New Jersey
Labor and Employment Law Quarterly

Vol. 42, No. 4 — May 2021

Message From the Chair

by Ian D. Meklinsky

I'm so glad we had this time together… As this is my final Message From the Chair, with my term ending at this year's Annual Meeting, I wanted to take this opportunity to thank all of the members of the Section, especially the officers and members of the Section's Executive Committee for making my two-year term—which mostly coincided with our COVID-19 pandemic experience—an invaluable experience. Not only has the Section continued its tradition of collegiality but it has done so during difficult and stressful times. The achievements of our Section and its members is also something we should all be proud of, from the publication of the *Quarterly* to the broad range of programming provided to our profession. While I know I will be stepping down, I know the incoming officers will serve the Section well. I wish them all the best.

Thank you for the honor of allowing me to serve as Section Chair!

Message From the Editor

by Lisa Barré-Quick

Welcome to the final issue of Volume 42 of the *Quarterly*. In this issue, we welcome back David Leach to the Director's Corner as he offers his unique and invaluable perspectives on a 45-year career at the National Labor Relations Board from the vantage point of retirement. His contributions to the *Quarterly* have been immeasurable, and our appreciation of his support of the *Quarterly* cannot be overemphasized.

As the world and technology evolve, the practice of labor and employment law evolves with them. With that in mind, this issue explores artificial intelligence (AI) and its potential discriminatory effects, considering the challenges concomitant with combatting bias in AI decision-making and offering a step-by-step approach to minimizing algorithmic bias. Turning from AI to accommodation, the issue next explores the New Jersey Supreme Court's decision in *Delanoy v. Township of Ocean* and what the decision means for interpretation of the Pregnant Workers Fairness Act to

Continued on page 2

both sides of the bar in interpreting and advising clients in this constantly changing area. The issue concludes with reflections on the United States Supreme Court's treatment and interpretation of discriminatory animus since *Trump v. Hawaii* and what these decisions may mean for future employment law jurisprudence at the Supreme Court and lower court levels.

As we close out Volume 42 of the *New Jersey Labor and Employment Law Quarterly*, let me take this opportunity to personally thank Ian Meklinsky for his unwavering support of the *Quarterly* and its editorial board during his term as Section Chair. Ian's calm and steadfast leadership has been invaluable and appreciated as we have sought to navigate a new normal, both personally and professionally, as the pandemic stretched into its second year. As we extend our thanks to Ian for his service and commitment to the Section, we also extend our welcome to the incoming Chair and officers. The editorial board looks forward to working with the new Chair and officers as we continue the important work of the *Quarterly*. Finally, I would like to thank the authors and editors who have made this issue possible and the Managing Editor, Hop Wechsler, for his tireless work and commitment to the *Quarterly*. We look forward to bringing you Volume 43 in the fall. In the meantime, wishing everyone a safe and healthy summer.

We want to hear from you…

The *Quarterly* is always looking for new authors and editors. Please contact the Editor-in-Chief, Lisa Barré-Quick (lbarrequick@ammm.com), or the Managing Editor, Hop Wechsler (hwechsler@selikoffcohen.com), if you would like to write or edit for, or otherwise become more involved with, the *Quarterly*!

Inside this issue

Labor and Employment Law Section Editorial Board

Editor-in-Chief
Lisa Barré-Quick

Managing Editor
Hop T. Wechsler

Editors
Heather Adelman
Raymond Baldino
Steven M. Berlin
Kirsten Scheurer Branigan
Jason T. Brown
Dean L. Burrell
Dena Calo
Suzanne M. Cerra
Anthony J. Cincotta
Micah L. Craft
Daniel R. Dowdy
Megan Gable
August W. Heckman III
Shane Kagan
Galit Kierkut
Stacy L. Landau
Michael Malatino
Lisa Manshel
Kathryn McClure
Carole Lynn Nowicki
Diane Englander Peyser
David A. Rapuano
Claudia A. Reis
Christina Silva
Valerie L. Weiss

Editors Emeriti
Anne Ciesla Bancroft
Mark Blunda
Domenick Carmagnola
Arnold Shep Cohen
Anthony P. Limitone
Margaret M. Madden
Kenneth A. Rosenberg
James F. Schwerin
Robert T. Szyba
Keith Waldman
Charles F. Waskevich Jr.

Labor and Employment Law Section Executive Committee Officers

Chair
Ian D. Meklinsky

First Vice Chair
Keith Waldman

Second Vice Chair
Stephanie J. Wilson

Treasurer
Colin Lynch

Secretary
John L. Shahdanian II

Immediate Past Chair
Lisa Manshel

Legislative Coordinators
Michael J. Dee
Sara Kaplan

The opinions of the various authors contained within this issue should not be viewed as those of the Labor and Employment Law Quarterly or the New Jersey State Bar Association.

The NLRB 1976-2021: The View From My Desk

by David E. Leach III

On July 5, 2021, the National Labor Relations Act,[1] one of the centerpieces of the New Deal, reaches the 86th anniversary of its signing into law. President Franklin D. Roosevelt issued a press release upon signing of the NLRA stating that the substantive purpose of the NLRA was to advance collective bargaining and provide methods by which the government can "safeguard that legal right."[2] Significantly, President Roosevelt stated that it should be clearly understood that the agency being created, the National Labor Relations Board, "will not act as mediator or conciliator in labor disputes."[3] He continued that the NLRA must not be misunderstood as anything but an "enforcement" act.[4]

In December 1975, I received an on-campus interview with Region 22 of the NLRB in Newark and was called back for interviews with Regional Attorney Bill Pascrell and Regional Director Arthur Eisenberg. Fortuitously, I also applied at Region 2 in New York and was interviewed by Regional Attorney Winifred D. Morio. 1976 was a difficult year in which to graduate law school, and I waited until early June 1976 before I received an offer of employment from then-Director Morio. I immediately accepted.

June 21, 1976, the day I started my almost 45-year career at the NLRB, was a miserable, rainy day. It was also the beginning of an incredible adventure which would end on Jan. 2, 2021, at which point I was serving as Regional Director at Region 22. My retirement occurred during the ongoing pandemic which had forced the entire agency to operate remotely from mid-March 2020. My wife, Maureen O'Connor Leach, also a retired attorney member of the New Jersey Bar, helped me clear out my office at 20 Washington Place on Dec. 31, 2020. As the Regional Office was deserted due to the pandemic, it was an eerie and isolated ending, in stark contrast to a career enforcing the NLRA that had been so rewarding and meaningful. As we sorted through decades worth of files in dusty cabinets, I thought how I was privileged to enforce the NLRA, which has been called the "single greatest piece of social legislation" by noted labor historian and Cornell University Professor James Gross.[5] I found this work to be incredibly meaningful and important, as it has made a significant and lasting difference in the lives of employees who were, and have been for almost 86 years, the focus of the rights guaranteed in Section 7. I have shared my thoughts on labor law several times in this publication,[6] and I am honored to have been asked to write one last time reflecting on my tenure. I have seen significant changes in the structure, operation, and case law of the NLRB, although the fundamental principles enacted in 1935 remain embedded in the NLRA that establishes collective bargaining as a fundamental right of all employees. I hope to share some of the most significant changes that I observed during my tenure with the NLRB but most especially in my six and a half years as Regional Director in the Newark Office.

I was hired in an entry-level attorney-trainee position at an agency with a growing case load and a need to open new regional offices. However, the economy, which was marred by inflation, resulted in a hiring freeze that lasted for several years. Luckily, I was among 12 field attorneys hired in Region 2 during the summer of 1976. In the previous year, 44,923 unfair labor practice and representation cases, a new record high, had been filed nationwide, representing a 5.7% increase over the prior year. The agency was clearly an important tool for parties seeking to enforce the rights that Congress had established. It was an exciting time to begin my career at the NLRB.

Starting as a field attorney, I was assigned only representation cases, as my supervisory attorney Tom Trunkes told me that a labor lawyer needs a strong understanding of representation case law and procedure as a foundation. I then started handling duty of fair representation cases before being assigned discharge cases. It was not until I was sufficiently seasoned two years later that I was assigned bargaining cases. I understood that the bargaining cases were the most important ones in the enforcement of the NLRA. After five years my training was complete and I became a trial specialist

litigating significant unfair labor practices complaints, including *Elmer Nordstrom, Managing Partner d/b/a Seattle Seahawks*,[7] which dealt with the unlawful discharge of wide receiver and player representative Sam McCullum and which was litigated in mid-1983. While I loved trial work at the NLRB, as it was a direct enforcement action, I deeply appreciated the importance of conducting representation elections in which employees exercised their protected Section 7 rights. In 1985, I became a supervisory attorney and then Deputy Regional Attorney in 1987 before becoming the Regional Attorney at Region 2 in 2012 and eventually, in 2014, Regional Director in Region 22.

As I look back over my career with the NLRB, it was in 1980 when significant changes started to slow the agency's growth. The first major change was in the composition of the Board. No, I am not old enough to remember the time when the Board was comprised of three members, nor was I even born when the Board was increased to five members in 1947, but I observed significant changes in the way the political process began to impact Board and general counsel appointments. Instability in the process of appointment of members and general counsel was not a reality until the 1980s. When I started at the NLRB, John Fanning and Howard Jenkins were stalwarts on the Board. Fanning, a Democrat, was appointed by President Dwight Eisenhower in 1957 and Jenkins, a Republican, was appointed by President John F. Kennedy in 1963. Fanning had come from the Department of Defense where he was the Director of Industrial Labor Relations, while Jenkins had been a professor at Howard University School of Law. Neither represented parties before the NLRB and both held to accepted and respected principles under the NLRA. They served as Board members for 25 and 20 years, respectively, and often joined either in majority or in the dissent in decisions. There was stability and continuity on the Board. Then the process of Board appointments became more complex.

A review of Board membership from 1935 to 1976 reveals that appointments were made at the time a position had become vacant upon expiration of a member's term. Further, members served full terms, meaning they were nominated, confirmed, and sworn in when the prior member's term expired. As the confirmation of nominees was delayed and nominees were not approved, recess appointments to the Board began. The first recess appointment occurred in October of 1980, when President Jimmy Carter appointed career employee and Board Secretary, John Truesdale, to a Board vacancy, where he served briefly until newly elected President Ronald Reagan selected a new member. While each of the five Board members' terms start in consecutive years, commencing in 1981, it became the norm for Board positions to remain vacant until several candidates could be confirmed by the Senate as a "package." Thus, multiple nominees would be sworn in as Board members within a few days of each other. The need to advance candidates through the approval process as a group indicates the political trading that was needed to confirm a nominee. Board members were no longer evaluated on their own individual merit.

As of Dec. 31, 2007, this practice resulted in three Board vacancies meaning one term had expired two years previously and the other term was vacant for over a year when a third term expired. This left only Wilma Liebman and Peter Schaumber as a two-member board. Liebman and Schaumber, a Democrat and a Republican, on advice from counsel began to decide cases that they agreed upon. In *New Process Steel LP V. NLRB*,[8] a divided Supreme Court held that a quorum of three Board members was a minimum requirement and a delegation of authority to a two-member panel was invalid. The NLRB also lost before the Supreme Court on the issue of when the president can make a recess appointment in *Noel Canning v. NLRB*.[9] Finally, the NLRB's general counsel position suffered a similar fate in *NLRB v. SW General. Inc D/B/A Southwest Ambulance*,[10] which held that Lafe Solomon inappropriately served as Acting General Counsel while he was also nominated for the permanent position. The failure of the appointment process to move from the White House through the Senate confirmation hearings efficiently will continue to hamstring the NLRB in its statutory mandate to enforce the NLRA. There has been no greater crisis at the NLRB than the lack of stability in the appointment of new members.

I would be naïve if I were to ignore the fact that politics has always played a role in the NLRB because there is a presidential nomination and a Senate confirmation. The question is whether NLRB members are free to decide cases based on their expertise in interpreting the intent of the statute or whether they are puppets of the administration that appointed them. Former NLRB Chair Guy Farmer, who served during the Eisenhower administration, acknowledged in an interview with Professor Gross that the NLRB was a "political animal"

and claimed that it had been from the beginning because appointees, while not pressured by the White House on any vote cast, were cognizant of a need to "implement the philosophy" of the administration that appointed them.[11] Moreover, courts are becoming less willing to enforce NLRB orders where the law is in constant flux. In my view, career employees like Fanning and Jenkins, who have not represented parties before the NLRB, are model appointments. They are best positioned to implement the underlying principles of the NLRA and establish firm and accepted guidelines for both practitioners and regional directors. Having to apply law that is ever changing is frustrating and demoralizing from my enforcement perspective. I cannot imagine how difficult it must be for practitioners who must advise clients.

In addition to NLRB nomination and confirmation issues, my biggest concern has been the change in case law as it has impacted the bargaining obligation. There are many cases that I could discuss but I want to concentrate on one situation that I believe started the denigration of the basic right of bargaining. Conflicting NLRB decisions in 1982 and 1984 regarding Milwaukee Springs caused significant discussion among practitioners and academics. The case involved the bargaining obligation where the employer, mid-term in the collective bargaining agreement, sought unsuccessfully to amend the agreement at the bargaining table and thereafter decided to relocate the operations to its non-union plant. The collective bargaining agreement contained a recognition clause and clauses establishing employees' wages and benefits but was silent on relocation of the unit. In its 1982 decision (*Milwaukee Springs I*),[12] the NLRB, with a majority consisting of Republicans John Van de Water and Howard Jenkins and Democrat John Fanning, found that the combined provisions of the agreement implicitly amounted to a non-transfer of work clause. The NLRB relied on its decision in *Los Angeles Marine Hardware Co., a Division of Mission Marine Associates, Inc.*[13] As the case was pending review before the Seventh Circuit, the newly-constituted Reagan NLRB recalled the case and reversed the decision. In its supplemental decision, in *Milwaukee Springs II*,[14] the NLRB held that the employer was allowed to unilaterally shift production because there were no clauses in the contract explicitly prohibiting such relocations even though the contract was still in effect. The NLRB held that management had a prerogative in matters relating to its operations so long as local labor costs were not the determining factor in deciding to relocate production. This decision appears to permit an employer the prerogative to ignore its collectively bargained agreement unless the agreement contained a provision specifically prohibiting a transfer of operations. It does, however, provide that bargaining would be required where the employer alleges cost was the basis for its action. Under established NLRB law, midterm bargaining was limited in order to preserve the sanctity of the agreement that was reached. The change in course permitting a transfer of work during the collective bargaining agreement started a significant diminution of bargaining rights under the NLRA.

More recently, the NLRB reversed its "clear and unmistakable waiver" doctrine which existed since 1949 and replaced it with a new "contract coverage" standard.[15] The former test presumed that action taken was a unilateral change unless the contract provided language which waived the Section 9(a) representative's right to bargain over the change in employees' terms and conditions of employment. The NLRB replaced the traditional 70-year-old test with a "contract coverage" standard requiring an analysis of the contractual language which provides for far greater flexibility for employers' changes. The "clear and unmistakable waiver" test is a definitive acknowledgement of bargaining as a hallmark under the NLRA. The elimination of that test sends an incredibly significant signal that the statute's core principle is no longer sacrosanct. The NLRA was enacted to promote industrial peace through the protection of collective bargaining. That core principle must be reaffirmed and reinvigorated for the NLRA to fulfill its promise to employees.

In 2018, NLRB case intake was again down significantly and it continued to decline significantly over the next two years, in part because of the pandemic in 2020 but largely because many labor organizations decided not to file. Then-General Counsel Peter Robb was extremely focused on the continuing drop in case intake and was considering how the NLRB should be organized and at what staffing levels. Clearly on the agenda was whether regions should be consolidated and how to handle the discrepancies in staffing levels among regions. If regions would not be consolidated, other issues to be resolved were whether cases should be reassigned or work assignments shared. I understand that these were legitimate questions, but with funding levels for the NLRB from Congress remaining constant,

many in the field offices were asking why hiring had slowed to a trickle and why positions in management and supervision of the region were not being considered. In this environment, Region 22, with a smaller case intake than our neighboring regions in Manhattan and Brooklyn, appeared in jeopardy of being merged. I started speaking to the labor practitioners at every possible chance that I could. With the support of the State Bar Association, especially the Labor and Employment Section under the leadership of Lisa Manshel and Ian Meklinsky, and with equally strong support from many Section members, especially Steve Cohen, who moved the Executive Committee to write directly to the NLRB and its general counsel to demonstrate the strength of the region, Region 22 survived.

In fiscal year 2019-2020, Region 22 had a strong case intake in comparison with other regions nationwide. Its case intake surpassed that of Region 29 and closed the gap on the intake deficit with Region 2. I deeply appreciate the support of the practitioners, and the excellent relations between the Region 22 personnel and all the practitioners. The strong and productive working relationship between the region and the practitioners made it easier for me to make the decision that it was time to retire. The leadership of the region under Regional Attorney Richard Fox and Assistant to the Regional Director Eric Schechter will continue the longstanding relationship between the region and the State Bar. I thank you all for your incredibly productive, cordial and professional relationships during my tenure at Region 22.

David E. Leach III was the Regional Director of the National Labor Relations Board, Region 22 in Newark from June 21, 2014 until his retirement from the NLRB on Jan. 2, 2021. In addition to his 45-year career at the NLRB, David was an adjunct lecturer at the Mailman School of Public Health at Columbia University, where he taught a class on the Health Care amendments to the NLRA, from 1985-2014 and has been an Adjunct Professor of Law at Brooklyn Law School, where he teaches courses in labor law and collective bargaining, since 2001.

Endnotes

1. 29 U.S.C. §§ 151-169.
2. Franklin D. Roosevelt, Statement on Signing the National Labor Relations Act. *Available at* presidency.ucsb.edu/documents/statement-signing-the-national-labor-relations-act.
3. *Id.*
4. *Id.*
5. James A. Gross, Broken Promise: The Subversion of US Labor Relations Policy, 1947-1994 (1995), at 283.
6. *See* David E. Leach III, Director's Corner: Restructuring at the NLRB, 39 *N.J. Lab. & Emp. L.Q.*, No. 1, 2017, at 6-7; David E. Leach III, Director's Corner: Region 22 Labor Conference Explores Impact of *Epic Systems/Murphy Oil* Decision, 40 *N.J. Lab. & Emp. L.Q.*, No. 1, 2019, at 4-6.
7. 292 NLRB 899 (1989).
8. 560 U.S. 674 (2010).
9. 573 U.S. 513 (2014).
10. 580 U.S. __, 137 S. Ct. 929 (2017).
11. Gross, *supra* n.5, at 97.
12. 265 NLRB 206 (1982).
13. 235 NLRB 720 (1978), enforced 602 F.2d 1302 (9th Cir. 1979).
14. 268 NLRB 601 (1984), enforced 765 F.2d 175 (D.C. Cir. 1985)
15. *MV Transportation, Inc.*, 368 NLRB 66 (2019).

Artificial Intelligence and Discrimination: Combating the Risk of Bias in AI Decision-Making

by Stephanie Wilson, Diane A. Bettino, and Kimberly Jeffries Leonard, Ph.D.

Artificial intelligence (AI) technology influences decision-making processes across varied industries. Unquestionably, AI technology is a societal boon in many appreciable ways because it can produce significant predictive information by synthesizing massive amounts of data in short time periods while minimizing human error. AI can predict whether and when a patient will need particularized medical treatment in order to stave off certain illnesses; consumers' spending habits; a loan applicant's credit risk; and whether a job applicant is likely to be a "good hire." However, decisions based on AI results are not always foolproof. Research shows that, in some instances, bias can taint AI's results. Consequently, decisions that rely on the results can expose the user to discrimination claims, usually based on a disparate impact theory.

Definition of Key Terms

AI is a broad research field that does not fit neatly into a single precise definition. However, John McCarthy, one of the founders of AI research, defines "AI [as] the field of getting a computer to do things which when done by people, are said to involve intelligence."[1] Stated another way, AI is "the science of making machines smart."[2]

AI has different sub-categories, one of which is machine learning. Machine learning provides "data-driven predictions"[3] and refers broadly to the science of enabling computers to "learn" through the development of algorithms that "discover correlations or patterns in the data."[4] Over the past 10 years, machine learning has become increasingly popular with its corresponding reliance on big data,[5] "the lifeblood of any AI application."[6] Big data is "defined as information that is large in scale and complex in its interrelationships."[7]

An algorithm is "a set of well-defined, step by step instructions for a machine to solve a specific problem and generate an output using a set of input data. AI algorithms involve complex mathematical codes that are designed to enable the machines to learn from new input data and develop new or adjusted output based on the learnings."[8] End-users rely on AI to either make decisions for them or to assist them in decision-making.[9] Algorithms that impact our daily lives include Netflix's sorting feature that suggests movies the subscriber may enjoy and Google's sorting feature that determines the order of what a user sees in response to a search request.

AI's Beneficial Uses

AI provides many positive benefits across different industries through its ability to provide meaningful predictions based on its quick, efficient, and cost-effective analyses of data sets. Its positive benefits are evident particularly in the health care field with AI's ability to save lives. Recently, researchers designed an algorithm that accurately predicts if a patient will experience acute kidney injury within 48 hours of the medical occurrence.[10] Another algorithm accurately predicts which skin cancers respond best to certain immunotherapies.[11]

Likewise, financial services companies are relying increasingly on AI-based algorithms for, among other things, evaluating consumer credit risk, customer identification and fraud assessments, portfolio management, and consumer marketing.[12] As with the health care field, proponents argue that AI technology is invaluable because it enables lenders to make "fairer, more responsible loan decisions"[13] and promotes greater societal inclusion by providing lenders with the ability to rely on "alternative data" in order to make credit available to more underserved consumers.[14]

Similarly, human resources managers across industries are turning to AI to assist with employment-related tasks such as recruiting, hiring, compensation analysis, employee retention and promotion decisions. Echoing industry proponents' arguments, human resources managers contend that AI is a critically important tool because it reduces risks that are associated with human errors in decision-making; expands the universe of potential applicants whom employers can interview; and

evaluates extensive and complicated compensation and other employment-related data in a quicker, accurate, and more cost-effective manner.

AI and Bias

Proponents of AI's use argue that it reaches quick and efficient decisions by analyzing huge amounts of data while eliminating factors that can affect negatively human decision-making, such as lack of objectivity, explicit and implicit bias, and mental fatigue. Arguably, AI produces neutral outcomes because algorithms belong to no race, gender or other protected status and are exempt from the problems that can impair human-decision making. Stated another way, "for algorithms, data is the ultimate determining factor."[15] Although this argument has initial facial appeal, research shows that, like human beings, AI's conclusions can be susceptible to unlawful bias.

Bias can infiltrate the algorithmic process at a number of access points. One potential access point is at the data input stage. It is at this point where flawed outcomes can occur if the algorithm relies on data that is incomplete or inaccurate, under-inclusive (e.g., data that contains information concerning only one gender), or contains historical patterns of discrimination.[16] If input and output data are flawed and are left unaudited and uncorrected, studies show that an algorithm's output will continue to perpetuate inequitable information that could provide the underlying foundation for a disparate impact discrimination claim.[17] This "garbage-in/garbage out" argument can arise regardless of the industry.

Data Integrity Issues in Health Care and Financial Services

A recent high-profile occurrence in the health care field is illustrative. In that case, health providers were using an established algorithm to identify patients who could benefit from high risk care management in order to receive specialized medical attention, which resulted in white patients being favored over African Americans.[18] The algorithm relied on data that equated the amounts of money individuals spent on health care to their increased medical risks or serious medical conditions.[19] However, the algorithm failed to consider that African Americans frequently spent less money on health care than their white counterparts because of certain socioeconomic obstacles to receiving health care.[20] Therefore, African Americans' history of lower health care expenditures was not indicative of their true health status or the care they should have obtained if it were available to them.[21] While race itself was not a variable used in the algorithm, health care expenditure history became a proxy for race.[22]

Data Integrity Issues in the Criminal Justice System

Algorithmic bias concerns are not limited to the health care industry. Racial bias concerns have arisen with the criminal judicial system's reliance on algorithms to predict criminal recidivism. A recidivism risk assessment tool—Correctional Offender Management Profiling for Alternative Sanctions (COMPAS)—has come under repeated attack. In 2016, ProPublica found that COMPAS's results were biased against African Americans because its algorithm used flawed data which led, among other things, to the inaccurate conclusion that African Americans were likely to reoffend at double the rate of white people.

The Wisconsin Supreme Court in *State v. Loomis* was one of the first courts to address these concerns.[23] In *Loomis*, the defendant argued on appeal that the sentencing court's use of COMPAS violated his due process rights because (1) COMPAS's proprietary nature prevented him from assessing its scientific accuracy since he could not examine how the COMPAS algorithm calculated risk, i.e., he could not examine how the risk scores were determined or how the factors were weighed; (2) reliance on COMPAS precluded him from receiving an individualized sentence since COMPAS's scores were based on group data; and (3) COMPAS's assessments improperly took gender into account.[24]

The Wisconsin Supreme Court considered the defendant's contentions and denied that the sentencing court's use of COMPAS in his case violated his due process rights.[25] However, in reaching its holding, the court acknowledged the existence of research that concluded that COMPAS's algorithm used unreliable and discriminatory underlying data (while noting other research had reached the opposite conclusion) and that Northpointe Inc., the manufacturer of COMPAS, relied on a trade secret defense to prevent disclosure of information about the algorithm.[26] These facts led the court to place procedural limitations on COMPAS's subsequent use that were designed to "instill both general skepticism about the tool's accuracy and a more targeted skepticism with regard to the tool's assessment of risks posed by minority offenders."[27]

Data Integrity Issues in Employment Matters

The same "algorithmic bias" issues can arise in the employment context. For example, when a company decides to use AI in making certain employment-related decisions, such as determining whom to interview, whom to hire and whom to fire, it has to consider both the nature of the inputted data and whether the outputs have a disparate impact on any protected status.[28] A case in point occurred in 2015 when Amazon discontinued use of a recruiting algorithm once it realized that the algorithm failed to identify potential candidates for an interview in a gender-neutral manner because it showed a preference for men.[29] Upon review, it was determined that this occurred because the data on which the algorithm was trained focused on certain re-occurring terms contained in resumes of applicants who had been hired by Amazon over a 10-year period.[30] As it turned out, the resumes that were used as part of the training data were predominately from male applicants and they contained verbs such as "executed" and "captured" in describing the applicants or what they had done.[31] In selecting candidates for interviews, the algorithm favored resumes that used these types of action verbs, penalized resumes that included the word "women's," and downgraded applicants who graduated from two of the all-women's colleges.[32] In a similar vein, recruiting algorithms are more likely to show advertisements for higher-paying jobs to men over women.[33]

Steps to Minimize Algorithmic Bias

Evaluate Data Input and Output with a Diverse Team

Data integrity is key to the proper functioning of machine learning models.[34] Therefore, an algorithm's input data and its output must be audited for possible disparate impact discrimination claims. Companies must examine the sources of the data for potential bias and have a thorough understanding of the data it uses and how the algorithm works. Human audits of the AI's dataset should be conducted to determine whether any objective factors are proxies for discrimination that impact individuals in a protected class. Recent studies show that having a diverse team who build and test AI reduces algorithmic bias as does training for individuals involved in the development and testing processes.[35] Human review of the final decision before it is made and implemented reduces the risk of discriminatory outcomes because inconsistencies and red flags with the algorithm's output can be spotted.[36]

Document Compliance and Risk Management Steps

Additionally, companies who utilize AI should document all steps and decisions taken in order to manage discrimination risk. This entails a continuing audit of their processes, which includes determining whether the original inputted data requires updating.[37]

Review Applicable Laws

Companies should review their applicable states' laws to ensure compliance, inclusive of laws governing privacy. While Congress has yet to pass legislation regarding the use of AI,[38] federal regulators that oversee financial services companies recently issued a request for information, encouraging interested parties to submit written comments in response to inquiries regarding how financial institutions use AI and machine learning.[39] Additionally, the Equal Employment Opportunity Commission has begun to explore the implications of algorithms for fair employment.[40]

At the state level, Illinois became the first state to regulate an employer's use of AI, effective Jan. 1, 2020.[41] Given the rise of AI's use across industries, other states, such as New Jersey, have pending legislation[42] and the New York City Council is considering a bill aimed at prohibiting the sale of AI technology unless it has been audited for bias and has passed anti-bias testing in the year before the sale, among other things.[43]

Conclusion

While AI is beneficial in the decision-making process, AI users must be aware that AI may come with risks that can lead to unintended discriminatory results. "Because algorithms do not have the power of the human mind in distinguishing right from wrong,"[44] companies must always include human decision-makers in the process. It is imperative for a company to continuously review and audit the input data and outputs obtained from the AI system for possible disparate impact issues. ■

Stephanie Wilson is a partner at Reed Smith in Princeton. Diane A. Bettino is a partner at Reed Smith in Princeton. Kimberly Leonard Jefferies, Ph.D is a Researcher and Behavioral Health Specialist and President and CEO of Envision Consulting LLC in Washington, D.C. Brittany Armour and Greyson K. Van Dyke (Reed Smith LLP associates) and James Barbuto and Alexis Cocco (former Reed Smith LLP associates) contributed to this article.

Endnotes

1. FINRA, Artificial Intelligence (AI) in the Securities Industry, FINRA Report, at 2 (June 10, 2020), *available at* finra.org/rules-guidance/key-topics/fintech/report/artificial-intelligence-in-the-securities-industry.
2. Frederick Zuiderveen Borgesius, Discrimination, Artificial Intelligence and Algorithmic Decision-making (2018), Directorate General of Democracy, Council of Europe at 8, *available at* rm.coe.int/discrimination-artificial-intelligence-and-algorithmic-decision-making/1680925d73.
3. *Id.* at 9.
4 *Id.*; FINRA, *supra* n.1, at 2.
5. Borgesius, *supra* n.2, at 9.
6 Nicholas Schmidt and Bryce Stephens, An Introduction to Artificial Intelligence and Solutions to the Problems of Algorithmic Discrimination, 73 *The Quarterly Report*, No. 2, 2019 at 134.
7. FINRA, *supra* n.1, at 13.
8. *Id.* at 4.
9. Sharon Hoffman and Andy Podgurski, Artificial Intelligence and Discrimination in Health Care, Yale Journal of Health Policy, Law and Ethics 19:30, 2020 at 9, *available at* digitalcommons.law.yale.edu/yjhple/vol19/iss3/.
10. Starre Vartan, AI Can Predict Kidney Failure Days in Advance, *Scientific American* (July 31, 2019), *available at* scientificamerican.com/article/ai-can-predict-kidney-failure-days-in-advance/.
11. Paul Johannet, Nicolas Coudray, Douglas M. Donnelly, *et al.*, Using Machine Learning Algorithms to Predict Immunotherapy Response in Patients with Advanced Melanoma, 27 *Clinical Cancer Research*, Issue 1 (January 2021), *available at* clincancerres.aacrjournals.org/content/27/1/131.
12. Arthur Bachinskiy, The Growing Impact of AI in Financial Services: Six Examples, *Trends Data Science* (Feb. 21, 2019), *available at* towardsdatascience.com/the-growing-impact-of-ai-in-financial-services-six-examples-da386c0301b2.
13. BPI, Artificial Intelligence: Recommendations for Principled Modernization of the Regulatory Framework (Sept. 14, 2020) at 15, 22, *available at* bpi.com/artificial-intelligence-recommendations-for-principled-modernization-of-the-regulatory-framework/.
14. Britt Faircloth, The Risks and Management of Algorithmic Bias in Fair Lending, *ABA Bank Compliance Magazine* (Nov/Dec. 2019).
15. Ben Dickson, Artificial Intelligence Has a Bias Problem and It's Our Fault, *PC Magazine* (June 14, 2018), *available at* pcmag.com/news/artificial-intelligence-has-a-bias-problem-and-its-our-fault.
16. Hoffman, *supra* n.9, at 12.
17. *Id.* at 13. *See also Bauserman v. Unemployment Ins. Agency*, 330 Mich. App. 545 (Mich. Ct. App. 2019) (finding that the unemployment agency's use of an automated decision-making system violated the plaintiffs' due process rights, resulting in as many as 26,000 people being wrongfully disqualified from receiving benefits, having penalties imposed, and subjected to criminal prosecution without notice to be heard or to present evidence in their defense).
18. Hoffman, *supra* n.9, at 17.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*; Starre Vartan, Racial Bias Found in Major Healthcare Risk Algorithm, *Scientific American* (Oct. 24, 2019), *available at* scientificamerican.com/article/racial-bias-found-in-a-major-health-care-risk-algorithm/; Ziad Obermeyer, Brian Powers, Christine Vogeli, Sendhil Mullainathan, Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations, *Science,* 447-453 (Oct. 25, 2019), *available at* science.sciencemag.org/content/366/6464/447.editor-summary.
23. *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016).
24. *Id.* at 757-58.
25. *Id.* at 772.
26. *Id.*at 761-64.
27. Criminal Law-Sentencing Guidelines-Wisconsin Supreme Court Requires Warning Before Use of Algorithmic Risk Assessments in Sentencing, 130 *Harv. L. Rev.* 1530, 1533 (2017).
28. Paige Smith, Daniel R. Stoller, AI Screens of Pandemic Job Seekers Could Lead to Bias Claims, *Bloomberg Law News* (June 30, 2020), at 1-2.

29. Jeffrey Dastin, Amazon Scraps Secret AI Recruiting Tool That Showed Bias Against Women, *Reuters* (Oct. 10, 2018), *available at* reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G.
30. *Id.*
31. *Id.*
32. *Id.*
33. Tom Simonite, Probing the Dark Side of Google's Ad-Targeting System, *MIT Technology Review* (July 6, 2015), *available at* technologyreview.com/2015/07/06/110198/probing-the-dark-side-of-googles-ad-targeting-system/; Dickson, *supra* n.15.
34. FINRA, *supra* n.1, at 14.
35. *Id.*
36. *Id.*
37. Alina Köchling, Marius Claus Wehner, Discriminated by An Algorithm: A Systematic Review of Discrimination and Fairness by Algorithmic Decision-making in the Context of HR Recruitment and HR Development, *Business Research* 13:795-848, 839 (Nov. 20, 2020), *available at* doi.org/10.1007/s40685-020-00134-w.
38. *See generally* United States Senate Bill S.1108 (Algorithmic Accountability Act of 2019), *available at* congress.gov/bill/116th-congress/senate-bill/1108; *see also* Yoon Chae, U.S. AI Regulation Guide: Legislative Overview and Practical Considerations, *The Journal of Robotics, Artificial Intelligence & Law,* Vol. 3, No. 1, at 17–40 (Jan.–Feb. 2020).
39. On March 31, 2021, the OCC, FDIC, Federal Reserve, NCUA and the CFPB issued a Request for Information and Comment on Financial Institutions' Use of Artificial Intelligence, Including Machine Learning, Federal Register, Vol. 6, Nov. 60 (Mar. 31, 2021), *available at* federalregister.gov/documents/2021/3/31.
40. Press release: Use of Big Data Has Implications for Equal Employment Opportunity, Panel Tells EEOC (Oct. 13, 2016), *available at* eeoc.gov/eeoc/newsroom/release/10-13-16.cfm.
41. Artificial Intelligence Video Interview Act, H.B. 2557, Public Act 101-0260 (Ill. 2019), *available at* ilga.gov/legislation/BillStatus.asp?DocNum=2557&GAID=15&DocTypeID=HB&SessionID=108&GA=101.
42. Assembly Bill No. 5430 (New Jersey Algorithmic Accountability Act). (N.J. 2019), *available at* njleg.state.nj.us/2018/Bills/A9999/5430_I1.HTM.
43. New York City Council, Intro. No. 1894; *available at* legistar.council.nyc.gov/LegislationDetail.aspx?ID=4344524&GUID=B051915D-A9AC-451E-81F8-6596032FA3F9&Options=Advanced&Search.
44. Dickson, *supra* n.15.

Delanoy v. Twp. of Ocean: A Case Law Update on the Status of Pregnancy Discrimination and Reasonable Accommodations of Pregnant Employees Under the Pregnant Workers Fairness Act Amendment to the NJLAD

by Katy McClure

On March 9, 2021, the New Jersey Supreme Court in *Delanoy v. Twp. of Ocean*[1] unanimously affirmed an Appellate Division decision reversing a grant of summary judgment to an employer under the Pregnant Workers Fairness Act, a 2014 amendment to the New Jersey Law Against Discrimination. The plaintiff in *Delanoy*, a pregnant police officer, claimed her employer denied her reasonable accommodations for her pregnancy and subjected her to unequal treatment in violation of the PWFA. The appellate panel in *Delanoy* held that the defendant township's maternity and light-duty standard operating procedures for police officers were unequal on their face in violation of the PWFA and that the PWFA obligated the township to provide Officer Delanoy with a reasonable accommodation for a normal pregnancy. The appellate court reversed and remanded the case for the determination by a jury of several other issues regarding the provision of reasonable accommodations to pregnant employees.[2] *Delanoy* thus presented the New Jersey Supreme Court its "first opportunity" to consider the PWFA, wrote retiring associate Justice Jaynee LaVecchia, whose unanimous opinion concurred in the Appellate Division's "illumination of the PWFA" as providing multiple theories for asserting pregnancy discrimination claims. The Court affirmed judgment in favor of the plaintiff Delanoy substantially for the reasons expressed by Appellate Division Presiding Judge Jack M. Sabatino's Jan. 3, 2020, published opinion.[3]

The most significant impact of the Supreme Court's decision in *Delanoy* is the affirmation of and elaboration on the Appellate Division's articulation of three distinct causes of action under subsection (s) of the PWFA: (1) unequal or unfavorable treatment; (2) failure to accommodate; and (3) unlawful penalization.[4] Noting that the complaint in *Delanoy* did not plead these separate causes of action, the Supreme Court instructed plaintiffs and their attorneys bringing claims under subsection (s) of the PWFA to identify the distinct theories on which their causes of action rely in order to "facilitate enforcement of the PWFA's goals and promote litigation economy and efficiency when a plaintiff seeks enforcement of a statute, like the PWFA, that contemplates various forms of protected conduct."[5] In *Delanoy*, the Supreme Court delivered a roadmap to employment counsel litigating pregnancy discrimination and accommodation claims under the PWFA while remaining faithful to the mandate that the NJLAD be liberally construed to achieve its important remedial purpose and reinforcing the critical responsibility of courts to advance the statutory intent of the Legislature.[6]

The PWFA Amendment to the NJLAD

Effective Jan. 17, 2014, the PWFA amended the NJLAD to expressly prohibit pregnancy-based discrimination in employment and require employers to reasonably accommodate employees, helping to maintain both their employment and normal pregnancies.[7] In adopting the PWFA, the Legislature expressed several public policy concerns and objectives.[8] For example, the Legislature found and declared "[t]hat pregnant women are vulnerable to discrimination in the workplace in New Jersey, as indicated in the reports that women who request an accommodation that will allow them to maintain a healthy pregnancy, or who need a reasonable accommodation while recovering from childbirth, are

being removed from their positions, placed on unpaid leave, or fired."[9] The Legislature further stated not only its intent to "combat this form of discrimination by requiring employers to provide reasonable accommodations to pregnant women," but also its affirmative lack of intent "to require such accommodations if their provision would cause an undue hardship in the conduct of an employer's business."[10]

The PWFA establishes pregnancy, not just gender, as a protected class.[11] The PWFA specifically makes it an unlawful employment practice or unlawful discrimination "[f]or an employer to treat, for employment-related purposes, a woman employee that the employer knows, or should know, is affected by pregnancy or breastfeeding in a manner less favorable than the treatment of other persons not affected by pregnancy or breastfeeding but similar in their ability or inability to work."[12] The PWFA defines "pregnancy" as "pregnancy, childbirth, or medical conditions related to pregnancy or childbirth, including recovery from childbirth."[13] The appellate panel in *Delanoy* announced that "[b]y declaring pregnant workers to be a protected class under the [NJ] LAD, the statute affords them all the [NJ]LAD's general protections, including its robust range of remedies and protections from retaliation or reprisal."[14]

The PWFA further requires employers, subject to an undue hardship exception, to provide reasonable accommodations in the workplace to pregnant employees, upon the advice of their physician, in order to accommodate a normal pregnancy.[15] The amended statute specifically requires employers of pregnant employees to make available accommodations in the workplace, "such as bathroom breaks, breaks for increased water intake, periodic rest, assistance with manual labor, job restructuring or modified work schedules, and temporary transfers to less strenuous or hazardous work, for needs related to the pregnancy…" Notably, the list is exemplative, not exhaustive. [16]

The PWFA instructs that factors to be considered when determining whether an accommodation would impose an undue hardship on an employer's business operation include

> the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget; the type of the employer's operations, including the composition and structure of the employer's workforce; the nature and cost of the accommodation needed, taking into consideration the availability of tax credits, tax deductions, and outside funding; and the extent to which the accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement.[17]

Reinforcing the principle of equal treatment among pregnant and non-pregnant workers, the PWFA mandates that "[w]orkplace accommodation[s] provided [under the statute] and paid or unpaid leave provided to an employee affected by pregnancy or breastfeeding shall not be provided in a manner less favorable than accommodations or leave provided to other employees not affected by pregnancy or breastfeeding but similar in their ability or inability to work."[18]

The PWFA additionally includes an anti-retaliation provision which states that an "employer shall not in any way penalize the employee in terms, conditions or privileges of employment for requesting or using the accommodation."[19] The NJLAD, as amended by the PWFA, does not define what might constitute an unlawful penalty; however, the appellate panel in *Delanoy* defined it as conditions imposed on an accommodation that are "especially harsh." [20]

Summarizing the PWFA, the appellate court in *Delanoy* stated:

> The PWFA essentially has four distinct and important components: (1) language that prohibits unequal treatment of pregnant women in a variety of contexts, including the workplace; (2) provisions that require employers to provide pregnant workers, upon request, with reasonable accommodations that can enable them to perform their essential job functions; (3) a mandate that the employer must not 'penalize' a pregnant worker for requesting or receiving the accommodation[;] and (4) an undue hardship exception to the reasonable accommodation provision.[21]

Delanoy's Factual Background: Maternity and Light-Duty Standard Operating Procedures

The plaintiff in *Delanoy* appealed from a New Jersey Law Division decision granting summary judgment in favor of the defendants, dismissing Delanoy's claim

that the defendant township's Maternity Assignment Standard Operating Procedure ("Maternity SOP") for police officers violated the PWFA's "equal treatment" mandate.[22] She also appealed the trial court's denial of her cross-motion for partial summary judgment on her facial challenge to the SOP.[23]

In January 2003, the plaintiff began working as a police officer in the defendant township's police department ("OPD"). Delanoy was one of just three female officers in a force of more than 50 police officers.[24]

In March 2011, the plaintiff learned she was pregnant with her first child and due in November 2011. At the time Delanoy learned she was pregnant, the OPD had neither a formal maternity leave nor a light-duty policy for police officers.[25] In April 2011, Delanoy informed the OPD police chief that she was pregnant and would be unable to perform her usual duties. Initially, the police chief advised Delanoy that the OPD did not have a light-duty assignment for pregnant police officers.[26]

In July 2011, the OPD implemented a Maternity SOP and a Light-Duty/Modified Duty Standard Operating Procedure ("Light-Duty SOP"). The policies were substantially similar in that they required a doctor's note recommending light duty and required an OPD police officer to deplete all of their accumulated paid leave before receiving a Maternity or Light-Duty SOP assignment.[27]

However, the OPD's policies also had two important differences.[28] The Light-Duty SOP granted the chief of police discretion to waive the requirement of depleting accumulated paid leave for a Light-Duty assignment, discretion for which was not included in the Maternity SOP. In opposition to summary judgment, Delanoy offered deposition testimony and a certification asserting that two male officers had been granted waivers of the accumulated-leave condition.[29]

The OPD policies also differed with regard to how a police officer's return-to-work date was determined. Under the Light-Duty SOP, the date was set by the treating physician, while under the Maternity SOP, a formula was established to determine the return-to-work date, which could be no more than 45 days past the child's expected due date.[30] According to the defendants, the two SOPs guaranteed any employee needing a maternity or light-duty assignment a position as one would be created for them, whereas prior to enacting the policies in 2011, whether an employee received a light-duty assignment depended upon whether such an assignment existed and was available.[31]

On July 11, 2011, Officer Delanoy informed the then-OPD police chief that her doctor instructed her to work a maternity assignment for the remainder of her pregnancy. She began her maternity assignment under the Maternity SOP on July 18, 2011 and remained in the assignment until her first child was born in November 2011.

Eighteen months later, in January 2013, Delanoy filed her first lawsuit against the OPD and other defendants alleging pregnancy discrimination because the two non-identical SOPs detrimentally affected the terms and conditions of her employment.[32] On Sept. 19, 2014, while that lawsuit was pending, Delanoy submitted a doctor's note to her employer advising that she was pregnant with her second child and requesting that she be placed on light duty beginning Sept. 22, 2014, through her anticipated due date of March 17, 2015.[33] At this time, the Maternity and Light-Duty SOPs were in full effect.[34] Effective Sept. 22, 2014, the plaintiff was "temporarily reassigned" to a maternity assignment.[35]

In November 2014, Delanoy filed a second lawsuit against the Township of Ocean, the police chief, township manager, and members of the Ocean Township Council. Delanoy sought, among other things, a declaratory judgment, finding that the Township's Maternity and Light-Duty SOPs violated the provisions of the PWFA, which had amended the NJLAD 11 months prior in January 2014. Delanoy further sought an injunction prohibiting the defendants from enforcing policies that discriminated against pregnant employees, damages, and counsel fees.[36] Upon learning the defendants were forcing her to take an early maternity leave, Delanoy subsequently filed an order to show cause for declaratory and injunctive relief. The trial court denied her emergent application and the Appellate Division and New Jersey Supreme Court declined to undertake interlocutory review.[37]

In accordance with the Maternity SOP, Delanoy was assigned to perform administrative duties in the OPD's records department and handle "walk-in reports," duties she testified during her deposition she had performed during her first pregnancy. The OPD considered Delanoy a "primary walk-in officer" such that when people entered the OPD to report a crime, accident or other incident, Delanoy was the officer responsible for meeting with the individual and preparing a report.[38] Delanoy testified that she objected to being the primary walk-in officer because she was unable to wear her service weapon (because firing it could expose her unborn

child to lead) when interacting with members of the public.[39] Delanoy recalled a prior incident at the OPD in which a mentally unstable person entered as a walk-in and became disruptive, which led to an outdoor scuffle with two officers in which one suffered an injury forcing them to retire. This incident caused Delanoy to be "absolutely terrified" and vulnerable because she could not defend herself and her unborn child against a violent walk-in.[40]

Delanoy worked in the maternity assignment from Sept. 22, 2014, until late February or early March 2015, prior to her second child's expected due date of March 17, 2015.[41] Although the parties disagreed on the precise day Delanoy's maternity leave began,[42] it was undisputed that she was forced to exhaust approximately two weeks of accumulated leave time days as a condition of receiving her maternity assignment.

The Appellate Division noted that the OPD's requirement that Delanoy exhaust her leave "is at the heart of the case."[43] Defendants contended the leave exhaustion requirement of the Maternity SOP was fair because it included a "give and take" whereby OPD officers gave up paid leave time in exchange for the benefit of getting paid their full salary during a maternity or light-duty assignment, rather than a lesser file-clerk salary.[44] The defendants reasoned the policies thus created a savings for the taxpayer and as a result were fair to all concerned.[45] Delanoy argued the loss-of-leave time requirement under the Maternity SOP was unlawful in violation of the PWFA because her doctor cleared her as medically able to continue to work the maternity assignment up to her due date of March 17, 2015, rather than being forced to deplete her accumulated paid leave in the weeks leading up to her due date.[46]

The Law Division Dismisses Plaintiff's PWFA Claims

Delanoy contended the OPD's Maternity SOP discriminated against pregnant officers because it was less favorable than the policy for light-duty assignment for non-pregnant officers.[47] The Maternity SOP allowed pregnant officers to work a modified assignment, but only on the condition that the officer use all her accumulated paid leave time —defined to include vacation, personal, and holiday time — before going on modified assignment.[48] The Maternity SOP also differed from the light-duty assignment policy for injured (nonpregnant) officers because the light-duty policy granted the OPD's police chief authority to waive the condition requiring use of accumulated paid leave time.[49] Further, the lawsuit claimed that requiring Delanoy to deplete her accumulated paid leave time under the Maternity SOP violated the PWFA because it was an improper penalty, as the statute requires employers to reasonably accommodate pregnant employees.[50]

Following discovery, the parties filed cross-motions for summary judgment. The trial court granted summary judgment to the defendants, dismissing all of Delanoy's claims, and denied summary judgment on Delanoy's motion for partial summary judgment. In a Jan. 19, 2018 oral decision, the trial court analyzed what it considered to be the PWFA's equal treatment mandate under disparate treatment and disparate impact analyses, concluding that the Maternity and Light-Duty SOPs treated pregnant and nonpregnant employees the same by requiring the depletion of accumulated leave time before receiving a modified assignment.[51]

As to disparate treatment, the trial court found that Delanoy failed to produce evidence that she suffered an adverse employment action and further held that being forced to deplete accumulated leave time did not constitute an adverse job action. The trial court also found that Delanoy was required to, but had failed to, produce evidence of a "discriminatory intent" on behalf of the defendants in implementing the Maternity SOP. With regard to the Light-Duty SOP granting discretion to the police chief to waive the "loss-of-leave-time condition," the trial court agreed with defendants' argument that the policy applied only to high-ranking senior officers who performed administrative and/or essential functions for the OPD and did not apply to Delanoy as a patrol officer.[52] As to a disparate impact analysis, the trial judge concluded that because the Maternity SOP did not harm all pregnant officers equally, the policy did not create an adverse impact for all members of the Delanoy's protected class.[53]

The Appellate Division Determines What is 'Fair' Under the PWFA

On appeal, Delanoy argued that genuine issues of material fact existed requiring her claim of unlawful denial of a reasonable accommodation to be submitted to a jury. Delanoy further claimed that the defendants' policies requiring pregnant employees to deplete their accumulated leave as a condition of obtaining a modified assignment under the Maternity SOP constituted

an unlawful penalty within the meaning of the PWFA. Additionally, Delanoy argued that the trial court's denial of summary judgment on her facial challenge that the Maternity and Light-Duty SOPs caused unequal treatment should be reversed.[54] Conversely, the defendants urged the Appellate Division to affirm the trial court's ruling on grounds that, even in a light most favorable to the appellant, Delanoy had no viable PWFA claims, she was not treated unequally, and she was not entitled to a reasonable accommodation because she admitted she could not perform the essential functions of a police officer during the later stages of her pregnancy.[55]

A Cause of Action for Unequal Treatment Under the PWFA

The Appellate Division vacated the trial court's entry of summary judgment in the defendants' favor on Delanoy's unequal treatment claim, holding that the OPD's Maternity SOP is less favorable than the Light-Duty SOP in the critical respect that the latter policy allows the police chief to waive the requirement that an officer deplete their accumulated leave time.[56] The appellate court found that the "trial court underestimated the significance of this key difference" in declaring the policies to be "neutral."[57]

At summary judgment, Delanoy had identified at least one nonpregnant patrolman and one nonpregnant sergeant who she contended obtained waivers from the police chief to be assigned to light-duty without having to exhaust their accumulated leave. The defendants disagreed, which the appellate panel found constituted a factual dispute requiring resolution by a jury.[58]

The appellate panel further found that the two policies are "clearly unequal on their face" based upon the rationale that no pregnant officers, regardless of the position they hold, can obtain a waiver, whereas nonpregnant officers can.[59] The Maternity SOP "as written, unlawfully discriminates against pregnant employees as compared to nonpregnant employees who can seek and potentially obtain a waiver from the police chief."[60] The appellate court concluded that such unequal treatment violated the PWFA. Accordingly, the appellate panel upheld Delanoy's facial challenge to the unequal policies and directed the trial court to grant her discrete requests for declaratory and injunctive relief.[61]

The appellate panel reserved for trial the question of whether Delanoy sustained damages as a result of the facial differences between the two SOPs and the fact that Delanoy was never able to seek a waiver.[62] Also reserved for trial were Delanoy's factual contentions that she suffered retaliation and disparate treatment in being assigned to handle walk-ins after she requested to be put on light duty.[63]

In affirming the appellate panel's reversal of the trial court's denial of partial summary judgment to Delanoy on her unequal treatment claim, the Supreme Court found the lower court's decision to be "sensible, rooted as it is in a plain, common-sense application of the terms of subsection (s)."[64] Relying upon "[t]raditional principles of statutory construction" to give meaning to the PWFA, the Supreme Court further held that subsection (s) of the amendment should not be interpreted as merely preventing the "prohibited hiring and firing or other discriminatorily impactful actions" set forth in subsection (a) of the NJLAD.[65] Rather, the Supreme Court held, a fair reading of subsection (s) "requires that it be recognized as intended to provide a broader swath of protection against unfavorable treatment of pregnant or breastfeeding employees" that may not fall within the unlawful employment practices identified in subpart (a).[66]

The Supreme Court did, however, disagree with the appellate panel's conclusion on the issue of whether the Maternity SOP was applied in a discriminatory manner still needed to be resolved on remand for Delanoy's unequal treatment claim. Rather, because the OPD's perforce application of the Maternity SOP according to its terms as to Delanoy was discriminatory, the Supreme Court remanded only for a jury to decide causation and damages resulting from the accumulated leave she was forced to sacrifice at the beginning and end of the Maternity SOP light-duty assignment.[67]

A Cause of Action for Failure to Provide a Reasonable Accommodation Under the PWFA

Next, the Appellate Division addressed Delanoy's claim that the OPD failed to provide her a reasonable accommodation during her second pregnancy by analogizing an employer's obligation to provide a reasonable accommodation under the PWFA to the similar requirement developed under disability law.[68] Referencing the standard under the federal Americans with Disabilities Act, the appellate panel noted that "an employer is liable for 'not making reasonable accommodations to known physical or mental limitations of an otherwise qualified individual who is an applicant or employee,' unless the accommodation would impose an undue hardship on

the defendant's business operations."[69] The appellate court further noted that while the NJLAD does not define what is a reasonable accommodation, the New Jersey Supreme Court in *Victor v. State* "declared that '[a]ffording person with disabilities reasonable accommodation rights is consistent with the [NJ]LAD's broad remedial purposes[.]'"[70]

The appellate panel further observed that the New Jersey Supreme Court recognized in *Caraballo v. Jersey City Police Dept.* that the New Jersey Division on Civil Rights adopted a regulation providing examples of reasonable accommodations in NJLAD disability cases that include:

(i) Making facilities used by employees readily accessible and usable for people with disabilities;
(ii) Job restructuring, part-time or modified work schedules or leaves of absence;
(iii) Acquisition or modification of equipment; and
(iv) Job reassignment and other similar actions.[71]

The purpose of such accommodations, the Appellate Division noted, is to allow disabled employees to continue to work without a physical handicap impeding their job performance.[72] Focusing on physical disabilities, the appellate court further observed that when construing the concept of "reasonable accommodation" in NJLAD cases, the employer's duty to accommodate the employee's physical disability does not require the employer to "acquiesce to the disabled employee's requests for certain benefits or remuneration."[73] The appellate panel rejected the defendants' claim that they were not obligated under the PWFA to accommodate Delanoy because by asking for a non-patrol assignment in the police station, which would not require her to carry her service weapon, she admitted that she could not perform the essential functions of her job with an accommodation. The appellate panel found the defendants' position unpersuasive based upon what it considered an important distinction between a temporary accommodation that allows a pregnant woman to continue working while transitioning to childbirth versus a permanent accommodation that would alter her job functions on an ongoing basis.[74]

The appellate panel pointed to the New Jersey Supreme Court's decision in *Raspa v. Gloucester Cty. Sheriff's Office*, in which the employer provided light-duty accommodations to employees experiencing short-term inabilities to perform the essential functions of their job duties. The plaintiff in *Raspa* sought to keep the light-duty assignment on a permanent basis.[75] The appellate court in *Delanoy*, quoting *Raspa,* stated that the light-duty assignment was "intended as a shield to protect the temporarily disabled, and not as a sword by which a person who is otherwise unqualified for the position can demand a permanent posting."[76] In short, the appellate panel rearticulated that the NJLAD does not require an employer to accommodate an employee on a permanent or indefinite light-duty assignment if the employee's disability renders her unable, absent a reasonable accommodation, to return to full-duty status.[77]

The appellate court found that the PWFA does require that temporary accommodations be granted to pregnant workers who requested them, including "temporary transfers to less strenuous or hazardous work."[78] The PWFA contemplates that a pregnant employee nearing the end of her pregnancy may be temporarily unable to perform essential functions of their regular job duties and have a right to accommodation, subject to the employer's undue hardship exception, including an assignment that is less hazardous or strenuous. The appellate court compared such an assignment to the temporary light-duty assignment in *Raspa* where "[t]he light duty positions were not intended to be a permanent post, but a temporary way station or bridge between an inability to work due to injury and a return to full employment status."[79]

The appellate panel also rejected the notion that the Maternity SOP could be construed as eliciting a waiver of rights under the PWFA because it required a doctor's note medically confirming an officer's pregnancy and recommending that she no longer perform the duties of her regular full-time assignment.[80] On the contrary, the appellate panel found that although the Maternity SOP was not labeled as such, it operated as an accommodation tool for pregnant officers.

> It is designed to offer a female officer nearing the end of her pregnancy and who has physical limitations the opportunity to continue to work in a less strenuous or dangerous assignment and still earn a paycheck. The assignment is a temporary way station that bridges the continued employment of the pregnant employee who needs a workplace accommodation until her child is born.[81]

Even absent the Maternity SOP, the appellate court noted that, consistent with the strong public policy objectives articulated in the statute, Delanoy had the

right under the PWFA to seek some form of temporary accommodation subject to the undue hardship defense.[82]

The Supreme Court departed from the Appellate Division's reasoning here, viewing the statutory reasonable accommodation claim in a conceptually different manner.[83] First, rather than analogizing to a disability reasonable-accommodation analysis, the Supreme Court found that, pursuant to the protection afforded by the Legislature in the plain language of the PWFA, employees already performing their job duties who become pregnant and, on the advice of their physician, request a reasonable accommodation, have a statutory right to an accommodation.[84] Second, the Supreme Court emphasized that the statutory provision for undue hardship is an affirmative defense for which the employer carries the burden of proof, not an element of the plaintiff employee's prima facie case.[85]

The Supreme Court held that a PWFA claim for failure to accommodate a pregnant or breastfeeding employee requires the plaintiff to prove three elements:

> (1) the plaintiff must be pregnant or breastfeeding; (2) the plaintiff employee must request a reasonable accommodation, as prescribed by subsection (s), so that the employer knows or should know of the plaintiff's need for an accommodation; and (3) the employer must fail to provide a reasonable accommodation.[86]

Undue Hardship is Also a Jury Question Based Upon a Multi-Factor Analysis

The Appellate Division reserved for a jury determination whether invalidation of the loss-of-leave-time condition in the Maternity SOP would create an undue hardship for the defendants under the PWFA.[87] Again, turning to traditional disability law for guidance, the appellate panel noted that the under the NJLAD's enabling regulations, there are four factors to consider when evaluating whether an accommodation imposes an undue hardship on business operations:

(i) The overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget;
(ii) The type of the employer's operations, including the composition and structure of the employer's workforce;
(iii) The nature and cost of the accommodation needed, taking into consideration the availability of tax credits and deductions and/or outside funding; and
(iv) The extent to which accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement.[88]

As discussed above, the PWFA uses nearly identical language to define undue hardship.[89] The appellate court declined, on the record before it, to determine whether the defendants could establish an undue hardship under the PWFA. Rather, the appellate panel instructed that a jury must analyze the issue, applying the multi-factor analysis to witness testimony and other trial evidence. Accordingly, the appellate court remanded the matter for a jury trial.[90]

The Supreme Court focused its undue hardship analysis on the last factor listed in subsection (s) of the PWFA, which is identical to the fourth factor in the disability accommodation analysis: the extent to which the accommodation would involve waiver of an essential function of the job. Analyzed in the PWFA context, this factor, said the Supreme Court, is "rich in meaning."[91] Implicit in the legislative expression of the PWFA is the acknowledgement that an employer's temporary waiver of a pregnant employee's essential job function will not automatically rise to the level of an undue hardship. Contrasting the undue hardship factor in the PWFA with the Legislature's choice of language when accommodating a sincerely held religious belief or practice, the Supreme Court noted that absent from factors in the latter analysis is any language contemplating whether an accommodation would require the employee to forgo an essential function of her position.[92] Reading the PWFA's subsection (s) in context with its statutory scheme, the Supreme Court found support for a legislative intent to place less weight on a pregnant employee's temporary inability to perform an essential job function in a pregnancy accommodation analysis versus other types of accommodation claims.[93]

The Supreme Court emphasized in *Delanoy* that it is the employer who must prove, as an affirmative defense, that providing a reasonable accommodation creates an undue hardship.[94] Once the employer satisfies its burden-of-proof obligation, the issue becomes a factual one for a jury including considering, among the totality of factors, whether temporary waiver of an essential function of the pregnant employee's job duties renders it an undue hardship in view of the employer's business operations.[95] Thus, the Supreme Court made abundantly clear that, unlike other accommodation claims,

in specific circumstances, the PWFA may require an employer to transfer a pregnant employee to perform work that omits an essential job function as a temporary accommodation.[96] Concluding that Delanoy met her prima facie burden under subsection (s) of the PWFA, the Supreme Court remanded the case to the trial court to determine if the OPD would come forth with proof that accommodating Delanoy created an undue hardship for the defendants and that, if such proof satisfies the trial court that it raises a genuine issue of material fact, the trial court should submit the disputed issue of undue hardship to a jury.[97]

A Cause of Action for Penalizing a Pregnant or Breastfeeding Employee Under the PWFA

The Appellate Division also analyzed the PWFA provision prohibiting the imposition of a penalty against a pregnant employee who seeks an accommodation. The appellate court opined that its meaning extends beyond what is merely unreasonable and likely includes retaliation, but neither the plain language nor the legislative history of the PWFA illuminated that court's inquiry.[98] Absent such legislative instruction, the appellate panel agreed with the argument offered by various amici that "the term appears to disallow employer-imposed conditions on accommodations that are especially harsh."[99] The Appellate Division opined that the Maternity SOP could still give Delanoy a viable PWFA claim if the terms and conditions imposed were "unreasonable" or constituted an unlawful "penalty."[100] As an example, the appellate court suggested that if, upon to her return to full-time work, a previously pregnant employee were given undesirable shifts (for example, covering holidays) because other officers covered her shifts during her leave, the condition of obtaining a temporary assignment could render the accommodation policy "unreasonable" or a "penalty" prohibited by the PWFA.[101]

The appellate panel referred the question to the Model Civil Jury Charge Committee and Division on Civil Rights for the promulgation of an appropriate jury charge and regulation, respectively, on the subject. The appellate court also declined to resolve the question of whether the OPD's loss-of-leave-time provision in *Delanoy* was an unlawful penalty and deferred the assessment to a jury.[102]

The Supreme Court agreed with how the Appellate Division defined a cause of action for an unlawful penalty under the PWFA and emphasized that, under subsection (s), it is an independent cause of action.[103] "The Legislature meant it to have its own teeth in promoting the public policy in favor of having employers welcome the continuing presence of pregnant and breastfeeding employees in the their workplaces[,]" wrote Justice LaVecchia.[104] The Supreme Court articulated two ways in which a plaintiff employee could assert a claim for an illegal penalty in violation of the PWFA. A viable claim of illegal penalty may arise (1) when conditions of an accommodation are made particularly harsh in order to deter "grudging 'compliance' with the will of the Legislature," and (2) "if the pregnant employee's request for an accommodation triggers a hostile work environment against that employee."[105] The Supreme Court urged that all contemplated forms of penalty should be considered in fashioning a new model jury charge in this area.[106]

Pregnancy Discrimination Historically Under the NJLAD and Title VII

As additional historical background, prior to passage of the PWFA, the NJLAD did not identify pregnancy as a specific protected class. However, as early as 1978, New Jersey courts construed the NJLAD to prohibit discrimination on the basis of pregnancy as gender-based discrimination or because of pregnancy-related disability discrimination.[107] Importantly, before the PWFA, neither federal nor state law required employers to reasonably accommodate the needs of employees affected by pregnancy. Therefore, the PWFA's most significant practical implication for employers and employees has been the requirement that an employer provide a reasonable accommodation to a pregnant employee to help her maintain a healthy and otherwise normal pregnancy.[108] For the first time since the PWFA was enacted, the Appellate Division's decision in *Delanoy* represented an expansive examination not only of what constitutes pregnancy discrimination under the amended NJLAD, but also the implications of the PWFA's obligation upon employers to reasonably accommodate pregnant employees when the statute itself does not define "reasonable accommodation."

As the Supreme Court in *Delanoy* acknowledged in affirming the decision below, the Appellate Division specifically noted that New Jersey passed the PWFA, at least in part, in response to a 2013 decision of the Fourth Circuit in *Young v. UPS*, dismissing on summary judgment a Title VII pregnancy discrimination action by a pregnant former parcel delivery worker who was

fired when she could no longer lift up to 70 pounds as required by UPS policy.[109] In *Young*, the Fourth Circuit panel rejected the plaintiff's argument that federal law required her employer to provide her with a reasonable accommodation of relaxing the lifting requirement on the basis that she did not have a "disability" as defined by Title VII because her pregnancy-necessitated lifting limitation was temporary and did not interfere with her participation in major life activities.[110]

In March 2015, a little more than a year after New Jersey enacted the PWFA, the United States Supreme Court reversed in part the Fourth Circuit's decision in *Young* on the rationale that UPS treated several nonpregnant employees with similar physical limitations more favorably than it did the pregnant plaintiff. The Court declined, however, to adopt the plaintiff's argument that federal law requires employers to provide reasonable accommodations to pregnant employees absent proof of disparate treatment.[111]

Delanoy's Implications and Future

The Supreme Court's analysis and holdings in *Delanoy* squarely address the breadth of protections afforded pregnant employees under the PWFA and give guidance to practitioners on the development of policies that will comply with the law. The most important takeaways are that plaintiffs' counsel should be prepared to plead three separate and distinct causes of action under the PWFA: (1) unequal or unfavorable treatment, (2) failure to accommodate, and (3) unlawful penalization.[112] In turn, defense counsel should heed the Supreme Court's guidance regarding their burdens of proof and production on the affirmative defense of undue hardship. ■

Katy McClure is a partner with Smith Eibeler, LLC, with offices in Holmdel and Springfield, and represents employees exclusively. She is the former president of NELA-NJ and a member of the NJSBA Labor & Employment Section Executive Committee.

Endnotes

1. *Delanoy v. Twp. of Ocean*, 245 N.J. 384 (2021).
2. *Delanoy v. Twp. of Ocean*, 462 N.J. Super. 78 (App. Div. 2020).
3. *Delanoy*, *supra* n.1, at 393.
4. *Id.* at 400.
5. *Id.*
6. *See, e.g., Smith v. Millville Rescue Squad*, 225 N.J. 373, 390 (2016) (observing that the NJLAD is "remedial legislation intended to eradicate the cancer of discrimination in our society and should therefore be liberally construed in order to advance its beneficial purposes"). (Internal quotations and citations omitted.)
7. *Delanoy*, *supra* n.2, at 91-92; N.J.S.A. 10:5-12(a) and (s). The Supreme Court noted that the Appellate Division opinion in *Delanoy* focused its PWFA analysis on subsection (s). *Delanoy*, *supra* n.1, at 395.
8. N.J.S.A. 10:5-3.1; *Delanoy*, *supra* n.2, at 91.
9. N.J.S.A. 10:5-3.1(a); *Delanoy*, *supra* n.2, at 91.
10. N.J.S.A. 10:5-3.1(b) and (c); *Delanoy*, *supra* n.2, at 91.
11. N.J.S.A. 10:5-12(a); *Delanoy*, *supra* n.2, at 92; *Delanoy*, *supra* n.1, at 394.
12. N.J.S.A. 10:5-12(s); *Delanoy*, *supra* n.2, at 92-93; *Delanoy*, *supra* n.1, at 394.
13. N.J.S.A. 10:5-12(s); *Delanoy*, *supra* n.2, at 93.
14. *Delanoy*, *supra* n.2, at 93.
15. N.J.S.A. 10:5-12(s); *Delanoy*, *supra* n.2, at 92-93.
16. N.J.S.A. 10:5-12(s); *Delanoy*, *supra* n.2, at 92.
17. N.J.S.A. 10:5-12(s); *Delanoy*, *supra* n.2, at 93.
18. N.J.S.A. 10:5-12 (s); *Delanoy, supra* n.2, at 92-93.
19. N.J.S.A. 10:5-12(s); *Delanoy, supra* n.2, at 94.
20. *Delanoy, supra* n.2, at 94, 105.
21. *Id.* at 91-92.
22. *Id.* at 83.
23. *Id.*
24. *Delanoy*, *supra* n.1, at 397.
25. *Delanoy*, *supra* n.2, at 84.
26. *Delanoy*, *supra* n.1, at 397.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Delanoy*, *supra* n.2, at 84.
31. *Id.* at 86-87.
32. *Id.* at 85.
33. *Id.* at 85-86.
34. *Id.* at 85.
35. *Id.* at 86.
36. *Id.* at 85.
37. *Id.* at 85-86.
38. *Id.* at 87.

39. *Id.* at 87 n.4.
40. *Id.* at 87.
41. *Id.* at 87-88.
42. *Id.* Delanoy contended she worked the maternity assignment until Feb. 25, 2015, when the OPD forced her to go on maternity leave. The defendants claimed Delanoy worked the maternity assignment until March 2, 2015 and began maternity leave on March 3, 2015.
43. *Id.* at 88.
44. *Id.*
45. *Id.* at 89.
46. *Id.* at 88-89.
47. *Id.* at 83.
48. *Id.* at 82.
49. *Id.* at 82-83.
50. *Id.* at 83.
51. *Id.* at 89.
52. *Id.*
53. *Id.* at 89-90.
54. *Id.* at 95.
55. *Id.*
56. *Id.* at 96-97.
57. *Id.* at 97.
58. *Id.*
59. *Id.*
60. *Id.* at 83.
61. *Id.*
62. *Id.* at 97.
63. *Id.* at 97-98.
64. *Delanoy*, *supra* n.1, at 401.
65. *Id.* at 401-02.
66. *Id.* at 402.
67. Id. at 402-03.
68. *Delanoy*, *supra* n.2, at 98.
69. *Id.* at 98 (citing 42 U.S.C.A. § 12112(b)(5)(A); *Victor v. State*, 203 N.J. 383, 411 (2010)).
70. *Id.* at 98.
71. *Id.*at 99 (citing *Caraballo v. Jersey City Police Dept.*, 237 N.J. 255, 268 (2019); N.J.A.C. 13:13-2.5(b)(1)).
72. *Id.* at 99 (citing *Caraballo, supra* n.62 at 268).
73. *Id.* at 99 (quoting *Jones v. Aluminum Shapes, Inc.*, 339 N.J. Super. 412, 426 (App. Div. 2001)).
74. *Id.*at 100.
75. *Id.* at 100 (citing *Raspa v. Gloucester County Sheriff's Office*, 191 N.J. 323, 339-42 (2007).
76. *Id.* at 101 (quoting *Raspa*, *supra* n.75, at 340).
77. *Id.* at 101.
78. *Id.* at 101 (citing N.J.S.A. 10:5-12(s)).
79. *Id.* at 100-101 (quoting *Raspa*, *supra* n.66, at 340).
80. *Id.* at 101-02.
81. *Id.* at 102.
82. *Id.* (citing N.J.S.A. 10:5-3.1).
83. *Delanoy*, *supra* n.1, at 403.
84. *Id.* at 406.
85. *Id.*
86. *Id.* at 408.
87. *Delanoy*, *supra* n.2, at 105-06 (citing N.J.S.A. 10:5-12(s)).
88. *Id.* at 106 (quoting N.J.A.C. 13:13-2.5).
89. *Id.*
90. *Id.* at 106.
91. *Delanoy*, *supra* n.1, at 407.
92. *Id.* at 408; N.J.S.A. 10:5-12(q)(3)(b) and (c).
93. *Delanoy*, *supra* n.1, at 408.
94. *Id.* at 408-09.
95. *Id.* at 409.
96. *Id.*
97. Id. at 410.
98. *Delanoy*, *supra* n.2, at 104-05.
99. *Id.* at 105. Amici before the Appellate Division included the National Employment Lawyers Association of New Jersey; The Academy of New Jersey Management Attorneys, Inc.; The New Jersey Association for Justice; and The Office of the Attorney General. NELA, NJAJ, and the OAG repeated as amici before the New Jersey Supreme Court, along with the American Civil Liberties Union on behalf of multiple other groups.
100. *Id.* at 103.
101. *Id.*
102. *Id.*
103. *Delanoy*, *supra* n.1, at 411.
104. *Id.*
105. *Id.*
106. *Id.*

107. *See, e.g.*, *Castellano v. Linden Bd. of Educ.*, 79 N.J. 407, 409-12 (1979) (affirming judgment of the Appellate Division finding that a mandatory one-year maternity policy and refusal to allow pregnant teacher use of accumulated sick leave for absence due to childbirth discriminated against teachers because of their sex); *Rendine v. Pantzer*, 141 N.J. 292, 298-307 (1995) (affirming jury verdict in favor of former employees discharged when their employer discovered they were pregnant in violation of NJLAD and modifying counsel fee award); *Farley v. Ocean Twp. Bd. of Educ.*, 174 N.J. Super 449, 451-52 (App. Div. 1990) (finding that school board policy singling out disability due to pregnancy and childbirth constituted disparate treatment on account of sex and, thus, violated NJLAD); *Gilchrest v. Haddonfield Bd. of Educ.*, 155 N.J. Super. 358, 367-68 (App. Div. 1978) (finding that if pregnancy was the only temporary disability which led to a non-tenured teacher's contract nonrenewal it would constitute gender-based discrimination in violation of the NJLAD but reversing determination and order of the Director of the Division on Civil Rights in teacher's favor and dismissing complaint on basis there was insufficient evidence to support that conclusion and, therefore, no proof of discrimination).
108. N.J.S.A. 10:5-12(s).
109. *Delanoy*, *supra* n.1, at 394-95; *Delanoy*, *supra* n.2, at 90; *Young v. United Parcel Service, Inc.*, 707 F.3d 437, 446 (4th Cir. 2013).
110. *Delanoy*, *supra* n.2, at 90-91; *Young, supra* n.109, at 450-51.
111. *Delanoy*, *supra* n.2, at 91; *Young v. United Parcel Service, Inc.*, 575 U.S. 206, 219-20 (2015).
112. *Delanoy*, *supra* n.1, at 396.

The *Trump v. Hawaii* Doctrine? or, Discriminatory Animus is Over (If You Want It)

by Hop T. Wechsler

Previous analysis of the United States Supreme Court's 2018 decision in *Trump v. Hawaii*,[1] the so-called "Muslim ban" case, from an employment law context has focused on the bleak prospects the majority opinion offers the plaintiff's bar.[2] Justice Sonia Sotomayor's dissenting opinion noted that the majority chose to ignore "strong evidence that impermissible hostility and animus motivated" Presidential Proclamation No. 9645, which imposed entry restrictions on nationals from eight countries, six of which were Muslim-majority, when it upheld the proclamation's constitutionality based on purported national security justifications.[3] Justice Sotomayor further noted a disconnect between *Trump v. Hawaii*, where the Court found "charged statements about Muslims"[4] made on multiple occasions by President Donald Trump to be irrelevant, and the same term's *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*,[5] where the Court found that a baker who refused to sell a cake to a same-sex couple was, in effect, entitled to a religious exemption from discrimination laws because of certain Commission members' purportedly "clear and impermissible hostility" toward his beliefs.[6] In employment law terms, the Court treated two mixed motive discrimination cases inconsistently.[7] Direct evidence of discriminatory animus was acknowledged only to be rejected outright in the former case[8] but was dispositive to the outcome of the latter case, where the purported animus (against religion) was found to outweigh the legitimate motive of preventing further discrimination (against same-sex couples). But why? The tendency of certain justices to defer to the executive branch on matters of purported national security? The willingness on the part of the same justices (all of whom are Christian, none of whom are Muslim) to acknowledge discrimination when the purported victims were members of their own religion but not when they were members of a different religion?

When direct evidence of discriminatory animus is and is not relevant to the Court has become no clearer in the two terms since *Trump v. Hawaii* was decided. On the contrary, the Court's contrasting outcomes with respect to this issue in more recent cases lack any doctrinal clarity or consistency at all.

- In *Dep't of Commerce v. New York*,[9] the Court ruled that the Secretary of Commerce's stated rationale for adding a citizenship question to the 2020 census questionnaire—that the Department of Justice purportedly needed the information to enforce the Voting Rights Act—was contradicted by the facts and remanded the case for an explanation. Dissenting in part, Justice Clarence Thomas claimed that "pretext is virtually never an appropriate or relevant inquiry for a reviewing court to undertake" as a matter of administrative law.[10] Justice Thomas further claimed that "the evidence cited by the Court"—for example, that the Department of Commerce had in fact requested the information from other departments, including DOJ—"hardly shows pretext"[11] and that "at most…the Secretary had multiple reasons for wanting to include the citizenship question on the census."[12] However, among other evidence that was not cited by the Court was a 2015 study from a Republican strategist concluding that adding the citizenship question would discourage immigrants from being counted, exclude traditionally Democratic Hispanic voters, and dilute Hispanic political power—direct evidence of discriminatory animus.[13] Notwithstanding this evidence, the Court gave DOC the opportunity to construct a more convincing explanation on remand; no justice was willing to conclude that the 2020 census could not eventually include a citizenship question.
- Ruling that nonunanimous convictions were unconstitutional in *Ramos v. Louisiana*,[14] Justice Neil Gorsuch's majority opinion traced the origin of Louisiana's rule permitting nonunanimous verdicts to an 1898 convention endorsing white supremacy and that of Oregon's rule to the rise of the Ku Klux Klan in the 1930s. Both the majority opinion and concurring opinions by Justices Sotomayor and Brett Kavanaugh argued that the non-unanimity

rules' racist history mattered and that the Court lacked any "excuse for leaving an uncomfortable past unexamined."[15] Nonetheless, Justice Gorsuch noted that nonunanimous jury verdicts would be unconstitutional even were a hypothetical jurisdiction to permit them for "benign reasons."[16] In a dissenting opinion, Justice Samuel Alito claimed that "the origins of the…rules have no bearing on the broad constitutional questions that the Court decides" and that, because "there were…legitimate reasons why [someone] might think that allowing non-unanimous verdicts is good policy," the racist history of the rules was not relevant.[17]

- In *Dep't of Homeland Sec. v. Regents of the Univ. of California*,[18] the Court ruled that the Acting DHS Secretary violated the Administrative Procedure Act when she issued a memorandum rescinding the immigration relief program Deferred Action for Childhood Arrivals without a well-reasoned explanation and without factoring in reliance interests. Dissenting in part, Justice Sotomayor rejected the plurality's conclusion that pre- and post-election statements by Trump were too "unilluminating," "remote in time," and "unrelated" to establish a plausible equal protection claim as well.[19] Citing her dissent in *Trump v. Hawaii*, Justice Sotomayor argued that the statements at issue in this case—for example, referring to Mexican immigrants as "criminals, drug dealers, [and] rapists" and comparing undocumented immigrants to "animals"—"create the strong perception" that the secretary's decision to rescind DACA was "contaminated by impermissible discriminatory animus" and that the plurality's dismissal of additional animus-based claims was premature.[20]
- Finally, in *Espinoza v. Montana Dep't of Revenue*,[21] the Court reversed a ruling from the Montana Supreme Court, which had found both that a state program that granted tax credits to organizations that sponsored scholarships for private school tuition violated a provision of the Montana constitution barring aid to religious schools and that a rule promulgated by the Montana Department of Revenue that expressly prohibited the use of scholarship funds at religious schools would be ineffective at doing so. Although the majority opinion focused primarily on the rule, which the Court concluded violated the First Amendment's Free Exercise Clause, it also noted the history of state constitutional provisions known as "Blaine Amendments" which prohibited aid to "sectarian" schools.[22] The Court observed that "'sectarian' was code for 'Catholic'" and that such amendments were "born of bigotry" and "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general."[23] Justice Thomas went further in a concurring opinion, claiming not only that "[h]istorical evidence suggests that many advocates for [a] separationist view" of the First Amendment's Establishment Clause "were originally motivated by hostility toward certain disfavored religions" but that the Court's "adoption of a separatist interpretation has itself sometimes bordered on religious hostility," citing a 1968 dissenting opinion from the late Justice Hugo Black that characterized the Catholic petitioners in that case as "powerful sectarian religious propagandists."[24] In a separate concurring opinion, Justice Alito noted that, although Montana's application of its constitutional provision would violate the Free Exercise Clause regardless, the provision's origin is relevant under the Court's decision in *Ramos v. Louisiana*.[25] Noting that he had argued in *Ramos* that "original motivation, though deplorable, had no bearing on [a law's] constitutionality because…laws can be adopted for non-discriminatory reasons… [b]ut I lost, and *Ramos* is now precedent," Justice Alito concluded that "[i]f the original motivation for the laws mattered there, it certainly matters here."[26] In contrast, Justice Sotomayor's dissenting opinion noted that the laws at issue in *Ramos* were not "otherwise…untethered to [discriminatory] bias" and "free of discriminatory taint," but the Montana rule and constitutional provision at issue here were.[27] Justice Sotomayor further noted the "stubborn fact that the constitutional provision at issue here was adopted in 1972 at a convention where it was met with overwhelming support by religious leaders (Catholic and non-Catholic), even those who examined the history of prior no-aid provisions."[28]

Taken as a whole, the Court's approach when confronted with direct evidence of discriminatory animus appears to be not doctrinally conservative as much as equivocal. According to the logic of the Court's opinions, DACA cannot be rescinded without a well-reasoned explanation, but DHS can retroactively create an explanation on remand. Likewise, the DOC can

retroactively create a more plausible justification for the census questionnaire's citizenship question on remand. Nonunanimous convictions are unconstitutional, but the constitutionality of retroactive nonunanimous convictions remains to be decided.[29] We must be wary of bad laws that resulted from nativist fears and religious scapegoating of Catholics in the 1870s but need draw no parallels between those laws and the laws that result from contemporary nativist fears and religious scapegoating.[30]

Nonetheless, a "*Trump v. Hawaii* doctrine," according to which direct evidence of discriminatory animus matters in certain cases but not in others, is neither completely novel[31] nor is it irrelevant to employment lawyers. The Court is a nonmajoritarian if not countermajoritarian[32] institution whose legitimacy has increasingly been questioned by both academic and lay observers[33] and whose decisions are for the most part neither neutral nor objective but "political." However, as critical theorists have noted for decades, judges cannot possibly decide cases based on purely neutral or objective values, but inherently must make moral and ideological judgments, preferring certain values over others depending on the context; not only is this process normal, it cannot be otherwise.[34] For employment lawyers and others, the relevance of the Court's conflicted decisions involving discriminatory animus is the fact that they underscore the obvious: namely, that the results the Court reached in each case represent nothing more and nothing less than the results a majority of justices wanted. ■

Hop T. Wechsler is an associate at Selikoff & Cohen, P.A. in Mount Laurel, representing public sector workers and unions.

Endnotes

1. 585 U.S. ___, 138 S. Ct. 2392 (2018).
2. *See, e.g.*, Kim Shayo Buchanan, Phillip Atiba Goff, Racist Stereotype Threat in Civil Rights Law, 67 *UCLA L. Rev.* 316, 356-57 n202, 345 n128 (May 2020) (stating in relevant part that the Court "has defined discriminatory intent so narrowly that it is nearly impossible to prove" and that "the government actor who openly declares his or her bigotry has (until recently) been hard to find"; citing *Trump v. Hawaii* as an exception, but further noting that "the…majority has been equally reluctant to invalidate government action where the signs of bigotry were overt and contemporaneous"); Hop T. Wechsler, *Trump v. Hawaii*: When Overwhelming Direct Evidence of Discrimination and Pretext Cannot Survive Rational Basis Review, 40 *N.J. Lab. & Emp. L.Q.*, No. 1, 2019, at 22-25 (noting in relevant part that "evidence of discriminatory animus in an employment context is more often circumstantial than direct" and that *Trump v. Hawaii* further "reflects the increasingly daunting odds of success by discrimination plaintiffs in federal court").
3. *Trump v. Hawaii*, *supra* n.1, at 2447 (Sotomayor, J., dissenting).
4. *Id.*
5. 585 U.S. ___, 138 S. Ct. 1719 (2018).
6. *Id.* at 1729. *See also* Lisa Manshel, Masterpiece Cakeshop Indecision, 39 *N.J. Lab. & Emp. L.Q.*, No. 4, 2018, at 10-13.
7. *See* Lisa Manshel, Message from the Chair, 39 *N.J. Lab. & Emp. L.Q.*, No. 4, 2018, at 1-3 (observing that "[t]he Court's inconsistent treatment of motive proofs [in *Trump v. Hawaii* and *Masterpiece Cakeshop*] creates new room for legal maneuvering on the types of and relevance of proofs of discriminatory motive").
8. *See supra* n.1, at 2421 ("[B]ecause there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification").
9. 588 U.S. ___, 139 S. Ct. 2551 (2019).
10. *Id.* at 2579 (Thomas, J., dissenting in part).
11. *Id.* at 2581 (Thomas, J., dissenting in part).
12. *Id.* at 2582 (Thomas, J., dissenting in part).
13. *See, e.g.*, Michael Wines, Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question, *N.Y. Times* (May 30, 2019), *available at* nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html.
14. 590 U.S. ___, 140 S. Ct. 1390 (2020).
15. *Id.* at 1401 n.44. *Cf. id.* at 1410 (Sotomayor, J., concurring) ("Where a law otherwise is untethered to racial bias—and perhaps also where a legislature actually confronts a law's tawdry past in reenacting it—the new law may well be free of discriminatory taint. That cannot be said of the laws at issue here"); *id.* at 1417-18 (Kavanaugh, J., concurring) ("In light of the racist origins of the non-unanimous jury, it is

no surprise that non-unanimous juries can make a difference in practice, especially in cases involving black defendants, victims, or jurors. After all, that was the whole point of adopting the non-unanimous jury requirement in the first place. And the math has not changed…[T]he Jim Crow origins and racially discriminatory effects (and perception thereof) of non-unanimous juries in Louisiana and Oregon should matter and should count heavily in favor of overruling").

16. *Id.* at 1401 n.44.
17. *Id.* at 1426-27 (Alito, J., dissenting).
18. 591 U.S. ___, 140 S. Ct. 1891 (2020).
19. *Id.* at 1917 (Sotomayor, J., dissenting in part).
20. *Id.* (quoting *Trump v. Hawaii*, *supra* n.1, at 2440 (Sotomayor, J., dissenting)).
21. 591 U.S. ___, 140 S. Ct. 2246 (2020).
22. *Id.* at 2259.
23. *Id.* (quoting *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000)).
24. *Id.* at 2266 (Thomas, J., concurring) (quoting *Bd. of Educ. of Ctl. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 251 (1968) (Black, J., dissenting)).
25. *Id.* at 2267 (Alito, J., concurring) (citing *supra* n.14).
26. *Id.* at 2268. Justice Alito further noted that Blaine Amendments were "prompted by virulent prejudice against immigrants, particularly Catholic immigrants" and that "a prominent supporter… was the Ku Klux Klan." *See also id.* at 2271 (Alito, J., concurring) ("[O]ne cannot separate the Blaine Amendment from its context…[nor can one] separate the founding of the American common school and the strong nativist movement"). (Citation and quotations omitted.) *See also id.* at 2273 (Alito, J., concurring) ("Under *Ramos*, it emphatically does not matter whether Montana readopted the no-aid provision for benign reasons. The provision's 'uncomfortable past' must still be '[e]xamined'") (quoting *supra* n.14, at 1401 n.44).
27. *Id.* at 2293 n.2 (Sotomayor, J., dissenting) (quoting *Ramos*, *supra* n.14, at 1410 (Sotomayor, J., concurring)).
28. *Id.*
29. The Court decided this term that not only could *Ramos* not be applied retroactively but, in fact, no new rule of criminal procedure could be applied retroactively. *Edwards v. Vannoy*, 593 U.S. ___ (2021).
30. *Cf. Trump v. Hawaii*, *supra* n.1, at 2423 ("The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority…*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution'") (quoting *Korematsu v. United States*, 323 U.S. 214, 236-37 (1944) (Murphy, J., dissenting)).
31. *See, e.g.*, Michael J. Klarman, Foreword: The Degradation of American Democracy—and the Court, 134 *Harv. L. Rev.* 1 (Nov. 2020), *available at* harvardlawreview.org/wp-content/uploads/2020/11/134-Harv.-L.-Rev.-1.pdf, at 227 (noting that "[i]n some doctrinal areas, government motive is everything, but in others it is irrelevant, and no attempt to reconcile the inconsistencies is offered").
32. *See, e.g.*, Joshua P. Zoffer, David Singh Grewal, The Counter-Majoritarian Difficulty of a Minoritarian Judiciary, 11 *Cal. L. Rev.* 437 (2020), *available at* californialawreview.org/counter-majoritarian-minoritarian-judiciary/ (using Implied Popular Vote and Implied Population Representation metrics to determine that as many as 63 federal judges and five United States Supreme Court justices are minoritarian, as their appointments do not reflect even an indirect popular mandate).
33. *See, e.g.*, Tara Leigh Grove, The Supreme Court's Legitimacy Dilemma, 132 *Harv. L. Rev.* 2240 (2019), *available at* harvardlawreview.org/2019/06/the-supreme-courts-legitimacy-dilemma/; Zack Beauchamp, The Supreme Court's legitimacy crisis is here, *Vox* (Oct. 6, 2018), *available at* vox.com/policy-and-politics/2018/10/6/17915854/brett-kavanaugh-senate-confirmed-supreme-court-legitimacy.
34. *See, e.g.*, David Kairys, ed., The Politics of Law: A Progressive Critique, 3d ed. at 4 ("There is no legal methodology or process for reaching particular, correct results…[T]he law usually embraces and legitimizes many…conflicting values and interests involved in controversial issues and a wide array and conflicting array of 'logical' or 'reasoned' arguments and strategies of argumentation, without providing any legally required hierarchy of values or arguments or any required method for determining which is most important in a particular context. Judges…make choices, and those choices are most fundamentally value based, or political").