ideological bias within [AI] models.” As an example, the EO specifically references the Colorado AI Act, which prohibits “Algorithmic Discrimination,” or any condition in which use of an AI system results in unlawful differential treatment or impact based on an individual’s protected status.
2. The EO appears poised to target state-level AI regulation that arguably extends beyond a state’s border in a manner that possibly infringes on interstate commerce.

Artificial Intelligence Litigation Task Force

The EO directs the U.S. Attorney General to form an “AI Litigation Task Force” to challenge state AI laws that are inconsistent with the goal of the “United States’ global AI dominance.” Further, the EO calls upon the Secretary of Commerce to identify by March 11, 2026, potentially unconstitutional state AI laws and other regulations that should be considered for challenge by the AI Litigation Task Force. States that have been identified as having onerous laws may also be ineligible for federal Broadband Equity Access and Deployment funding.

Carve-out Exceptions

Notably, the EO indicates that the resulting framework must protect children, prevent censorship, respect copyrights, and safeguard communities. Specifically, the EO directs that legislative recommendations should not include proposals to preempt state AI laws relating to child safety protection, AI computer and data center infrastructure, state government procurement of AI, and “other topics as shall be determined.” This carve-out language suggests the potential for further negotiation regarding where the federal AI framework should govern versus state AI regulation.

Next Steps for Employers

In light of this EO, employers should continue to:

Develop Comprehensive AI Governance Programs:

- Employers should build strong AI governance frameworks that comply with state AI laws, anti-discrimination statutes, and industry-specific regulations.
- Robust governance (including impact/risk assessments, transparency, and bias testing) helps defend against litigation and demonstrates good-faith efforts to prevent discrimination.
- Following federal guidelines (like NIST and CISA) increases compliance and shows commitment to fair practices.

Conduct Internal Workplace AI Audits and Assessments:

- Regularly audit workplace AI tools to ensure they function as intended and do not create disparities among protected groups.
- Effective audits can serve as evidence in defending against discrimination claims.

Ensure Compliance with Laws and Guidance:

- Stay updated on changes in federal, state, and local AI regulations.
- Consult legal counsel to ensure ongoing compliance and best practices.

In short, Employers should strengthen AI governance, regularly audit AI systems, and stay vigilant about legal compliance to manage risks and demonstrate responsible use of AI in the workplace. ■

This article is a combination of articles that first appeared on the website of Epstein Becker & Green, P.C.

NEW GC MEMORANDA UNDER TRUMP APPOINTEES



GC 25-05: Rescission of Certain General Counsel Memoranda

GC 25-06: Seeking Remedial Relief in Settlement Agreements

GC 25-07: Surreptitious Recordings of Collective-Bargaining Sessions as a Per Se NLRA Violation

GC 25-08: Guidance for Investigating Salting Cases

GC 25-09: Guidance for Referring Cases to the National Mediation Board

GC 25-10: Guidance for Deferring ULP Cases

GC 25-11: Proceedings Under NLRA Section 10(j)

GC 26-01: New Agency Wide Docketing Protocol

GC 26-02: Operational Priorities to Ensure Consistent, Fair, and Timely Case Resolution Across Regions

GC 26-03: Case Handling Guidance

All these new GC memos were issued by William B. Cowen, Acting General Counsel, until GC Memo 26-02 which was issued by Crystal S. Carey, who was sworn in on January 7, 2026, as the new General Counsel.

(nlr.gov/guidance/memos-research/general-counsel-memos).

LEGAL HAIKU REDUX— THE FRAUGHT STATE OF THE LEGAL-PROFESSION AND A CALL FOR POETS

Stuart M. Israel

We live in a brave new world of artificial intelligence and, we're told, a time of crisis-level legal-profession unwellness. What is to be done? Write poetry, of course. Legal Haiku is needed to balance the volatile jurisprudential universe. You can help. Instructions follow.

1. Legal Haiku rules.

I learned to value poetry when forced to by the Detroit Public Schools. Much later, thanks to *Labor and Employment Lawnotes*, I became a published poet. To paraphrase Montréal-born novelist and essayist Mordecai Richler (1931-2001), I became world-famous among a few readers and relatives. [1]

I carefully chose my art-form. No book-length Walt Whitman stuff. Succinctness was imperative. I decided on the haiku style. Haiku is a form of Japanese poetry. Brevity is the soul of haiku. Haiku is so succinct that the word *haiku* is both singular and plural.

Traditional haiku are written in Japanese. But I write in English, so my haiku is accessible to *Lawnotes* readers. Few, I assume, are fluent in Japanese. Besides, I know only a few words of Japanese, mostly picked up at the Japanese market, watching Toshiro Mifune movies, and during a term teaching law students at U-H in Honolulu.

English-language haiku has traditions. The classical form has 17 syllables in three lines. The first line has 5 syllables, the second has 7 syllables, and the third has 5 syllables.

Masters might go with 7-7-3, 5-5-7, or 7-5-5, or even two lines. To each poet, his or her own art form. Attributed to Picasso: "Learn the rules like a pro, so you can break them like an artist." If Picasso really said that, he probably used *Español*. Still, the point is made: do what *you* want. In Hawaiian pidgin: "Whatevahs!"

I don't think there are haiku-police who enforce the conventions. That is good, as we fallible humans sometimes find it difficult to count syllables with mathematical certainty. Anyway, I try to be a purist. Three lines, 17 syllables, 5-7-5. I use the classical form as if mandated by the Federal Rules of Civil Procedure. As Tevye sang: tradition.

That's as to form. I'm non-traditional about content.

Traditionally, whether in Japanese or English, haiku are about seasons and nature. Another form of Japanese poetry—called *senryu*—is about irony and human foibles. The practice of law is full of irony and human foibles. It is also full of more organic stuff. I write about law stuff. I write in the haiku style, but about *senryu* subjects. I call my art **Legal Haiku**.

You now have my (flexible) rules. Legal Haiku examples follow. Then, I will invite you to become a *Lawnotes*-published haiku poet. Read on.

2. Legal Haiku in *Lawnotes*.

Lawnotes first published some of my Legal Haiku years ago. I was the editor at the time, confident of my poetic acumen. Here are three of my early Legal Haiku.

A Discovery Response

It's irrelevant.
It's overbroad; burdensome.
I will not answer.

Remembering Evidence Class

Out of court? For truth?
I know it when I hear it.
"Objection! Hearsay!"

A Cross-Examination Commandment

Don't ask the witness,
If you don't know the answer.
Unless you don't care.

Succinct, edifying, insightful, and amusing, right? One disagreed. I received a counter-haiku from Cheryll Israel. We are married. She wrote:

I got your column.
So, just how should I respond?
"Yuck, a lawyer poem."

It's easy to be a critic, Cheryll. But no worries. I got uber-positive responses from many poetry-mavens—lawyers, judges, state and federal officials, arbitrators, law professors, the ABA *Litigation* journal editor, and the director of ALI-ABA book publications.

Some astute readers submitted their own Legal Haiku for *Lawnotes* publication. Most followed my rules (more or less). I reprint some next, without advance consent from the authors. I remind them that *Lawnotes* holds the copyright. [2]

3. Legal Haiku from *Lawnotes* readers.

One of good-humored Shel Stark's untitled Legal Haiku offers advice to litigators.

No humor at trial.
Makes the decision-makers
Think of smart alecks.

Jim Feeney writes perhaps the first-ever intentionally-poetic request to the Michigan Employment Relations Commission.

MERC

Public employment
Disputes we bring to you.
Be gentle and fair.

Jim also offers litigation advice.

Answering a Complaint

Admit, deny, or
Neither admit or deny.
And say nothing else.

Michigan Court of Appeals Judge Mark J. Cavanagh openly eschews the 17-syllable form in three succinct lines of what he calls "Irish Haiku."

Appeal

One last chance
To be wrong
Again.

The late Maury Kelman, Wayne law professor emeritus, provides sage realism.

Summary Judgment

Facts undisputed.
Applicable Law is clear.
Bye-bye jury trial.

Megan Norris offers the voice of practical experience.

Rethinking the Trial Date

The deadline seemed
Fine when we met with the Court.
Need adjournment now.

These vintage insights (even those with syllabic miscues) edified and amused, and cleansed some juris-doctored souls. But that was more than 17 years ago, in simpler times. Today, we need new haiku and all the fresh poetic edification and amusement we can get.

4. The fraught state of the legal profession—30 examples.

There have been many changes in our learned profession since *Lawnotes* last published Legal Haiku. Bar journals, law reviews, and legal prognosticators predict many more. Some changes and rumors of changes will no doubt speak to your poetry muse.

There are (1) the positive possibilities and ominous portents of the proliferation of generative artificial intelligence use by lawyers, clients, and judges.

There are (2) the expansion of remote and screen-centric legal work and (3) the generational and philosophical differences about the value of face to face interaction—with clients, witnesses, colleagues, opponents, and adjudicators—versus insulating and isolating electronic substitutes. Are, for example, in-person oral-arguments useful expenditures of resources or outmoded extravagances?

There are the ongoing debates about (4) law school accreditation and admission processes and standards; (5) the length, content, quality, cost, and utility of legal education; (6) whether law schools should be lawyer-schools (serving students) or fonts of legal scholarship (serving faculty) and whether they can be both; (7) the *raison d'être* of bar examinations and *cui bono* from requiring them; and (8) measuring the "due" part of what *The Lawyer's Oath* calls the "respect due to courts of justice and judicial officers."

There is, we are told, (9) a crisis of "unwellness" among lawyers, judges, and law students—some unknown number burdened by depression, stress, anxiety, dissatisfaction, legal and illegal substance abuse, gambling addiction, suicide ideation, and other health concerns, dysfunctions, and afflictions. The crisis, we are told, demands more bar-affiliated therapy programs, more attention from bar-association staff and court-appointed study-committees, and some empathy-informed legal-system changes. [3]

There are (10) the expanding economic and cultural gulfs between BigLaw, not so big law, and hang-up-a-shingle law. There are perpetual problems regarding (11) legal services affordability, (12) the under-informed and misinformed law-consuming public, and (13) the barriers to what is called "access to justice." There are (14) the imbalances in litigation power between, *e.g.*, (a) haves and have-nots; (b) one-shotters (like consumers, tenants, and workers) and repeat-players (like lenders, landlords, and bosses); and (c) insiders (like campaign-donors and politicians) and outsiders (not in good ole boy/girl networks).

There are (15) problems connecting clients to the right lawyers—those who can and will address the clients' legal needs with practical knowledge, apt experience, alacrity, empathy, economy, and efficiency. There are (16) the many questions that vex both those who work and charge for "billable hours" and those who pay for them.

There are (17) the constant challenges that arise from the immutable fact that the law—at least the private practice of it—is a business. The law-business requires lots of time and attention and endless decisions about things like: recruiting, managing, and properly compensating personnel; office space, expensive and temperamental equipment, and paperclips, file-folders, highlighters, and rubber bands; paper and "paperless" confidential record-keeping and retention; computer technology and security; insurance, accounting, and tax-paying; profit margins; client acquisition, satisfaction, and retention; and many other requirements and vicissitudes not portrayed in lawyer-movies or novels, and not mentioned much in law schools.

There is the reality that being a lawyer in most any milieu comes with (18) great responsibilities—regarding quality and ethical, fiduciary, and moral obligations—and (19) great challenges emanating from the frequent need to deal with difficult people and not-always-rationally-functioning institutions—adjudicatory, regulatory, and otherwise.

Some of these difficult people will be on the other side. Some will be on your side. Some won't have a side, but for one or another reason will be in the way of, in Rule 1 terms, the "just, speedy, and inexpensive" resolution of the problems on your desk. Lawyers are— or are supposed to be—problem-solvers. This means lawyers are ALWAYS laden with others' problems and are always dealing with SNAFUs, TARFUs, and FUBARs.

There are (20) the rocky and winding roads connecting new lawyers to the right jobs or, for some, to any jobs. There are complaints from lawyers-with-jobs about: (21) insufficient professional support, (22) inadequate on-the-job learning opportunities, (23) overwork, and (24) underemployment, measured by substance, compensation, or both.

There is (25) the constant bombardment of calls, mail, emails,

LEGAL HAIKU REDUX — THE FRAUGHT STATE OF THE LEGAL-PROFESSION AND A CALL FOR POETS

(Continued from page 17)

and texts from vendors. They promise systems, applications, training, advice, and marketing "solutions" that will expand your law practice beyond your wildest dreams, reduce your drudgery, and leave you with time for the satisfactions of lawyering and the joys of life. Their products and services, the vendors say, will pay for themselves—but the costs constantly increase for renewals, updates, upgrades, and the newest new thing.

All this is on top of: (26) the increasing complexity and exponential expansion of "the law," (27) the endless adjustments of federal, state, local, and courtroom rules and protocols, (28) perpetual government reconfigurations, and (29) the many instances of judicial mercuriality, idiosyncrasy, injudiciousness, empathy-deficiency, and other shortcomings. Not least, there are (30) the increasingly-heated debates about what is and is not "clearly" unconstitutional and an "existential" threat to the "rule of law."

Some of these problems and challenges are old, but unresolved and exacerbated by inattention or new circumstance. Some are new. We can agree that, as Mercer Ellington put it: "Things ain't what they used to be." Anyway, its hard out here for a lawyer. Still, as Hyman Roth said: "This is the business we've chosen."

5. The need for your poetry.

What, you ask, can one lawyer (*i.e.*, you) do, *inter alia*?

Write Legal Haiku. The profession's problems, challenges, achievements, and aspirations demand *your* poetic attention. Reflect. Illuminate. Edify. Inspire action. Praise the good and rue the bad. You can do this economically and efficiently—and without a rhyming dictionary. *You* can make a difference 17 syllables at a time.

6. Some topical Legal Haiku

Here are some topical Legal Haiku to reawaken your artistic soul—likely asleep since you successfully completed poetry-bereft Legal Research and Writing 101.

The Road To The Learned Profession

College. Then law school.
Then bar examination.
Is this excessive?

No Second Thoughts

Intellectual.
I help people *and* get paid.
Lawyering is good.

Second Thoughts

Unwellness and debt.
Lincoln or Darrow, I'm not.
Is the law for me?

The Unwellness Crisis

Depressed. Repressed. Sad.

Suppressed. Oppressed. Always mad.
Is the law for me?

Marketing Strategy

"Client, hire me!"
"You will get what you deserve!"
Deserve? A good pitch?

What Do Greek Philosophy and Rule 26 Have in Common?

Aristotle's Mean:
Nothing too much. When in court:
Be proportional.

Who Will Judge The Judges?

Socrates: Judge, be
Courteous, wise, sober, fair.
Do you measure up?

Litigator, Sometimes You *Must* Be Politic!

Some judges are bad.
Lazy, dense, biased, mean, vain.
Call them "Your Honor."

What Mediators Say

In court, there are at
Least two sides to the story.
Better to settle.

What Legal-Readers Think

Some lawyers can't write.
Verbose. Dense. Fat. Stiff. Off-point.
Get an editor!

The Righteous Path (Proverbs 16:18)

You went to law school,
Like *every* lawyer. Big deal!
Be modest. Humble.

YOUR INVITATION TO ACTION

You now know the (flexible) rules. You've read the stimulating examples. You can write Legal Haiku with the best of them—so you say. So do it.

Submit your Legal Haiku for possible *Lawnotes* publication. Be heard. Reap the artistic fame and praise you deserve. What is right about the law? Or wrong? Or ironic? Or, as Picasso might say, *estúpido*? Send your wry, opinionated, insightful, and passionate-but-tasteful Legal Haiku to *Lawnotes* editor John G. Adam, jgabrieladam@gmail.com.

Three lines, 17 syllables, 5-7-5—or otherwise. Original work; no generative AI. For security and self-esteem purposes, check any box that says "I am not a robot."

Send your Legal Haiku soon. *Carpe diem*. Do it for art's sake and the betterment of the bar, the bench, and the public. *Ars gratia artis et pro bono publico*. Preserve your insights for posterity. *Ars longa, vita brevis*. Exercise your expression rights to help secure the blessings of liberty. It's the constitutional thing to do. ■

End Notes

1. See "Law and Poetry," Vol. 18, No. 3 *Labor and Employment Lawnotes* 10 (Fall 2008), reprinted in *The Scrivner* (Winter 2009) and collected in Stuart M. Israel and Barry Goldman, *Opinions—Essays on Lawyering, Litigation and Arbitration, the Placebo Effect, Chutzpah, and Related Matters* (Createspace 2016). Richler's quote: "I'm world-famous...all over Canada."

2. Legal Haiku from the bench, the bar, and others—and my reply haiku when called for—are in "Poetic Lawyers and Judges," Vol. 18, No. 4 *Labor and Employment Lawnotes* 18 (Winter 2009). Past issues of *Lawnotes* are archived at the State Bar of Michigan Labor and Employment Law Section page at michbar.org.

3. On the legal profession's reputed "unwellness" crisis, see my reporting in "Lawyer Wellness," Vol. 32, No. 3 *Labor and Employment Lawnotes* 12 (Fall 2022). Playwright, movie-maker, and essayist David Mamet explained in 2022: "'Wellness' is a neologism meaning 'health.'" What was wrong with "health," Mamet asks. He answers: one can never have enough wellness "and so may be sold any amount." There is much wellness-selling to the legal profession nowadays. This might be called the MAHA movement: *make attorneys healthy again*. Again?

THINKING ABOUT BILL SAXTON

Sheldon J. Stark
Arbitrator and Mediator (Retired)

Watching several of the most prominent law firms in this country caving in to intimidation by the Trump administration, I have been thinking about William M. ("Bill") Saxton, who passed away in 2019, at the age of 92. Not everyone reading this will remember Bill, which is too bad. I have only the fondest memories, both personally and professionally, and I want to share a few with you.

First, however, let me note Bill Saxton was a giant in our profession. He was an outstanding labor and employment law practitioner, a master litigator, a mentor to some of the best lawyers in the field today, and truly a gifted storyteller. In 1998 he became only the second member of the Labor and Employment Law Section to receive our newly established Distinguished Service Award. When his friend and practice adversary, Ted Sachs, a union side labor lawyer received the very first award, everyone understood Bill would be second.

At the height of his powers, Bill was considered Dean of the Management Defense Bar in Michigan. He was for many years managing partner and later CEO of Butzel Long where he started in 1952. As such, he mentored more than one generation of great lawyers: John Hancock, Don Miller, John Dudley, Frank Vecchio, Virginia Metz, Dick Rassel, Dave Calzone, Dan Tukel, Mark Nelson, Jim Rosenfeld, Ed Kronk, Greg Murray, Gloria Hage, Robert Boonin, and many others I didn't personally deal with. All benefited from practicing alongside Bill as he set an example of what leadership in a law firm should look like. I believe I know how Bill would have reacted to government meddling.

As a young plaintiff's lawyer, Bill reached out and mentored me, too. Surprisingly, as I was always on the other side. I have

now spent a lifetime giving CLE presentations. It was Bill who recruited me to give my very first at a Labor and Employment Law Section program. We had many matters together over the years and he always treated me with respect. Best of all, Bill started referring his friends to me when they got into trouble at work and needed a plaintiff side employment lawyer to advise and represent them.

There are two stories that perfectly exemplify the Bill Saxton I knew.

One of Bill's many large and influential clients was the Detroit News. I was consulted early in my career by a senior News editor forced to retire after 42 years on the job. Ironically, the News ran an editorial on his last day of work condemning mandatory retirement. Regrettably, there was nothing to be done. The Age Discrimination in Employment Act (ADEA) carved out an exception for workers covered by then existing union contracts, and this editor was caught in that exception. "This is terrible," said the client. "There are two openings for my old job posted right now!" "Go apply," I counseled. "But they would never hire me," he replied. "I'm too old!" "Ah! Exactly. Then you would have a great case! Who can they possibly find better qualified than the guy who has performed the job with skill and ability for 42 years!?" We were both right, of course. When his application was rejected, I brought a claim under the ADEA for failure to hire. As a lark, I quoted the Detroit News editorial at length in the Complaint. As soon as the complaint was served, Bill called to invite me to his office to discuss the case. We had never met before.

Entering into negotiations with Bill Saxton was something special. He always started with a couple of spicy, off-color jokes followed by 30-40 minutes of totally unrelated story telling. It was difficult not to enjoy listening despite myself. Eventually, he got to the point: "I'm deeply disappointed in you, Shel," he began on this occasion. "What!?" I thought. "Aren't we having a perfectly fine conversation?" "What have I done?" I asked. "I understand you're a big ACLU supporter," he replied. "Yes," I acknowledged. "How did you know that?" "Never mind," he replied, "I have my ways. Let me just say I'm deeply disappointed because I can't believe you would want the business office of a great newspaper controlling editorial policy!" Of course, he was right. We settled the case nonetheless before the time expired to file an answer.

From 1977 to 1990 or so, my office was in the Ford Building in downtown Detroit. The entire 11th floor was taken up by a law firm by the name of Beaumont, Smith and Harris. At one time, they were Detroit's largest and most influential. When the firm "merged" with the Clark Klein law firm in the late 1970s, the remaining personnel moved out to Clark Klein's offices. Once they had moved out but before remodeling began, the manager of the Ford Building took several of us on a tour of the now empty suite. As we stepped through the door, we felt we were entering The Twilight Zone: a portal into a 1940s noir world. The reception area was closed off from the receptionist's desk by an old-fashioned glass cage with a hole through which to communicate. The switchboard itself was something out of an old movie: large plugs with long thick cords attached. The walls were painted institutional green with old, framed sketches of famous buildings from the founding of the nation. Every office door had frosted glass. Two offices were labeled "Stenographic Pool." Each lawyer office had an outer office where a secretary

THINKING ABOUT BILL SAXTON

(Continued from page 19)

sat. The telephones were black, old fashioned rotary dial models with large cables and little flashing buttons. Every lawyer's desk had a 1940s-style goose neck lamp. We could almost hear the Twilight Zone theme playing in our ears.

Some 50 years later, the memory of that walk through remains vivid and amazing. I couldn't wait to share the story with friends. As it happens, I was having lunch that day with Bill Saxton. I kicked off our conversation describing the eerily empty retro offices of Beaumont, Smith and Harris. "Beaumont, Smith and Harris was THE major firm in Detroit when I graduated from law school," Bill reminisced. "I was invited to interview with the managing partner for an associate position and was very excited. When the interview was over and I had answered all of his questions, he asked if I had any questions for him. 'Yes,' I replied, 'what are your plans for future growth?'"

"Future growth?" the managing partner asked incredulous. "Don't worry your head about the future, Mr. Saxton. We are Beaumont, Smith and Harris. We represent Packard Motors, J.L. Hudson and Briggs Manufacturing, the best clients in Detroit! We don't worry about future growth."

With that, Bill had heard enough. He accepted an offer from Butzel Long. Within a few years, Briggs Manufacturing was acquired by Chrysler Corporation, Packard Motors went out of business; and J.L. Hudson was acquired by the Dayton Corporation. All chose new counsel – NOT Beaumont Smith and Harris. "You can never rest on your laurels, Sheldon," Bill concluded. And he never did.

Even after retiring to his place in Arizona, Bill continued to keep current, regularly calling friends and former colleagues to share his insights and suggestions for what this decision or that would mean for our own practices.

Bill Saxton was an unforgettable man A towering figure. In 2003, he was awarded the State Bar's Champion of Justice Award "for integrity and adherence to the highest principles and traditions of the legal profession and professional accomplishments." www.butzel.com/news-Former-Butzel-Long-Chairman-and-CEO-William-M-Saxton-passes-away.

We could use more of that Bill Saxton backbone and integrity in the world today. ■

VIVALDI'S SPRING READING

Paul Johnson, *Mozart: A Life* (2013).

David Schoenbaum, *The Violin: A Social History of the World's Most Versatile Instrument* (2013).

James Grymes, *Violins of Hope: Violins of the Holocaust-Instruments of Hope and Liberation in Mankind's Darkest Hour* (2014).

Eric Siblin, *The Cello Suites: J. S. Bach, Pablo Casals, and the Search for a Baroque Masterpiece* (2009).

Kate Kennedy, *Cello: A Journey Through Silence to Sound* (2024).

CONTRACTING AGENTS UNDER MICHIGAN'S PREVAILING WAGE LAW

Andrew Niedzinski
Wage Hour Division Administrator

Michigan's Prevailing Wage on State Projects law, enacted through Public Act 10 of 2023, restored state prevailing wage protections on certain publicly funded construction projects. A key concept in the statute is the role of the "contracting agent," which determines when Michigan's state prevailing wage requirements apply.

Under Act 10, a contracting agent is the public entity or authorized representative that procures and administers a construction contract using state funds. In practical terms, the contracting agent is the public body that issues the bid, signs the construction contract, and oversees the project on behalf of the state. Typical contracting agents include State of Michigan departments and agencies, public universities, and local public school districts. These entities are responsible for ensuring that prevailing wage clauses and wage schedules are included in bidding documents and construction contracts.

Act 10 also expanded the definition of contracting agent to include certain private entities. Legal entities that enter into contracts for large-scale energy storage, wind, or solar facilities with a capacity of 2 megawatts or more may be treated as contracting agents when state support is involved. This provision was intended to ensure that major energy infrastructure projects benefiting from state involvement are subject to prevailing wage protections.

However, Local units of government; counties, cities, townships, and villages, are not included in the statutory definition of contracting agent under Act 10. The Legislature did not extend state prevailing wage coverage to purely local government projects. This exclusion is consistent with Michigan Supreme Court precedent in *Associated Builders & Contractors v City of Lansing*, which held that municipalities were not covered under Michigan's former prevailing wage law (Public Act 166 of 1965). As a result, a large share of public construction work in Michigan; municipal buildings, local roads, water and sewer infrastructure, and projects, falls outside the state prevailing wage system even if receiving state appropriated funds

Prevailing wage coverage may still apply to local government projects when federal funding includes Davis-Bacon and Related Acts (DBRA). In those cases, federal prevailing wage rates apply, and enforcement authority rests with the U.S. Department of Labor. When DBRA applies and the project is issued by a contracting agent, Michigan Wage and Hour does not have jurisdiction to enforce state prevailing wage requirements.

Finally, Michigan Wage and Hour has encountered projects using Michigan-issued prevailing wage rates where federal Davis-Bacon rates should have applied. The Division is working to develop a pathway for appropriate state coverage where permitted, but at this time, wage violations on federally funded projects must generally be addressed either as a contract compliance issue or through the U.S. Department of Labor's Wage and Hour Division. ■

STRAIGHTENING TEETH --AT ANY AGE-- THE SMARTER WAY WITH CLEAR ALIGNERS

Dr. Doug Thompson, DDS and Chelsea Kiser, RDH

For decades, fixed appliances such as traditional metal braces have been the clinical standard for correcting misaligned teeth and bite problems. While very effective, traditional braces come with a unique set of challenges—brackets and wires can appear unsightly; home hygiene becomes more complicated, and patients may feel restricted in their diet.

In recent years, clear plastic aligners have emerged as a widely accepted orthodontic modality, offering both the functional and health-related benefits of traditional braces but with fewer complications. Clear aligner therapy has transformed orthodontic care by providing a removable, esthetic, and patient-centered alternative. Beyond smile improvement, aligner therapy can contribute to enhanced bite function, improved gum health, greater patient comfort, and overall systemic well-being.

Clear aligners effectively address crowded teeth, spacing irregularities, and bite discrepancies. By correcting bite problems, aligner therapy redistributes bite forces more evenly across the entire mouth. This balanced force distribution helps prevent abnormal enamel wear, tooth fractures, and excessive stress on specific teeth. Beyond that, improved bites can enhance chewing ability and support long-term dental stability. Digital treatment through intraoral scanning and 3D models also helps enhance planning precision, contributing to improved outcomes and treatment efficiency.

Impacts on Daily Oral Hygiene

Traditional fixed orthodontic appliances often complicate home oral hygiene due to increased plaque retention around brackets and wires, leading to gum inflammation and a higher decay risk. In contrast, clear aligners are removable, enabling patients to easily maintain their brushing and flossing routines. By eliminating crowding and reducing hard-to-clean "in-between" areas, clear aligner therapy further decreases bacterial retention due to increased access to all tooth surfaces. This improved access minimizes the risk of bacterial buildup and while lowering the risk of gingivitis, periodontal disease, and enamel decalcification, commonly known as white spot lesions.

Impacts on Bite and Jaw Health

Bite disease can also contribute to increased strain on the temporomandibular joint (TMJ). Clear aligners gradually reposition teeth to improve bite alignment, thereby reducing abnormal mechanical stress on the TMJ. Improvements patients may find with bite alignment may include reduced jaw pain, decreased muscle tension, diminished jaw clicking or locking, and relief from associated tension headaches. While aligners are not a standalone treatment for all TMJ disorders, correcting underlying bite discrepancies may significantly alleviate contributing factors, leading to increased relief.

Impacts on Tooth Grinding

Bruxism, or tooth grinding, remains a common destructive habit associated with gradual enamel wear, dentin exposure, tooth sensitivity, and structural damage. Clear aligners function similarly to bite guards by providing a thin physical plastic barrier between upper and lower teeth. Over time, improved tooth alignment promotes more balanced biting contacts which potentially reduces excessive enamel wear and protects long-term tooth integrity.

Impacts on Comfort and Daily Living

Clear aligners are made from smooth, BPA-free thermoplastic materials that are gentle on the surrounding soft tissues. Unlike traditional brackets and wires, clear aligners are far less likely to cause irritation to the cheeks, lips, and tongue. With clear aligners, patients often report greater comfort and experience fewer emergency visits related to broken brackets, poking wires, or soft tissue injury. Clear aligners also have minimal impact on speech, eating, and daily routines, which helps support better compliance and overall treatment satisfaction.

Impacts on Whole-Body Health

The relationship between oral and systemic health is well established. Chronic gum inflammation has been associated with at least fifty-seven different systemic diseases, including cardiovascular disease, diabetes, strokes, cognitive decline, and some cancers. By improving oral hygiene accessibility and reducing risk factors, clear aligner therapy may indirectly contribute to improved systemic health outcomes. While orthodontic treatment alone does not eliminate systemic disease risk, optimizing oral health represents a meaningful preventive measure.

While a straighter smile may be the most visible result, clear aligner therapy offers benefits that extend well beyond appearance and provides substantial clinical and functional benefits. Improvements in bite balance, gum health, temporomandibular joint support, and enamel protection underscore its therapeutic value. Together with improved comfort and advanced digital planning, clear aligners offer a modern orthodontic solution that promotes healthier, more stable smiles. ■



THE SIXTH CIRCUIT ON FACULTY SPEECH AND TITLE IX

Ahmad A. Chehab and Claudia Caster
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1.

In *Patterson v. Kent State Univ.*, 155 F.4th 635 (6th Cir. 2025), the Sixth Circuit affirmed summary judgment for a public university after a tenured professor launched a weeks-long, profanity-laden social media campaign attacking administrators and colleagues. The court held the university had legitimate, non-discriminatory reasons for its actions (workplace disruption and unprofessional conduct), rejected Title VII discrimination and retaliation theories, concluded the First Amendment did not protect the employee's targeted, vulgar attacks over internal workplace disputes, and found a "regarded as disabled" Rehabilitation Act claim failed based on a stray "mental stability" remark.

Patterson, a transgender professor at Kent State University, became involved in a dispute with university administrators over leadership roles and curricular decisions related to a gender-studies center and program. Over several weeks, Patterson published a series of public, profanity-laden social media posts sharply criticizing colleagues and administrators as "transphobes" engaged in "F*uckery" and "epistemic violence" and accusing them of incompetence and discrimination (including "overt trans antagonism"). After the posts, the university denied Patterson's requested tenure transfer to the main campus.

The Sixth Circuit's opinion reads as a cautionary tale about how *what* public employees can say in the workplace may be protected—or at least actionable—but *how* public employees say it can sink the ship. The panel opens with the framing that drives the whole outcome: this case "arise[s] out of Kent State's response to Patterson's weeks-long, profanity-laden Twitter tirade insulting colleagues and the university." The record the court emphasizes is not careful whistleblowing, but rather a barrage of personalized, profane attacks that repeatedly targeted specific administrators and colleagues by identity and profession. That factual posture matters because the court repeatedly treats the situation as an internal workplace dispute that spilled into public view, rather than a public-facing criticism about institutional policy.

On the Title VII discrimination claim, the Court of Appeals found that Kent State had "legitimate, nondiscriminatory reasons" for its actions, finding the "rude and profanity-laced" communications and insults toward colleagues violated university norms and policies and easily justified management intervention "having nothing to do with sex or gender." Although administrators were initially "excited" to work with Patterson, this "changed course" after the tweets and messages became "hostile," which undercuts the narrative that gender identity was the real driver.

The retaliation claim fared no better because the timing and knowledge elements did not line up. Several of Patterson's "protected activity" emails came after the key adverse decision,

and for the remaining communications, Patterson was unable to show the relevant decisionmakers even knew about them.

On the First Amendment retaliation claim, the Sixth Circuit drew a bright line between public-concern speech and public airing of workplace feuds. The court emphasized the "public concern" inquiry, characterizing the posts as "employee beef" and that "complaining about your boss and coworkers is not protected by the First Amendment just because you work for the government." Even where a tweet arguably gestures toward broader commentary (e.g., generalized claims about discrimination), the court refused to let that "immunize" what it calls "caustic personal attacks against colleagues." And then the opinion lands the punchline: "The First Amendment does not require a public employer to tolerate an embarrassing, vulgar, vituperative, ad hominem attack," particularly where the manner and content are "disrespectful, demeaning, rude, and insulting," and the workplace experiences it as such. In other words, the Sixth Circuit advised public employees that there *is* "a way to raise awareness of discrimination" without turning it into profane, targeted workplace warfare. And when the speech produces "serious strife" and a "dysfunctional work environment," the employer's legitimate interests prevail. Furthermore, the Court found that a university's interest "in administering effective public services" outweighed a public employee's interest in "trash talk." As such, it did not constitute protected speech under the First Amendment.

This case serves to illustrate that social media posts attacking employer and its agents constitute a legitimate and nondiscriminatory reason for adverse action. Employers should endeavor to establish policies prohibiting these kinds of attacks to formally establish them as legitimate grounds for adverse action. This decision also highlights employers' ability to discipline employees for speech made outside their employment when such speech does not speak on matters of public concerns and impedes the employer's ability to further its core organizational interests.

2.

Title IX requires schools receiving federal financial assistance to "provide equal athletic opportunity for members of both sexes." But can Title IX plaintiffs force a university to create Division I varsity teams based largely on interest surveys? On January 20, 2026, the U.S. Court of Appeals for the Sixth Circuit's answer was no, affirming a post-bench trial judgment for the University of Kentucky ("UK"). *Niblock v. University of Kentucky*, ___ F. 4th ___, 2026 WL 146504 (for publication, 2026).

Under the Department of Education's 1979 guidance, a school is considered in compliance with Title IX's participation-opportunities requirement if it shows that: (1) athletic opportunities are substantially proportionate to enrollment; (2) that it has a history and continuing practice of expanding opportunities for the underrepresented sex; or (3) that it fully and effectively accommodates the interests and abilities of the underrepresented sex.

In *Niblock v. University of Kentucky*, female students alleged the University violated Title IX because it refused to create a women's lacrosse team, field-hockey team, and equestrian

team (though UK also does not have a men's lacrosse team, field-hockey team, or equestrian team). After a three-day bench trial on a fulsome record, the district court agreed with the plaintiffs that UK did not provide "substantially proportionate" athletic opportunities for women, and that UK's efforts did not demonstrate a history and continuing practice of expanding opportunities for the underrepresented sex. Nonetheless, the court found that UK had fulfilled the demand for varsity athletics spots by female students who had an interest in, and the skills required for, competing at a Division I level, thereby complying with Title IX.

In arriving at that conclusion, the district court relied on the results of an annual student survey, which indicated that for women's equestrian, 244 students were interested and 122 claimed they could compete, but only 34 reported Division I recruitment. Only 11 cleared athletics requirements and agreed to follow student-athlete rules, and only 9 provided contact information, far below a typical roster of about 40 athletes. For women's field hockey, 60 students expressed interest, but only 13 reported objective indicators of Division I ability, and only 3 provided contact information, compared to a typical roster of about 25 athletes. And finally, for women's lacrosse, 136 students expressed interest, but only 19 reported objective indicators of Division I ability, and none provided contact information, against a typical roster of about 34 athletes. Based on these results, UK did not have enough female students who wanted to and could compete on the requested varsity teams, and thus the court found no Title IX violation.

The Sixth Circuit affirmed, holding that "Title IX does not require schools to manufacture interest in a team or field teams unable to compete at a meaningful level." Its analysis—like that of the district court—turned on the third prong of the Department of Education's 1979 guidance: whether the institution's program "fully and effectively accommodates" the interests and abilities of the underrepresented sex. It noted that the surveys "by themselves cannot make up for the absence of evidence of individuals who want to play these varsity sports and have shown an ability to do so" on a Division I level and thus focused on the distinction between generalized expressions of interest and the type of evidence needed to demonstrate Division I-level ability and team viability. Plaintiffs relied heavily on UK's annual student athletics-interest survey and related club-sport evidence. But the court credited UK's position that self-reported survey responses—particularly where students did not provide identifying information or objective indicia of competitive readiness—did not establish that UK could assemble rosters capable of competing at the Division I level. And the Sixth Circuit agreed that the district court was entitled to treat the survey as imperfect evidence of ability and to instead credit the practical reality that a university cannot field a team from anonymous, unverifiable responses. The court also highlighted roster-size benchmarks in the record and the district court's finding that the numbers of students demonstrating objective readiness (and willingness to be contacted and participate) fell materially short of what would be required to assemble viable, Division I teams in the three sports at issue.

Thus, even where women are underrepresented in varsity roster spots compared to overall enrollment, plaintiffs still must prove sufficient current student "interest and ability" to create a new Division I team. That showing, the Sixth Circuit said, was

not made by the female class plaintiffs.

Two judges wrote separately to go a step further than the majority opinion, specifically calling into question the future viability of the 1979 guidance. The concurring judges observed that, after the Supreme Court's seminal 2024 decision in *Loper Bright v. Raimondo*, 603 U.S. 369 (2024), courts no longer afford deference to agency interpretations of statutes and regulations (here, the Department of Education's interpretation of Title IX). They noted that this development could warrant revisiting 1979 guidance in an appropriate case, and they offered preliminary guideposts for how that reassessment might proceed. In particular, the concurrence questioned the "substantial proportionality" prong, reasoning that achieving proportionality may pressure universities to eliminate men's teams, thereby depriving male students of athletic opportunities on the basis of sex. At the same time, the concurrence acknowledged the significant complexity that would accompany replacing the 1979 framework and therefore left any reworking of that guidance for another day.

The decision reinforces that underrepresentation alone is not dispositive in participation-opportunity claims. It also raises significant questions about the future of the nearly 50-year-old methods of compliance with Title IX. ■



Moon



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Labor and Employment Law Section

State Bar of Michigan
 The Michael Franck Building
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