Chapter 5

Employment Law Update:
Maximizing Human Resources

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§ 5.01  Introduction.

Human capital is a critical component of any company. Much of the law that governs employee relations is still evolving and mistakes can be very costly. This chapter will review some of the recent changes in the law – including statutes, proposed regulations and case law – in the many areas that affect human capital and employee relations. In particular, this chapter will examine those changes that might have the greatest impact on employers in the energy business.

This review will first focus on Supreme Court cases that affect different areas of the law. Next it will examine other cases, statutes and regulations arising in various areas of labor and employment law. Finally, it will review what may become the next developing area of employment law: workplace bullying.

§ 5.02  Supreme Court Update.

The Supreme Court addressed many technical issues relating to discrimination claims, from what constitutes a charge, to when a charge is timely filed, to what type of evidence can sustain a discrimination claim. The Court also examined the degree of deference Department of Labor (DOL) regulations, interpretations and internal Advisory Memorandum are to be afforded. The Court also examined an Employee Retirement Income Security Act (ERISA) case involving a defined contribution pension plan...
and the remedies available to an individual account, rather than the plan as a whole.


Turning first to the initiation of discrimination allegations, the Court answered the question, what does it take to file a charge with the Equal Employment Opportunity Commission (EEOC)? And answered — not very much. In Federal Express Corp. v. Holowecki, the Court held that a charge is filed when the complainant alleges discrimination, names the party to be charged and can be reasonably construed as making a request to take some remedial action to protect the employee’s rights or to settle a dispute between the employee and employer.

This case arose under the Age Discrimination in Employment Act (ADEA). A small group of Federal Express Corporation (FedEx) employees brought a suit against FedEx alleging that two of the company’s productivity programs violated the ADEA. These employees also sought class certification of similarly situated FedEx employees.

FedEx challenged the lawsuit as not being timely filed, alleging that one of the Plaintiff’s did not first file a charge with the EEOC as required by the ADEA. The Plaintiff responded that she had indeed filed a charge with the EEOC by submitting Form 283 “Intake Questionnaire” along with a signed affidavit that described the alleged discriminatory practices. The district court agreed with FedEx, but was reversed by the Second Circuit. FedEx then appealed to the Supreme Court, which granted certiorari to decide two questions: “What is a charge, as the ADEA uses that term? And were the documents respondent filed in December 2001 a charge?”

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2 The ADEA is codified at 29 U.S.C. §§ 621 – 634.
3 The ADEA requires that an individual cannot file a civil action under the ADEA until 60 days after filing a discrimination charge with the EEOC. See 29 U.S.C. § 626(d).
5 Id.
6 Id.
The Court began its analysis by noting that the ADEA does not define a charge.\(^7\) Examining the regulations, the Court found that while the EEOC did provide guidelines for what a charge should contain, it fell short of creating a comprehensive definition.\(^8\) One pertinent regulation states that a “charge shall mean a statement filed with the [EEOC] by or on behalf of an aggrieved person which alleges that the named prospective defendant has engaged in or is about to engage in actions in violation of the Act.”\(^9\) Another regulation identifies five pieces of information a “charge should contain.”\(^10\) Yet another states that a charge is “sufficient” if it is “in writing and . . . name[s] the prospective respondent and . . . generally allege[s] the discriminatory act(s).”\(^11\) Turning to case law, the Court observed that there were at least three views of what it means to be a charge.\(^12\) Some courts hold that an Intake Questionnaire cannot be a charge unless the EEOC acts on it.\(^13\) Others look to the intent of the filer to determine whether the individual was seeking to enact the EEOC’s enforcement process.\(^14\) Still others view all Intake Questionnaires are charges.\(^15\) The EEOC’s position was in line with the third view: that when determining whether a filing is a charge, the court should look to “whether the filing, taken as a whole, should be construed as a request by the employee for the agency to take whatever action is necessary to vindicate her rights.”\(^16\)

The Court agreed with the EEOC, concluding that a filing is deemed to be a charge if it contains an allegation of discriminatory conduct, names the charged party and can reasonably be construed as a request for the EEOC

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7 Id. at 1154.
8 Id.
9 See 29 C.F.R. § 1626.3 (2007).
10 See 29 C.F.R. § 1626.8(a)(1)-(5)(2007).
11 See 29 C.F.R. § 1626.8(b)(2007)(citing § 1626.6).
12 Holowecki, 128 S. Ct. at 1154.
13 Id.
14 Id.
15 Id.
16 Id. at 1155.
to take some action on behalf of the filer.\footnote{Id. at 1157-58.} The Court went on to determine that the documents filed by plaintiff met the test to be a charge under the ADEA.\footnote{Id. at 1160.}

One of the real problems, as the Court notes in the last paragraphs of its decision, is that the EEOC did not treat the plaintiff’s filing as a charge.\footnote{Id. at 1160-61.} Thus, FedEx was not aware of the complaint until it was notified of the lawsuit.\footnote{Id.} FedEx did not have an opportunity to use any dispute resolution process that would have avoided litigation.\footnote{Id.} Similarly, other employers may face lawsuits that could have been avoided if the employer were aware of the charge of discrimination so that it could take appropriate measures to address the charge.


In arguably the most contentious decision of last year, the Supreme Court denied a pay discrimination claim for lack of timeliness, reasoning that the effects of previous discrimination that occurred during the charging period are insufficient to establish a timely charge because there is no discrete discriminatory act within the charging period.\footnote{Ledbetter v. The Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2168 (2007).} Characterizing Lilly Ledbetter’s situation as “an unfortunate event in history which has no present legal consequences,” the Court denied her any redress for almost 19 years of discriminatory performance reviews that were used to set her salary far below similarly situated male employees.\footnote{Id. at 2165.}

Lilly Ledbetter was a long time supervisor for The Goodyear Tire and Rubber Company, from 1979 until her retirement in November 1998.\footnote{Id. at 2165.}
During her employment, Ledbetter asserts that she received poor performance reviews because of her sex and that her salary increases were smaller than they would have been had she been evaluated in a non-discriminatory manner.\textsuperscript{25} As a result, when she retired, Goodyear was paying her significantly less than her male counterparts.\textsuperscript{26} Just prior to her retirement, in 1997 and 1998, Goodyear denied her a raise.\textsuperscript{27} Ledbetter alleged sex discrimination in a questionnaire filed with the EEOC in March 1998 and filed a formal charge in July of that same year.\textsuperscript{28} After her retirement, Ledbetter filed suit against Goodyear asserting a Title VII pay discrimination claim and a claim under the Equal Pay Act, 29 U.S.C. § 206(d).\textsuperscript{29} Only the Title VII claim proceeded to trial at the district court, and the jury awarded Ledbetter back pay and damages.\textsuperscript{30} The Eleventh Circuit reversed, over Ledbetter’s argument that each paycheck constituted a separate act of discrimination, holding that “a Title VII pay discrimination claim cannot be based on any pay decision that occurred prior to the last pay decision that affected the employee’s pay during the EEOC charging period.”\textsuperscript{31} The Supreme Court granted certiorari to address one question, whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.\textsuperscript{32}

The Court affirmed the Eleventh Circuit, holding that without a current, intentionally discriminatory act within the charging period, a claim is untimely filed, even if effects of previous intentional discrimination arise within the charging period. Reasoning under several precedents, the Court

\textsuperscript{25} \textit{ld.} at 2165-2166.  
\textsuperscript{26} \textit{ld.}  
\textsuperscript{27} \textit{ld.}  
\textsuperscript{28} \textit{ld.} at 2165.  
\textsuperscript{29} \textit{ld.}  
\textsuperscript{30} \textit{ld.} at 2166.  
\textsuperscript{31} \textit{ld.}  
\textsuperscript{32} \textit{ld.}
found that Ledbetter failed to point to a specific employment practice committed with discriminatory intent within the charging period.\textsuperscript{33}

The more difficult distinction for the Court was distinguishing \textit{Bazemore v. Friday},\textsuperscript{34} a pay discrimination case that on its face appears to be directly on point with the facts as alleged in \textit{Ledbetter}. In \textit{Bazemore}, prior to 1965, the employer segregated its work force and paid its white employees more than its black employees.\textsuperscript{35} “In 1972 after Title VII was extended to public employees, black employees brought suit claiming that pay disparities attributable to the old dual pay scale persisted\textsuperscript{36} and they succeeded. As summarized by the \textit{Ledbetter} court, \textit{Bazemore} held that “when an employer adopts a facially discriminatory pay structure that puts some employees on a lower scale because of race, the employer engages in intentional discrimination whenever it issues a check to one of these disfavored employees . . . \textit{Bazemore}, thus is entirely consistent with our prior precedents . . . turn[ing] on whether ‘any present violation existed.’”\textsuperscript{37} Because the current pay structure in \textit{Bazemore} was a “mere continuation of the pre-1965 discriminatory pay structure,” it qualified as a present violation.\textsuperscript{38} Impliedly, the difference for Ledbetter was that the intentional discrimination of which she complains is not structural;
it is based on individual performance reviews specific to her, thus, the continuing nature of her reduced salary increases is not a present violation, but just the effect of past discrimination. Because the employer in Bazemore had a clearly discriminatory policy in place that subsequently was made illegal by Title VII, yet continued, each time a new paycheck was issued, it was discriminating anew based on race. Thus, the Court carefully distinguished Bazemore without overruling it, but its ultimate decision in Ledbetter seems to have foreclosed the “paycheck accrual” rule that Bazemore established.

The dissent vigorously disagrees with the majority opinion arguing that the nature of pay discrimination cases is such that the effects of discrimination are not easily detected and the effects are incremental over the career of an employee. The majority specifically refused to decide whether a discovery rule is appropriate for some Title VII actions.39 This decision has been met with controversy as it is perceived to reward the most egregious offenders that have engaged in serial, but specific, discrimination in the workplace, by insisting that the effects of pre-charging period discrimination do not meet the timeliness requirement, but refusing to address the possibility of a discovery rule. Whether or not a discovery rule is appropriate will be fodder for the lower courts.

[3] — What Type of Evidence Can Sustain a Discrimination Claim?

Moving from what information constitutes a charge, to what evidence is admissible to sustain an allegation of discrimination, the Supreme Court addressed a hotly litigated topic in employment discrimination actions – whether “me-too” evidence of discrimination is subject to a per se rule of admissibility or inadmissibility.40 Employees alleging employment discrimination often proffer other employees as witnesses to attest to acts of alleged discrimination by the employer, arguing that such evidence is relevant to a disparate treatment theory of discrimination. Employers

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39 Id. at 2177, n. 10.
vehemently oppose such evidence, asserting that it is both irrelevant and highly prejudicial. The debate focuses on Federal Rules of Evidence 401 and 403. Rule 401 is the basic relevance rule and Rule 403 requires a balancing test of relevant evidence that evaluates the probative value of a particular piece of evidence versus the danger of unfair prejudice, confusion of the issues, misleading of the jury and undue delay. The Court does not offer particular clarity on the admissibility of such evidence, but defers to a case by case determination to be made by the district court.41

Before the Court was an appeal from the Tenth Circuit, which overruled what it reasoned was the District Court’s holding that the “me-too” evidence subject to a motion in limine was decided on the basis of a per se rule against admissibility of such evidence.42 Ms. Mendelsohn brought suit against Sprint alleging age discrimination in her termination as part of a reduction in force.43 At trial, Ms. Mendelsohn attempted to introduce evidence of five witnesses who would testify that Sprint had discriminatory motives or had discriminated against them on the basis of age.44 None of the individual witnesses was in the same group as Ms. Mendelsohn, nor were any subject to the same superiors that made the decision to include Ms. Mendelsohn in the reduction in force at Sprint.45 Sprint filed a motion in limine seeking to exclude the testimony of these five witnesses.46 In its motion, it cited Aramburu, a disparate treatment in discipline case alleging race discrimination, for the proposition that similarly situated employees are limited to those employees with the same supervisor as the plaintiff.47 The Tenth Circuit relied on this reference to infer that the district court granted the motion in limine based on a perceived rule in Aramburu that such “me-too” evidence was per se inadmissible.48

41 Id. at 1147.
42 Id. at 1144.
43 Id. at 1143.
44 Id.
45 Id.
46 Id. at 1144.
47 Id.
48 Id. Aramburu v. The Boeing Co., 112 F.3d 1398, 1404 (10th Cir. 1997).
The Supreme Court summarily overruled the Tenth Circuit, finding that the court did not apply the proper standard for review, improperly inferred reasoning into the district court’s order and inappropriately engaged in its own balancing of prejudice analysis reserved almost entirely for the district court’s discretion.\textsuperscript{49}

The Court reiterated the long-standing principle that “questions of relevance and prejudice are for the district court to determine in the first instance.”\textsuperscript{50} It also noted that the brief district court minute order gave no indication that it relied on \textit{Aramburu} and went on to reason that such an application of \textit{Aramburu} to the case at bar would have been erroneous.\textsuperscript{51} It was improper for the Tenth Circuit to presume an incorrect legal conclusion on the part of the district court when the minute order allowed for an interpretation resulting in a proper legal conclusion.\textsuperscript{52} After determining that the proffered evidence was not \textit{per se} irrelevant, the Tenth Circuit improperly engaged in balancing probative value and prejudice under Rule 403.\textsuperscript{53} Such issues of relevance and prejudice are for the district court to determine.\textsuperscript{54} The Court ultimately reversed and remanded for the district court to decide the relevance issue under Rule 401 and to balance any prejudice under Rule 403.\textsuperscript{55}

For employers, the holding in this case presents neither a victory nor a defeat; it is the dicta that will trouble employers in future challenges to “me-too” evidence. The decision does foreclose the possibility of a \textit{per se} rule that “me-too” evidence is inadmissible because it is always irrelevant. This employer expectation was far from reality given the nature of the two rules of evidence at play in “me-too” determinations. It has been long held that relevance and prejudice determinations are left to the discretion of the

\textsuperscript{49} \textit{Id.} at 1144-45.  
\textsuperscript{50} \textit{Id.} at 1146.  
\textsuperscript{51} \textit{Id.}  
\textsuperscript{52} \textit{Id.}  
\textsuperscript{53} \textit{Id.}  
\textsuperscript{54} \textit{Id.} at 1146-47.  
\textsuperscript{55} \textit{Id.} at 1147.
district court to decide on a case-by-case determination, and this holding does not alter that expectation in the least.

However, the dicta in this case should give an employer pause before relying too heavily on cases that have found “me-too” evidence inadmissible – even similar cases could easily be distinguished, as evidenced by the Court’s decision. In this case, the Court held improper Sprint’s reliance on Aramburu, where the plaintiff alleged disparate treatment in regard to discipline he asserted was based on race.\(^56\) Aramburu developed a definition of “similarly situated” employees whose testimony would be relevant, and thus, admissible.\(^57\) Only those employees who had the same supervisor of the plaintiff would be considered similarly situated.\(^58\) In Sprint, the plaintiff alleged disparate treatment in reduction in force based on age.\(^59\) The Court rejected any definition of “similarly situated” from Aramburu to determine relevance in the present case, reasoning that its application in Aramburu was in a completely different context.\(^60\) Despite the similarities, the Court rejected the analogy.\(^61\) The strict case-by-case determination reinforced in Sprint will limit an employer’s ability to draw on similar cases to argue motions \textit{in limine}, thus impacting critical trial court admissibility arguments that could allow marginally relevant, potentially prejudicial evidence before the trier of fact.

[3] — \textbf{Deference to Department of Labor (DOL) Regulations, Interpretations and Advisory Memorandum – Long Island Care at Home v. Coke.}

In \textit{Long Island Care at Home v. Coke},\(^62\) the Supreme Court determined the level of deference to afford a DOL regulation, interpretation, and internal

\begin{footnotesize}
\begin{itemize}
\item \(^{56}\) \textit{Id.} at 1146.
\item \(^{57}\) \textit{Id.} at 1144.
\item \(^{58}\) \textit{Id.}
\item \(^{59}\) \textit{Id.} at 1143.
\item \(^{60}\) \textit{Id.} at 1146.
\item \(^{61}\) \textit{Id.}
\end{itemize}
\end{footnotesize}
Advisory Memorandum relating to two conflicting Department of Labor interpretations / regulations. The Fair Labor Standards Act (FLSA) exemption at issue exempted “any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary [of Labor]).”

The issue in this case revolved around two conflicting DOL regulations. The General Regulation defined “domestic service employment” as “services of a household nature performed by an employee in or about the private home . . . of the person by whom he or she is employed,” thus indicating a requirement that the exemption from FLSA for domestic service employment companionship workers applied only when the individual is working in the home of his employer and not when employed by a third party agency. However, the second set of DOL regulations addressing the FLSA, called Interpretations, exempts those companionship workers “who are employed by an employer or agency other than the family or household using their services . . . [whether or not] such an employee [is assigned] to more than one household or family in the same week.” Last, the DOL issued an internal Advisory Memorandum after this suit was initiated that favored the Interpretation over the General Regulation. Thus, the Court was faced with what level of deference to give the Advisory Memorandum to decide if the General Regulation governs the domestic service employment exemption and covers only those companionship workers that perform work in the private home of one’s employer or whether the Interpretation governs and the FLSA also exempts those employed by a third party to perform companionship services for another.

63 Id. at 2344, quoting 29 U.S.C. § 213(a)(15).
64 Id.
65 Id. at 2344, quoting 29 C.F.R. § 552.3.
66 Id. at 2345, quoting 29 C.F.R. § 552.109(a).
67 Id. at 2345.
68 The Second Circuit reasoned that this inconsistency, along with many other legal errors, contributed to its conclusion that the Interpretation was legally defective and did not warrant judicial deference. Id., slip op. at 5.
In determining the deference to be afforded to the DOL, the Court relied on express language by Congress in the FLSA directed to the DOL that “instructs the agency to work out the details of . . . broad definitions [like ‘domestic service employment’]. . . . [W]hether to include workers paid by third parties within the scope of the definitions is one of those details.”

Because Congress intended DOL to fill in the gaps of the FLSA, so long as that is done “reasonably, and in accordance with other applicable . . . requirements, the courts accept the result as legally binding.”

Finding that the DOL promulgated their regulations “reasonably, and in accordance with other applicable requirements,” the Court adopted DOL’s recommendation in its internal Advisory Memorandum and found in favor of the Interpretation over the General Regulation, thus excluding from FLSA individuals providing domestic services that are employed by a third party. The Court reasoned first, that if it decided to apply the General Regulation across the FLSA (including to the Interpretation), many workers employed by third parties that were intended to be covered by FLSA would be placed outside of its coverage because they would not work in the home of their employer. Additionally, if the General Regulation defining “domestic service

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69 Id. at 2346.
71 Id. at 2348-49. The Court brushed aside the DOL’s changing interpretations of its regulations over time, “as long as interpretive changes create no unfair surprise – and the Department’s recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation, makes any such surprise unlikely here – the change in interpretation alone presents no separate ground for disregarding the Department’s present interpretation.” Id. at 2349, citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1998). It also discounted the fact that the most recent DOL interpretation of the pertinent regulations was contained in an internal Advisory Memorandum by reasoning that “the agency’s course of action indicates that the interpretation of its own regulation reflects its considered views – the Department has clearly struggled with the third-party employment question since at least 1993 – we have accepted that interpretation as the agency’s own, even if the agency set those views forth in a legal brief.” Id.; see also, Auer v. Robbins, 519 U.S. 452, 462 (1997).
72 Id. at 2348.
employment” were limited to the Interpretation, all third party employees would be removed from the exemption, including companionship workers paid by a family member that does not live with the aged or infirm individual in need of the companionship, a result Congress did not intend.73

Second, the Court relied on basic statutory construction principles, reasoning that the specific governs the general,

The sole purpose of the third party regulation [the Interpretation]. . . is to explain how the companionship services exemption applies to persons employed by third-party entities, whereas, the primary, if not sole purpose of the conflicting general definitional regulation . . . is to describe the kind of work that must be performed by someone to qualify as a ‘domestic service’ employee. Given that context, [the Interpretation] is the more specific regulation with respect to third party employer questions.74

Finally, the Court dismissed Respondent’s argument that the Interpretation is an “interpretive” regulation that was not intended to fill a statutory gap and should not be given deference by the Court.75 It reasoned that the “Department intended the third-party regulation as a binding application of its rulemaking authority . . . the agency used full public notice-and-comment procedures which under the Administrative Procedure Act an agency need not use when producing an ‘interpretive’ rule.”76 The Court reiterated that “where an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable, then a court ordinarily assumes that Congress intended it to defer to the agency’s determination.”77 In this case, the notice-and-

73 Id.
74 Id. at 2348 (emphasis in original).
75 Id. at 2349-50.
76 Id. at 2350.
77 Id. at 2349-50, citing United States v. Mead Corp., 533 U.S. 218, 229-233 (2001).
comment procedures as outlined in the Administrative Procedure Act and prior precedent were met, thus the Interpretation is a valid interpretation of a regulation entitled to deference by a court.  


The Supreme Court broke ground in an ERISA suit this term by allowing recovery to an individual section 401(k) account under § 502(a)(2) by distinguishing long-held precedent related to defined benefit plans on account of the changing “landscape of employee benefits plans,” thus creating a different rule for defined contribution plans where recovery to individual accounts is allowed without proving injury to the “entire plan.” LaRue directed DeWolff to “make certain changes to the investment in his individual account, but DeWolff never carried out those directions” resulting in an alleged $150,000 depletion of his account. LaRue asserted breach of fiduciary duty and demanded that “make-whole” damages of $150,000 be restored to his account. DeWolff argued that LaRue’s claim was really a claim for money damages that are not recoverable under ERISA 502(a)(3) and was granted judgment on the pleadings in the district court. The court of appeals rejected LaRue’s ERISA 502(a)(2) argument, characterizing it as “personal” and citing to Russell, which states that this ERISA section “protect[s] the entire plan, rather than the rights of an individual

78 Id. at 2351-52.
80 Id. at 1022.
81 Id. at 1022-23.
82 Id. at 1023.
83 Id.
84 Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) held that a defined benefit plan participant could not recover damages under ERISA 502(a)(2) related to a delay in processing her claim because the ERISA provisions were meant to protect the plan as a whole, not an individual participant.
beneficiary." The court of appeals also rejected the notion that the “make whole” relief was equitable in nature. The Supreme Court found that the court of appeals misread ERISA 502(a)(2) and reversed. In a concurring opinion, Chief Justice Roberts argues that LaRue’s claim is really a claim for benefits and that recovery may be more appropriate under § 502(a)(1)(B) because he is seeking to “recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan” and that “[i]f LaRue brings his claim under § 502(a)(1)(B), it is not clear that he may do so under § 502(a)(2) as well.”

The Court reiterated that the basic fiduciary duties defined in ERISA 409(a) “‘relate to the proper management, administration, and investment of fund assets,’ with an eye toward insuring that the ‘benefits authorized by the plan’ are ultimately paid to participants and beneficiaries.” The Court also relied on Varity Corp. v. Howe, 516 U.S. 489 (1996) where the ERISA 409(a) fiduciary duty was further elucidated, noting that such obligations “‘relate to the plan’s financial integrity’ and ‘reflect a special congressional concern about plan asset management.’” The plaintiff in Russell was ultimately not successful because the misconduct that she alleged did not relate to “concerns about plan asset management,” but rather involved a claim for damages because of delay in processing her claim. She received the benefits to which she was contractually entitled, thus there was no injury to the “entire plan,” just to the plaintiff individually.

85 LaRue, 128 S. Ct. at 1023 (emphasis added).
86 Id.
87 Id.
88 Id. at 1026 (C.J. Roberts, concurring). The distinction is important, Chief Justice Roberts notes, because § 502(a)(1)(B) requires administrative exhaustion and also subjects a plan administrator’s decisions made under § 502(a)(1)(B) to an abuse of discretion standard of review. Id. at 1027.
89 Id. at 1024, quoting, Russell, 473 U.S. at 142.
90 LaRue, 128 S. Ct. at 1024, quoting, Varity, 516 U.S. at 511-12.
91 Id.
92 Id.
The Court goes to great lengths to distinguish *Russell*, focusing on the change in employee benefit plans from defined benefit plans at the time of *Russell* to defined contribution plans today. The plans differ in the effect of fiduciary misconduct on the participants. In defined benefit plans, “misconduct by administrators . . . will not affect an individual’s entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan.” Conversely, “for defined contribution plans . . . fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive.” Thus, the required injury to the “entire plan” in *Russell* “accurately reflect[s] the operation of §409 in the defined benefit context, [but is] beside the point in the defined contribution context.”

The Court also relied on congressional intent to create this different rule for defined contribution plans, “whether a fiduciary breach diminishes the plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts, it creates the kind of harms that concerned the draftsmen of §409.” Finally, as a matter of statutory construction, the court looked to the language of §409 and noted that the term “entire plan” appeared nowhere in the language. Additionally, the Court examined ERISA 404(c) which exempts fiduciaries from responsibility for losses caused by the participant’s exercise of control over their own accounts, and reasons that “this provision would serve no real purpose if . . . fiduciaries

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93  *Id.* at 1025. The Court notes, “*Russell’s* emphasis on protecting the ‘entire plan’ from fiduciary misconduct reflects the former landscape of employee benefit plans. That landscape has changed. . . . Defined contribution plans dominate the retirement plan scene today. In contrast, when ERISA was enacted and when *Russell* was decided, ‘the defined benefit plan was the norm of American pension practice’.” *Id.*

94  *Id.*

95  *Id.*

96  *Id.*

97  *Id.* Justice Thomas’ concurring opinion looked no further than the statutory language itself, “it is ERISA’s text, and not ‘the kinds of harms that concerned the ERISA draftsmen’ that compels my decision” and further notes that his “reading of the §§ 409(a) and 502(a)(2)
never had any liability for losses in an individual account.”

Thus, the Court keeps Russell alive by distinguishing it in the name of progress and creating a different rule for defined contribution plans.

§ 5.03. Family Medical Leave Act (FMLA).


Waiving prospective and retrospective Family and Medical Leave Act (FMLA) rights in the Fourth Circuit became increasingly difficult by requiring either prior DOL or court approval. Before the court was the language of a DOL regulation that reads, “employees cannot waive, nor may employers induce employees to waive, their rights under FMLA.” Based on a plain language reading of the regulation, the court reinstated its previously vacated holding in Taylor I requiring DOL or court approval to waive FMLA rights. It reasoned that FMLA rights include substantive, prospective and remedial rights and nothing in the regulation indicated a contrary intent. It also reasoned that because FMLA rights include remedial rights, “claims” are included in the “rights” that cannot be waived. The court concluded that the term “waive” traditionally has both a prospective and retrospective component, thus waiving both types of rights requires DOL or court approval.

is not contingent in trends in the pension plan market.” Id. at 1028 (J. Thomas concurring).

Section 409(a) allows recovery for all plan losses and “the assets allocated to petitioner’s individual account were plan assets” because “a defined contribution plan is essentially the sum of its parts, the losses attributable to the account of an individual participant are necessarily ‘losses to the plan’ for purposes of § 409(a).” Id. 1029.

98 Id. at 1029 (emphasis added).
100 Id. at 456, quoting 29 C.F.R. § 825.220(d).
101 Id. at 456-57.
102 Id.
103 Id. at 457.
104 Id. at 458.
[2] — Changes to FMLA.

The Family Medical Leave Act (FMLA) was amended this year through the National Defense Reauthorization Act to allow an eligible employee who is a spouse, son, daughter, parent or next of kin of a covered service member to take 26 weeks of FMLA leave in a 12-month period to care for the service member who became seriously ill or was injured while on active duty.\footnote{29 U.S.C. § 2601.} With this amendment, Congress also updated the FMLA definition sections to include “next of kin,” “covered service member,” and “serious illness or injury.”\footnote{Id.} It also allows an eligible employee to take up to 12 weeks because of any “qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parents of the employee is on active duty (or has been notified on an impending call or order to active duty) in the Armed Forces in support of a contingency operation.”\footnote{Id.} Unfortunately, for present application of the amendments, Congress did not define “qualifying exigency,” leaving that responsibility to the DOL to issue regulations related to its definition.

[3] — Proposed changes to DOL Regulations Related to FMLA.

The DOL has proposed several important changes to its FMLA regulations.\footnote{See The Family and Medical Leave Act of 1993; Proposed Rule, 73 Fed. Reg. 7875-7924 (February 11, 2008)(to be codified at 29 C.F.R. pt. 825).}

[a] — Employer Notice Requirements.

Under the proposed regulations, employers would be required to include information regarding FMLA rights in employee handbooks or to distribute such information to their employees on an annual basis. As with the current regulations, the proposed regulations also require employers to provide timely notice to employees who might be eligible to take FMLA leave.
However, for purposes of the eligibility notice, “timely” would be defined to mean generally within five business days, rather than the two business days currently required. In addition, once an employer determined that the employee’s leave qualified, the employer would be required to provide a designation notice within five business days of making that determination.

This designation notice would be required to state the amount of the employee’s absence that qualified as FMLA leave, or, if it were indeterminate, the employer would be required to provide follow-up designation notices every 30 days.

[b] — Employee Notice Requirements.

The proposed regulations also impose stricter notice requirements on employees. Employees would be required to do more than simply call in “sick” in order to invoke their FMLA rights. Instead, they would be required either to specify the functions of their job that they can no longer perform or, if the leave were to care for a family member, to provide increased information regarding the family member’s inability to participate in regular daily activities. Employees would also be required to submit information regarding the anticipated duration of their absence and whether they (or their family member) will visit a health care provider.

[c] — Direct Contact with the Employee’s Health Care Provider Permitted.

The proposed regulations would permit direct contact between the employer and the employee’s health care provider for purposes of clarifying the employee’s medical certification form, provided that such contact met the requirements of any applicable federal health privacy laws.

[d] — Definition of “Serious Health Condition” Strengthened Slightly.

The proposed regulations would create a somewhat stricter definition of what constitutes a “serious health condition” covered by the FMLA. Currently, employees must generally be incapacitated for more than three
consecutive days and receive at least two treatments from a health care provider. The proposed regulations would require that the two treatments occur within 30 days of the beginning of the period of incapacity. In addition, a chronic condition would qualify only if it required at least two health care treatments per year.

[e] — Intermittent Leave.

The proposed regulations provide that employees who need to take intermittent leave must make “reasonable efforts” to avoid unduly disrupting the employer’s operations. Because the current regulations provide that employees must “attempt” to avoid such disruption, the proposed regulation does little to address the administrative problems often associated with intermittent leave.

[f] — Settlement of FMLA Claims.

The proposed changes make it clear that employers may settle FMLA claims without first obtaining the approval of the DOL or a court.

§ 5.04. Americans with Disabilities Act (ADA).


The Seventh Circuit decided two cases under the Americans with Disabilities Act that further clarify when an impairment “substantially limits” a major life activity and whether it is discriminatory for an employer to impose stricter requirements than federal regulations require. The first case involved an employee, Williams, who suffered a spinal cord injury resulting in an inability to balance on one leg or stand for more than 30 to 40 minutes without moving around, sitting or lying down to alleviate back pain. Williams performed light duty upon his return to work and was told that he could take short breaks as needed. This arrangement worked well

110 Id. at 310.
and Williams received average to excellent performance reviews in his new position in the Shipping and Receiving Department. Nonetheless, a little over a year later, Williams was terminated for spreading a rumor that Excel discharged an employee who was recovering from a workplace injury. This suit followed, with Williams alleging he was terminated because of his disability.

Neither party disputes that “a fractured back is an impairment or that the ability to stand is a major life activity,” but rather, the parties disagree as to whether Williams is substantially limited in his ability to stand. The district court granted summary judgment in favor of Excel and the Seventh Circuit affirmed.

The Seventh Circuit looked to precedent, common sense and EEOC regulations to determine that Williams was not substantially limited in a major life activity. The court defined a person with a substantial limitation as one who is “unable to perform a major life activity that the average person can; or [who is] . . . significantly restricted as to the condition, manner or duration under which he can perform a major life activity as compared to the average person.” The court reasoned that common conditions, “like excess weight and back pain” impair one’s ability to stand for long periods, but held that “all persons impaired by virtue of common afflictions cannot be disabled.” Next the court relied on an EEOC regulation which stated that “a person is substantially limited in the ability to walk if ‘he can only walk for very brief periods of time . . .’” The court then looked to other circuits to determine what constitutes a “brief period[ ] of time,” and concluded that

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111 Id.
112 Id.
113 Id. at 309.
114 Id. at 311.
115 Id. at 309.
116 Id. at 311-13.
117 Id. at 311.
118 Id.
119 Id. quoting 29 C.F.R. pt.1630, App., § 1630.2(j).
other circuits held that standing for 50 minutes was not “brief.” Thus, the court found that Williams was not substantially impaired in a major life activity by his inability to stand for only 30 to 40 minutes without resting or moving around, and further held that the inability to balance on one leg has a minimal impact on Williams’ ability to stand.

[2] —Is It Discriminatory for an Employer to Impose Stricter Requirements than Federal Regulations Require?

The second case involved a truck driver, Hoefner, who suffered from neurocardiogenic syncope, a treatable condition that causes one to faint due to a sudden drop in blood pressure. The employer had a strict policy of not employing drivers with this condition, based largely in part on an accident where a driver with this condition was killed because he fell asleep at the wheel. Hoefner was hired by another trucking company to perform the same work he was providing to Schneider; nonetheless, the EEOC brought this case on Hoefner’s behalf against Schneider. The EEOC argued that the “company had fired him because it mistakenly believes that neurocardiogenic syncope is a disabling condition within the meaning of the Americans with Disabilities Act, which among other things forbids discrimination in employment against persons mistakenly believed to be disabled.” The district court granted summary judgment for Schneider and the Seventh

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120 Id. at 312, citing Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 186-87 (3d Cir. 1999). The court also likened Williams’ impairment to those suffered by police officers in Colwell v. Suffolk County Police Department, 158 F.3d 635, 639 (2d Cir. 1998), where the officers were unable to “stand in one spot for ‘any period of time’ without experience excruciating pain,” inability to stand for a “long period of time” without lower back pain and shooting pain in leg. Id. The Second Circuit found this evidence insufficient to show impairment and the Seventh Circuit agreed, holding the same for Williams. Id.

121 EEOC v. Schneider Nat’l, Inc., 481 F.3d 507 (7th Cir. 2007).

122 Id. at 508.

123 Id.

124 Id.
Circuit affirmed that decision.\textsuperscript{125} The court framed its analysis by examining two issues: whether the employer’s decision to terminate or take some other adverse employment action against the employee was motivated by a mistaken belief that the condition precludes him from engaging in some activity. If so, the second question is whether the activity that the employer mistakenly believes the employee to be disabled from engaging in is a ‘major life activity.’\textsuperscript{126}

It found that Schneider was not motivated by a mistaken understanding of neurocardiogenic syncope, but that it was risk averse to employing a driver with this condition despite federal regulations allowing such a driver to operate heavy trucks, trucks carrying hazardous material or trucks with sixteen or more passengers.\textsuperscript{127} Schneider “is entitled to determine how much risk is too great for it to be willing to take” and it is also entitled to “set higher safety standard[s] than law or custom requires” without running afoul of the ADA.\textsuperscript{128} Schneider does not exaggerate the severity of Hoefner’s condition, nor is there any indication that Schneider believed that Hoefner could perform no driving job.\textsuperscript{129} He was offered a non-driving job when his condition was discovered.\textsuperscript{130} Likewise, there were no available driving jobs that did not require one to meet federal regulations (the jobs to which Schneider applied the prohibition).\textsuperscript{131} Lastly, the court found that driving a

\begin{itemize}
  \item \textsuperscript{125} \textit{Id.} at 509, 512.
  \item \textsuperscript{126} \textit{Id.} at 509.
  \item \textsuperscript{127} \textit{Id.} at 508, 510. Company officials stated that disqualifying Hoefner was “a matter of safety and direct threat,” and that they “simply could not take the risk that while driving, you would lose consciousness.” \textit{Id.} at 509.
  \item \textsuperscript{128} \textit{Id.} at 509, 512. The court also notes that “an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment — such as one’s height, build, or singing voice — are preferable to others, just as it is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job.” \textit{Id.} at 510, \textit{citing} Sutton v. United Air Lines, Inc., 527 U.S. 471, 491 (1999).
  \item \textsuperscript{129} \textit{Id.} at 511, 512.
  \item \textsuperscript{130} \textit{Id.} at 511.
  \item \textsuperscript{131} \textit{Id.} at 512.
\end{itemize}
truck is not a major life activity. The court notes, “If being able to drive a huge truck or a truck filled with hazardous chemicals safely, or being able to fly a place or guide climbers to the summit of Mt. Everest, is a major life activity, then virtually the entire population of the Unites States is disabled, which would be a ridiculous construction to place on the Americans with Disabilities Act.” Thus, Hoefner was not the subject of discrimination based on disability.

§ 5.05. National Labor Relations Act (NLRA).

Among the many recent National Labor Relations Board (NLRB) decisions, three stand out as particularly important for all energy and mineral law employers. One decision is a case of first impression for the NLRB: the use of the employers’ email system for union purposes. The other two address important issues in defending against union organization.


In The Guard Publishing Co., the NLRB held that an employer does not violate labor law by prohibiting employees from using the employer’s email system for “non-job related solicitations.” The Guard Publishing Co. (Guard) publishes a newspaper called The Register-Guard. About 150 employees of Guard are represented by the Communications Workers of America Union (CWA or Union). The Guard has a computer system through which many employees have access to email. The Guard had a written policy regarding the use of its communications system, including email that stated such systems were not to be used “to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.”

132 Id. at 511.
133 Id.
134 Id. at 512.
136 Id. at *2
During bargaining in 2000 for a new contract, the local Union president and unit employee Suzi Prozanski sent three emails that the Guard concluded were in violation of its communications policy. The Guard disciplined Prozanski by issuing her a written warning for sending these emails. The first email sought to refute a company email that stated the police had warned the company that anarchists may attend a Union rally. The second email requested Union employees to wear green to show support for the union during negotiations. The third email asked for employees to join in the Union’s participation in a town parade.

The Union then filed unfair labor practice charges against the Guard, alleging that the Guard’s communications policy and its discipline of Prozanski violated the NLRA. The NLRB held that while the company’s discipline of Prozanski in one instance was discriminatory enforcement of its policy, the policy itself was lawful. In sum, the NLRB held that it is not a violation of the NLRA to prohibit the use of email for “‘non-job related solicitations;’” but employers cannot discriminatorily enforce this policy by punishing union communications while ignoring non-union communications of a similar nature.

In holding that an employer does not violate the NLRA by prohibiting employees from using its email systems for non-job related solicitations, the NLRB started from the basic labor law tenet that the employer has the right to regulate and restrict the use of its property. The NLRB has recognized this right in the past, upholding prohibitions on the use of video systems, bulletin boards, copy machines and telephones. In particular, the NLRB analogized the use of email to that of company phone systems, finding that while “the widespread use of telephone systems has greatly impacted communications, the Board has never found that employees have a general

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137 Id. at *3.
138 Id. at *1.
139 Id. at *7.
140 Id.
right to use their employer’s telephone system for . . . [protected employee] communications.”

In this decision, the NLRB also modified the NLRB’s standard for analyzing discriminatory enforcement of otherwise lawful employer policies. Under old NLRB precedent, if an employer allowed employees to use its equipment for non-work related purposes then the employer could not lawfully prohibit the use of such equipment for protected employee activities. The NLRB found that this standard did not appropriately measure discrimination as the “unequal treatment of equals.” Instead, the NLRB held that in order for enforcement to be discriminatory, it must consist of “disparate treatment of activities or communications of a similar character because of their union or other [employee]-protected status.” In applying this to the email context, discriminatory enforcement of a lawful email policy would include allowing employees to solicit for one union but not others and antiunion employee emails but not pro-union employee emails.


In Toering Electric Co., the NLRB addressed the growing problem of union “salts” seeking to disrupt or harass a company by changing the burden of proof in determining whether a job applicant is genuinely seeking employment. Under labor law, job applicants are protected from job

141 Id. at *9.
142 Id. at *10-13.
143 Id. at *10. For example, an employer would have been prohibited from removing union items from an employer bulletin board if the employer allowed personal postings to be placed on that board.
144 Id. at *11.
145 Id. Continuing the example above, an employer will not be prohibited from removing union items from an employer bulletin if the employer allows dissimilar personal postings such as personal announcements, birthday cards and for sale items but forbids posting organizational notices.
146 Id. at *12.
discrimination based on union affiliation or activity only when they are considered statutory employees within the meaning of Section 2(3) of the National Labor Relations Act. In this decision, the NLRB abandons the presumption that any applicant is genuinely seeking employment. Rather, if the employer presents appropriate evidence that the job applicant has no actual interest in working for the employer, the burden shifts to the NLRB General Counsel to show by preponderance of the evidence that the job applicant is genuinely interested in employment.148

In addition to placing the ultimate burden of proof on the General Counsel, the NLRB will now also require the General Counsel to first show that an individual actually applied for the job or that he or she authorized someone to submit the application. Thus, in situations where the employer receives a batch of applications, the General Counsel must determine if each applicant authorized the submission of the application. It may not be sufficient for a Union to submit batches of application where the applicants have not given recent authorization unless it can be shown that the Union actually or at least regularly confirmed the applicant’s ongoing interest in employment.149

In 1987, the International Brotherhood of Electrical Workers (IBEW) began a “salting” campaign with the stated purpose of driving non-union employers out of the business.150 A key aspect of this campaign was to file unfair labor practice charges against non-union employers at every opportunity. The union sought two goals from these practices: first was to impose substantial expense on the employer as it was forced to defend itself against the charges; and second, to provide the opportunity for disruptive unfair labor practice strikes. One tactic used by the union was to respond to blind advertisements with numerous applications to make a “prima facie case of statistical discrimination.”151

148 See GC Memo 08-04 (Revised)(Feb. 15, 2008).
149 See id.
150 Toering at *2.
151 Id. (citations omitted).
In 1994 Toering Electric became the victim of the IBEW’s salting campaign which resulted in a settlement that offered jobs and backpay to union members.\textsuperscript{152} Toering was again subject to a salting campaign by the IBEW two years later. In this later campaign, Toering received eighteen resumes from the union, of which it determined that four were actually authorized by the applicants. Toering did not hire any of these 18 IBEW applicants. The IBEW then filed unfair labor practice charges against the employer.\textsuperscript{153}

In responding to the unfair labor practice charges, Toering argued that the NLRB failed to establish that any of the 18 applicants were legitimately seeking employment with Toering.\textsuperscript{154} Because they were not real applicants, Toering argued that they were not employees entitled to protections against union discrimination in hiring under the NLRA.\textsuperscript{155} The administrative law judge rejected the employer’s arguments and held that Toering violated the NLRA by refusing to hire any of the 18 applicants.\textsuperscript{156}

The NLRB reversed the judge’s holdings, explaining that “one cannot be denied what one does not genuinely seek.”\textsuperscript{157} Only applicants that are considered employees under the NLRA are entitled to its protections.\textsuperscript{158} The case was remanded back to the judge to appropriately weigh the evidence to determine whether the applicants had a genuine interest in employment with Toering.

As stated above, employers may now raise questions as to the legitimacy of a job applicant. This can be accomplished by demonstrating that the applicant, among other things, “refused similar employment with the employer; made belligerent or offensive comments on his or her application; engaged in disruptive, insulting or antagonistic behavior during the application process;

\textsuperscript{152} Id.
\textsuperscript{153} Id. at *3
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id. at *1.
\textsuperscript{158} Id.
or engaged in other conduct inconsistent with a genuine desire to establish an employment relationship with the employer. ¹⁵⁹

[3] — Decertification Petitions Now Allowed for Initial 45 Days Following Voluntary Recognition of Union

— Dana Corp.

In Dana Corp., the NLRB addressed the bar to questions concerning representation after a voluntary recognition of the union by an employer. ¹⁶⁰ Prior to this decision, the recognition-bar doctrine prevented decertification petitions or rival union petitions for a reasonable period of time while the employer and the recognized union negotiated a first contract. ¹⁶¹ This recognition-bar policy was changed to allow decertification petitions or rival union petitions for 45 days following the notice of recognition. ¹⁶²

In 2003, Dana Corp. and the Automobile, Aerospace and Agricultural Implement Workers of America (“Union”) agreed to a card check and neutrality agreement. ¹⁶³ After about three months of organizing activity, the Union announced it had a majority of authorization cards signed by the bargaining unit members. ¹⁶⁴ After a check of the cards by a neutral third-party, Dana recognized the Union. A little over 30 days later, a bargaining unit member submitted a decertification petition that was supported by the necessary showing of interest. The NLRB dismissed the petition based on its then-current recognition-bar policy and the petitioners appealed the dismissal. ¹⁶⁵

¹⁵⁹ See GC Memo 08-04 (Revised)(Feb. 15, 2008).
¹⁶¹ Id. at *1.
¹⁶² Id. at *13.
¹⁶³ Id. at *1-3. A card check agreement removes the ability of an employer to demand a secret ballot election and instead requires the employer to voluntarily recognize the union as the bargaining representative of its employees upon verification that the union has obtained signed authorization cards from a majority of employees. A neutrality agreement usually requires the employer to act impartially towards the union during an organizing campaign and refrain from any negative comments about the union or unionization.
¹⁶⁴ Id.
¹⁶⁵ Id. at *1.
Dana appealed the decision to the NLRB, arguing that NLRB election is the “preferred method” of resolving questions concerning employee representation.\(^{166}\) And, because of the recent growth of card-check agreements, too much “unchecked power” was being given to the agreeing union and employer. Dana further argued that these agreements coupled with the voluntary recognition bar restrain employee free choice and removes the NLRB from the process of choosing an employee representative.\(^{167}\)

Although the NLRB stated that it was not questioning the legitimacy of voluntary recognition agreements, card check and/or neutrality agreements, it was clear that the reversal of its prior precedent was influenced by the increasing prevalence of these types of agreements.\(^{168}\) In addition, the NLRB was well aware of the push by many unions to pass labor laws providing mandatory card check recognition.\(^{169}\) Unlike an election, cards can be collected over a significant period of time, allowing an employee to change his or her mind about union representation.\(^{170}\) In addition, there is a greater reliability of NLRB elections because votes are cast in private in contrast to the public signing of cards.\(^{171}\) Thus, the NLRB decided that it was appropriate to allow for a window of time to make challenges to a voluntary recognition to better assure employee free choice in the representation process.

In this context, the NLRB decided that 45 days was the appropriate timeframe for filing election petitions after voluntary recognition.\(^{172}\) The NLRB also maintained the 30 percent showing of interest requirement.\(^{173}\) It also held that in determining the sufficiency of the showing of interest, both pre-recognition and post-recognition signatures would be valid.\(^{174}\)

\(^{166}\) Id. at *3.

\(^{167}\) Id.

\(^{168}\) Id. at *5.

\(^{169}\) Id. at *6-8.

\(^{170}\) Id.

\(^{171}\) Id.

\(^{172}\) Id. at *13.

\(^{173}\) Id. at *14. The showing of interest requirement is the minimum threshold to get to an NLRB election.

\(^{174}\) Id.
§ 5.06. Workplace Bullying: Is this a Real Issue?

Even though a Supreme Court in Indiana dodged the issue of whether “workplace bullying” is an actionable employment claim, proponents of this theory point to this case as validating this theory of recovery.175 The case is *Raess v. Doescher* and involves claims by a perfusionist against a heart surgeon; in essence, that the perfusionist was bullied by the surgeon during an operation.176

During the trial, the plaintiff introduced testimony of an expert witness on workplace bullying.177 Before the trial through a motion in limine and during the trial, the defendant objected to the witness and the line of testimony that referred to the defendant as a workplace bully.178 The trial court overruled the defendant’s motion in limine and the general trial objections.179

The defendant lost the trial and appealed the case, ultimately winding up in front of the Indiana Supreme Court. Among other things, the defendant appealed the trial court’s denial of his objections to the expert witness on workplace bullying. The plaintiff argued that this witness was not qualified under the Indiana Rule of Evidence No. 702 to give expert testimony.180 Without getting to the substance of the defendant’s objection, the court held that he had not properly preserved the objections made in the motion

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175 Workplace bullying has been defined by the Workplace Bullying Institute as: repeated, health-harming mistreatment of one or more persons (the targets) by one or more perpetrators that takes one or more of the following forms: verbal abuse; offensive conduct/behaviors (including nonverbal) which are threatening, humiliating or intimidating; [and] work interference – sabotage – which prevents work from getting done.

See [http://bullyinginstitute.org/education/bbstudies/def.html](http://bullyinginstitute.org/education/bbstudies/def.html)


177 *Id.* at 795-96

178 *Id.*

179 *Id.* The court did limit the allowable testimony to that of actions toward the plaintiff but stated that the plaintiff could not “paint [the defendant] as a workplace bully against the world . . . .”

180 *Id.* at 796.
Thus, this case does not uphold the workplace bully concept as an appropriate theory of recovery under the law.\textsuperscript{182}

\textsuperscript{181} \textit{Id.} at 796-98.

\textsuperscript{182} While the concept of workplace bullying is not currently found in any state or federal law, several attempts have been made to legitimize this claim through legislation. \textit{See} http://workplacebullyinglaw.org.