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ARE EXPANDED REMEDIES ON THE HORIZON IN UNFAIR LABOR PRACTICE CASES BEFORE THE NATIONAL LABOR RELATIONS BOARD?

BY KRISTEN A. BARNES

In July 2021, President Joe Biden appointed Jennifer Abruzzo as the new general counsel for the National Labor Relations Board (NLRB). Since her appointment to a four-year term, Abruzzo has issued a number of memoranda setting new policies for the agency. In particular, General Counsel Abruzzo has expressed a desire to expand upon the scope of remedies available to workers impacted by unlawful actions both in the litigation of unfair labor practice charges and through settlement agreements.

GENERAL COUNSEL MEMORANDUM GC 21-06: NEW REMEDIAL PRIORITIES IN UNFAIR LABOR PRACTICE LITIGATION

Citing the NLRB's broad statutory authority under the National Labor Relations Act (NLRA or "the Act") to devise appropriate remedies in unfair labor practice cases, the general counsel advised the NLRB regional offices to seek a full scope of remedies for workers impacted by unfair labor practices when litigating cases going forward. In addition to a traditional back pay and reinstatement order, potential remedial requests in cases involving unlawful worker terminations may include:

- **Consequential Damages:** Potential consequential damages requests could include compensation for economic losses suffered by impacted workers outside of back pay, such as for health care expenses incurred as a result of the unlawful conduct, credit card late fees and interest incurred, penalties for early retirement withdrawals, increased transportation and child care costs, and/or costs associated with the loss of a home or car resulting from the job loss. In a July 2021 case, *Vorhees Care & Rehabilitation Center,* the current NLRB chairman indicated a willingness to consider the issue of consequential damages and other ways to make workers completely whole. Thereafter, in *Thryv, Inc.*, a pending case involving the unlawful layoff of workers, the NLRB accepted briefs on the issue of whether the NLRB should expand its traditional make-whole remedies to account for consequential damages of workers harmed by unfair labor practices. Given the NLRB's recent request for briefs, a decision on the appropriateness of consequential damages in unfair labor practice cases is likely to be forthcoming in 2022.
- **Front Pay:** In addition to back pay awards, the regions will seek front pay in appropriate unlawful termination cases. The NLRB previously signaled that it would consider the issue of front pay in an appropriate case in lieu of reinstatement for unlawfully terminated workers.
- **Additional damages for undocumented workers:** In cases involving the unlawful termination of undocumented workers, the regions will seek compensation for workers for time worked under unlawful terms and employer sponsorship of work authorizations. These remedies are in addition to potential requests to require the employer to read notices to workers, publish notices in newspapers, and to train workers, managers and supervisors on workers' rights under the NLRA.

The general counsel also indicated a desire to expand upon potential remedies sought in cases involving unlawful conduct in organizing campaigns, and in response to bad faith bargaining on the part of employers.

Additional potential remedy requests for violations occurring during a union organizing drive may include requests granting the union access to workers, such as by requiring employers to provide the union with employee contact information, time to address employees during employer meetings regarding union representation, and access to bulletin boards. The region may also seek to require employers to pay unions for additional costs incurred to rerun elections set aside due to employer conduct, among other measures like enhanced notice postings and worker and supervisor trainings on workers' rights under the Act.

Apart from damages, the general counsel requested that the NLRB regions seek further distribution of notice postings alerting workers to both violations of the NLRA committed by their employers and workers' rights under the NLRA. In addition to physical postings and email distribution, the regions were directed to seek circulation of notices via text messaging and social media sites.

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As of September 2021, the NLRB is composed of a majority of members appointed by the Biden administration. Given the current composition of the board, potential exists for the full NLRB to consider and adopt changes in the areas targeted by General Counsel Abruzzo.

GENERAL COUNSEL MEMORANDUM GC 21-07: CHANGES IMPLICATING NLRB SETTLEMENTS

Beyond seeking additional remedies in unfair labor practice litigation, the NLRB general counsel directed the regions to seek all of the new remedies covered by General Counsel Memorandum GC 21-06 in NLRB settlement agreements, in addition to other measures not necessarily available through litigation, to make impacted workers fully whole.

Among the areas for expansion of remedies in settlements outlined in the memorandum, the general counsel directed the regions to seek 100% of the back pay and back benefits owed to impacted workers. Previously, the regions had discretion to slightly discount back pay and back benefits amounts owed in settlements of unfair labor practice charges.

In cases where an unlawfully terminated worker will not be reinstated, the regions were directed to seek not only front pay but also neutral references, agreements not to contest unemployment compensation, and employer paid-for use of work placement services. Where a settlement agreement covers reinstatement, the regions will further seek to require employers to provide the impacted workers with letters of apology.

Going forward, those representing workers in unfair labor practice should evaluate if workers have damages in any of these expanded areas and seek to both gather and preserve documentation of those damages. ■

ESG LEADS TO INCREASED EMPLOYEE AND BOARD DIVERSITY

BY VALERIE C. SAMUELS AND KAILA D. CLARK

Environmental, social and governance (ESG) issues have become important to publicly traded companies, and many non-public ones as well. Many socially responsible investors screen companies using ESG criteria, and the number of investment funds that incorporate ESG factors has grown rapidly since the beginning of this century. This trend has not only continued, but exploded during the pandemic, as people were glued to their devices to get real-time global updates. This should have a profound impact on diversity initiatives, the "S" in ESG, as employers realize diverse workforces increase their appeal to investors and employees alike. This is an important issue for employment lawyers, as we are often called upon to advise on diversity best practices and defend employers who failed to heed the call of diversity.

Here is an example of ESG in action: In December 2020, Engine No. 1, an activist and impact investing hedge fund, was founded. That same month, Engine No. 1 challenged Exxon Mobil, the world's largest publicly traded oil and gas company, to change its ways and bought a stake in ExxonMobil worth $40 million, which equated to about 0.02% of the oil company's shares. Engine No. 1 garnered international attention when, in less than six months, it successfully led a shareholder revolt in early 2021 to unseat three directors on ExxonMobil's board and replace them with nominees who would make climate change a central issue.

After its unprecedented win against ExxonMobil on climate change, Engine No. 1 is widening its work to include diversity issues. Motivated in part by the growing national conversation about race, Engine No. 1 will ask its portfolio companies to explain their obligations to workforce demographics. ESG-centric funds, like Engine No. 1, are responding to the social climate of the nation and broadening their efforts to include social issues such as Black Lives Matter, human rights, gender diversity and worker safety, and to governance issues that encompass board diversity, transparency and reporting, and other issues.

According to a study performed by Calvert Research and Management, a unit of Morgan Stanley Investment Management, over the last several decades, the key driver of the global economy shifted from natural resources to human talent, making diverse talent a social imperative. Just ask the people behind TikTok, a social app used to create and share videos. In the summer of 2020, as protests calling for racial justice and equality swept the country, TikTok experienced a blackout on the app calling for Black creators to be treated more fairly amid accusations of censorship and content suppression. TikTok, whose popularity was significantly helped by Black creatives, apologized, vowing to do better. TikTok vowed it wouldn't just say it wanted a more diverse platform; it would make it happen. Some steps taken included the creation of an independent advisory board and bringing in more diverse advisers. TikTok is not alone. Many companies are actively promoting diverse and inclusive cultures to attract and retain talent and drive innovation.

That diverse teams drive better results for companies is not limited to creativity. A recently published study by Calvert Research and Management reveals that using racial and ethnic board diversity factors can improve U.S. large-cap equity stock selection. The Calvert study analyzed over 800 large-cap companies in the United States, United Kingdom, Canada and Australia from 2012 to 2020. Calvert tested the relationship between the ethnic diversity of corporate boards and equity performance, and found that companies with greater board diversity may be better stock picks. For U.S. companies, the study found, racial and ethnic diversity on corporate boards of large-caps had a significant positive impact on stock price: the difference in returns between stocks of companies with the highest number of people of color on their boards and those with the least was 1.5%.

A 2015 study conducted by McKinsey & Company found that companies in the top quartile for racial and ethnic diversity were 35% more likely to have returns above their national industry medians than less-diverse peers. Although studies on the impact of gender are somewhat limited, research focusing on the relationship between gender diversity and company performance supports the same conclusion that board diversity improves company performance. According to a 2020 article in Forbes, women hold more jobs than men in the United States. Hopefully, we will see women increasing their numbers in senior management and board roles as well.

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Companies in the top quartile for gender or racial and ethnic diversity are more likely to have financial returns above their national industry medians (15% and 30%, respectively), whereas companies in the bottom quartile in these dimensions are statistically less likely to achieve above-average returns. Racial and ethnic diversity has a stronger impact on financial performance in the United States than gender diversity and, in the United States, there is a linear relationship between racial and ethnic diversity and better financial performance (for every 10% increase in racial and ethnic diversity on the senior executive team, earnings before interest and taxes rise 0.8%). Thus, the research proves that companies with more diverse workforces perform better financially. Not only should companies use workforce diversity as a strategy to help attract and retain talent, enhance intellectual capital and drive long-term value creation, but diversity improves financial performance.

Companies that commit themselves to diverse employees and leadership will be more successful. Achieving greater diversity may not be a simple task for businesses, but it should not take a social media blackout or a shareholder revolt for companies to recognize the value of diversity, equity and inclusion. As companies pay more attention

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THE MISPLACED EXPECTATION OF CLOSE TIMING IN RETALIATION CASES

BY ROBERT S. MANTELL[1]

"Vengeance and retribution require a long time; it is the rule."

Charles Dickens, *A Tale of Two Cities*, Book 2, Chapter 16

This article addresses how the passage of time affects the burden of proof for claims involving employment retaliation. Human experience confirms that adverse actions may take place years after the motive to retaliate develops.[2] Protected activity may never grow stale for those it offends.[3] Nevertheless, courts place a far greater emphasis on temporal proximity in retaliation cases than in other discrimination cases.

Courts seem to use temporal proximity evidence as a gatekeeper — either requiring that the adverse action take place soon after the employee's protected activity, or, if there is a delay, requiring an explanation for why the timing is consistent with a retaliatory motive.[4] Courts routinely assume that gaps in time as short as three or four months fail to support the inference of a retaliatory motive.[5] The First Circuit has held that a gap of one year is normally inconsistent with a finding of retaliation, unless there is additional, affirmative evidence of lingering retaliatory hostility.[6]

On the other hand, race discrimination may be proven by circumstantial evidence with no reference to timing. For example, if a Black employee with 10 years' seniority seeks to prove that her termination was based on race, she may prevail by showing that she was qualified for the position and was replaced by someone with similar qualifications, and that the employer's explanation for her termination was not the real reason. She need not provide additional evidence of timing, such as showing that the employer was somehow reminded of her race shortly before her termination. This is because we understand that race discrimination is not expressed as a reflexive reaction, but as a cognitive bias that waxes and wanes based on factual circumstances and changes in the decision-maker too.

The *de facto* focus on timing in retaliation cases seems to rest on the unsupported assumption that employers will forgive or forget whistleblowing in a few months — that retaliatory animus evaporates quickly. Conversely, the courts assume that people who retaliate cannot contain their impulse for revenge and are compelled to act quickly. While courts recognize exceptions to these non-scientific, unsupported notions of retaliatory bias, the exceptions are deemed to be so contrary to ordinary human experience that special evidence is required to explain a substantial delay. These unwarranted assumptions make it more challenging to prove retaliation than other types of discrimination.

For the reasons discussed herein, we should end our peculiar devotion to temporal proximity — a focus that has no parallel in discrimination cases. This unique emphasis causes courts to apply a more restrictive *prima facie* case to retaliation claims. Worse still, courts apply the fiction of evaporating bias at the summary judgment stage, where no inferences favoring the employer should be considered. This article concludes that retaliation can be proven with the same types of circumstantial evidence that support other types of discrimination cases, and without specific reference to timing. Delayed action should not be viewed, especially at summary judgment, as inconsistent with retaliation. Delayed action is what ordinary retaliation looks like. Retaliation is a dish that has been, and will continue to be, served sometimes hot and sometimes very, very cold.

I. ANTI-RETALIATION LAWS DO NOT REQUIRE FOCUS ON TEMPORAL PROXIMITY

It is illogical to impose a focus on temporal proximity in retaliation cases when such focus is not applied to discrimination cases. Discrimination and retaliation laws are parallel, with interconnected prohibitions, and neither set of laws contains any statutory "timing" requirement.

Federal and state statutes prohibit discrimination based on protected status, such as race, gender, age, religion and handicap.[7] The same laws prohibit retaliation for voicing *complaints* about discrimination based on protected status.[8] Those engaging in protected conduct are as protected as those targeted for their race or gender.[9] Employees who pursue retaliation claims use the same procedures, are subject to the same standards, and have access to the same remedies as those who pursue discrimination claims.[10] Even the purposes of anti-discrimination and anti-retaliation laws are bound together, as the prohibition against retaliation is essential to the ultimate goal of ending discrimination.[11]

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However, retaliation is not just *like* discrimination — it *is* discrimination. Civil rights statutes do not use the word "retaliation," and instead use variations of the word "discriminate" to define retaliatory misconduct.[12] For example, the Title VII anti-retaliation provision makes it unlawful "for an employer to **discriminate** against any of his employees . . . because he has opposed [an unlawful practice]."[13] Likewise, Massachusetts law uses the term "discriminate" to describe retaliation for opposing protected activity.[14] The word "retaliation" is used as shorthand by courts and litigants (and the author of this article), since the statutes do not use the word.[15]

Supreme Court cases confirm that retaliation is not just *related to* discrimination, but *is* discrimination.[16] The court interprets statutory provisions prohibiting race and gender discrimination as including prohibitions against retaliation, because, for example, retaliation against an employee for complaining about sex discrimination means the complainant is being victimized on the basis of sex.[17] "Retaliation is discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination."[18] Thus, discrimination and retaliation are a co-mingled and overlapping set of ideas.

Nothing in the parallel anti-retaliation or anti-discrimination laws refers to a temporal proximity requirement. There is no reason courts should direct their focus on timing for one more than the other.

II. THE RULES OF EVIDENCE DO NOT PERMIT A MANDATORY FOCUS ON TEMPORAL PROXIMITY

The rules of evidence do not support the exaggerated focus on timing that we see in retaliation cases. Properly understood, timing issues are equally relevant to discrimination cases as they are to retaliation. A discrimina-

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tion case can hinge upon the date of notice to an employer of an employee's race or gender. Yet, and despite the relevance of timing to both kinds of claims, courts are much more concerned about timing in retaliation cases.[19]

The burden on plaintiffs in both retaliation and discrimination cases is to show that the adverse action would not have occurred but for the unlawful bias.[20] The rules of evidence governing proof of causation for both types of claims are the same.

One way to prove causation in retaliation — but not the only way[21] — is to show a close temporal proximity between the protected activity and the adverse action.[22] It is important to remember that a short gap is a *type* of circumstantial evidence of causation — not an *element* of a retaliation claim.[23] As stated above, many courts have found that retaliation occurred after a long delay. *Supra* fn.2.

Under the analysis that has developed, where adverse employment actions follow closely on the heels of protected activity, a causal relationship may be inferred. *Mole v. Univ. of Mass.,* 442 Mass. 582, 595 (2004). As the time between the two events increases, courts seem to believe that the inference weakens and ultimately evaporates. *Id*. at 595.[24] When there is a substantial delay, courts do not simply ignore the lack of affirmative evidence of causation; rather, they tend to require an explanation of how the delay is consistent with retaliation.[25]

A review of case law[26] shows that courts almost always focus on timing issues in retaliation cases — either to determine if there was a short gap, or to scrutinize the record for an explanation of the delay.[27] The tendency to overvalue this type of evidence is statutorily unnecessary, creates the risk of distorting the proper understanding of the elements of such claims, and has the effect of delegitimizing otherwise probative evidence.

An overemphasis on timing allows employers to game the system. For example, one business-side article suggests that employers simply delay intended terminations to hide the actual timing of their decision-making.

> [I]f you have an employee who engaged in protected activity close in time to a possible termination, you . . . may decide to move forward with the termination anyway, but you will at least understand that the timing of the termination makes it more risky for the company and you will have the opportunity to minimize risk to the company. **Or, you may decide to move the termination to a later date.**

"Top Five Termination Mistakes," June 8, 2018, www.magmutual.com/learning/article/top-five-termination-mistakes/ (emphasis added). It is also possible that an employer could hasten its efforts to fire an employee to avoid the appearance of retaliation.[28]

The courts' single-minded focus should be rejected, just like other occasions where judges have erroneously imposed requirements for certain types of evidence in discrimination cases. For example, when some courts began to suggest that comparator evidence would be required in all discrimination cases, that notion was quickly rejected.[29] Likewise, the Supreme Court has stated that evidence of pretext may take many forms, and a plaintiff is not restricted to proving pretext in a particular way. *Patterson v. McLean Credit Union,* 491 U.S. 164, 186 (1989) (District Court erred by instructing the jury that the plaintiff needed not show that her replacement was less qualified). This type of correction is long overdue with respect to timing evidence, because other types of evidence are just as probative of a retaliatory motive, if not more so.[30]

Courts acknowledge that, like discrimination, retaliation may be established using different types of circumstantial evidence.[31] No single type of evidence is required. "Temporal proximity is but one method of proving retaliation."[32] There is no reason to overemphasize temporal proximity, an optional and unnecessary type of evidence, in retaliation cases.

III. THE UNMERITED FOCUS ON TEMPORAL PROXIMITY HAS DISTORTED THE BURDEN OF PROOF IN RETALIATION CASES

As will be shown below, courts routinely impose a *prima facie* standard for retaliation claims, and focus on temporal proximity in a manner different from, and stricter than, their treatment of discrimination claims. This article will briefly discuss the types of evidence that support discrimination cases, in contrast to the evidence courts require in retaliation cases.

A. CIRCUMSTANTIAL EVIDENCE SUPPORTING DISCRIMINATION CASES

Discrimination may be proved by direct or circumstantial evidence.[33] The *McDonnell Douglas* framework, a common method for evaluating the sufficiency of circumstantial evidence in discrimination cases,[34] requires that the plaintiff produce evidence of a *prima facie* case and pretext.[35]

The *prima facie* burden is often expressed as a four-pronged test involving a flexible set of proofs that may be tailored to the facts of the case.[36] The first three steps can be satisfied if the plaintiff produces evidence showing that: (1) that the plaintiff was in a protected class; (2) the plaintiff was qualified for the job; and (3) the plaintiff was rejected. *Id.* The fourth element, which is generally designated as evidence giving "rise to an inference of unlawful discrimination," is, as a practical matter, usually described with easy-to-meet criteria — e.g., the position remained open and the employer sought applicants with qualifications similar to those of the plaintiff, or the plaintiff was replaced.[37] (Some jurisdictions accept an even lighter burden of proof at the *prima facie* stage).[38]

The *prima facie* case raises an inference of discrimination by eliminating the most common non-discriminatory reasons for the employer rejecting the plaintiff: (1) the plaintiff lacking the required qualifications, and (2) job elimination.[39] This initial burden is not onerous, and must not be equated with the ultimate burden of proof for demonstrating discrimination.[40]

After establishing a *prima facie* case, the employer provides evidence of its asserted legitimate business reason for the adverse action, after which the plaintiff may establish an inference of unlawful discrimination by showing that the employer's asserted reason was pretextual.[41] For example, it would be pretextual for an employer to fire an employee for matters it knew were not within the employee's authority or control.[42] Pretext evidence is sufficient to raise an inference of discrimination, even though it does not specifically address the presence of discriminatory bias.[43] Nor is there a requirement for discrimination plaintiffs to prove they were subjected to an adverse action shortly after the employer learned of their protected status, such as race or gender. A discriminator is not assumed to act on a hair trigger. Plaintiffs can prove their cases indirectly, based on proof that they were qualified and replaced, and the employer's justification for the adverse action was not the actual reason. This is so even if they have been with the employer for a period of years.

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B. CIRCUMSTANTIAL EVIDENCE SUPPORTING RETALIATION CASES

The *McDonnell Douglas* burden-shifting approach can also be used to establish retaliation.[44] Under a modified *McDonnell Douglas* approach for retaliation cases, plaintiffs can establish a *prima facie* case by showing that: (1) they engaged in protected activity; (2) they were thereafter subjected to an adverse action; and (3) a causal connection exists between their protected activity and the adverse action.[45] Retaliation decisions describe the *prima facie* burden as "not onerous" or "*de minimis*."[46]

However, the different descriptions of the *prima facie* case imply a harsher burden for retaliation claims. For discrimination, the *prima facie* case is not meant to track the plaintiff's ultimate burden, and is satisfied with proof of qualification and replacement. Replacement and qualification evidence is deemed supportive of a discrimination case because it tends to eliminate from consideration common justifications for termination: job elimination and incompetence.[47] Even beyond replacement evidence, courts construing discrimination claims have recognized a wide range of non-onerous, circumstantial evidence that satisfies the fourth element.[48]

In contrast, the *prima facie* burden for retaliation claims is frequently described in terms that directly track the ultimate burden: establishing a causal connection between protected activity and an adverse action. *Che*, 342 F.3d at 38; *Mesnick,* 950 F.2d at 827; *Mole,* 442 Mass. at 591-92.[49]

For the most part, courts do not focus on replacement or qualification evidence when describing a retaliation *prima facie* case. If replacement and qualification evidence is helpful and relevant in discrimination cases as tending to eliminate common, non-discriminatory reasons for adverse actions, why are they not equally helpful in retaliation cases? In contrast to the wide range of evidence that satisfies the fourth element in discrimination cases, retaliation cases tend to focus solely on temporal proximity at the *prima facie* stage.[50]

Assuming a retaliation plaintiff satisfies the *prima facie* burden, the plaintiff can prevail by demonstrating that the employer's explanation for its adverse action is pretextual — same as in the discrimination context.[51] Neither discrimination nor retaliation cases require direct evidence, nor do they necessarily require additional evidence after establishing pretext.[52] However, temporal proximity is again often considered at this stage,[53] even though, if anything, pretext evidence is more probative in retaliation cases than discrimination cases.[54]

While courts seem united in their adoption of a *McDonnell Douglas* approach to both discrimination and retaliation claims, their application of the method is asymmetrical and reflects an improper, ubiquitous focus on temporal proximity in retaliation cases. Plaintiffs' attorneys are encouraged to fight this by supporting their retaliation *prima facie* cases with qualification evidence, replacement evidence and other types of evidence, just as they do in discrimination claims, and emphasizing that the *prima facie* case is a flexible set of proofs that do not depend upon temporal proximity.

IV. DELAYED RETALIATION IS AS CONSISTENT WITH HUMAN NATURE AS RAPID RETALIATION

Many of the decisions cited above consider retaliation cases at the summary judgment stage, where all reasonable inferences should favor the non-moving party, and none should favor the moving party. Although close timing can play an important role in some cases,[55] the absence of close timing should not result in an inference favoring the employer in Rule 56 proceedings.

A review of the cases, and the courts' frequent focus on timing in retaliation cases, creates the concern that courts are drawing inferences in favor of employers when an adverse action does not closely follow protected activity.[56] For this reason, we must discuss the nature of retaliation and demonstrate why delayed retaliation is as consistent with human nature as swift retaliation. As will be shown, the psychological basis for delayed retaliation can run much deeper than the desire to not get caught.

A retaliatory mindset is just like other types of cognitive bias, which manifest in specific situations and which may take time to develop.[57] For example, the "glass ceiling" reflects a type of discrimination that occurs over time. An employer may be enthusiastic about hiring women in subordinate positions, but may decline to promote them into more prestigious or traditionally male-dominated positions after they have developed seniority and expertise.[58] Thus, we easily understand that glass ceiling discrimination takes place long after the employee's gender is revealed. Likewise, an employer may continue to retain a whistleblower in a lower-level position, but be unwilling to promote him/her into a management position years later. There is no reason why delay should be a neutral, understood aspect to a gender discrimination case, but a reason for skepticism in a retaliation case.

Just like a racial or sexual stereotype, retaliatory bias allows a tired mind to take shortcuts that disfavor the protected employee in specific circumstances.[59] It means that someone who has complained will not be given the benefit of the doubt when another controversy arises, or be subject to increased scrutiny.[60] It means that over time, subtle disadvantages may add up, and finally lead to a tangible, adverse action.[61] A final adverse action may be preceded by any number of decisions and judgments by various actors that are compounded, and within any one of those stages, a retaliatory mindset can affect the ultimate outcome.[62]

Retaliatory feelings may be subjectively experienced by the wrongdoer as a benign desire to protect the employer or to return harmony to the workplace.[63] The stain of retaliatory bias — feelings of resentment, embarrassment, or fear for one's reputation or career based on being the subject of a complaint — undoubtedly affects the wrongdoer's mental process, the effects of which accumulate over time.[64]

A retaliatory act is not necessarily an impulsive one. Biases can exist for extended periods of time, even among well-meaning individuals. For example, assume a lawyer, who becomes a judge, is assigned a case in which the plaintiff was previously a client from two years before. Obviously, the judge should recuse, because the judge would undoubtedly have *some* bias with respect to the former client.[65] We demand recusal in this situation based on accepted notions of human nature. It should not come as a surprise, then, that after an employee reports sexual harassment, an employer's retaliatory sentiment could persist for an extended period of time.

We must no longer accept the misguided notion that those who retaliate are so out of control that they cannot delay their effort to rid the workplace of a whistleblower. Frequently, the retaliator is not even the person about whom the complaint was made. Just as a judge should not preside over proceedings involving a former client, so too should we recognize that employers have the potential for lingering biases. Extraordinary evidence of temporal proximity should not be required

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to prove employer bias similar to that which we presume applies to all judges.

Many cases demonstrate that retaliation may take place years after protected activity.[66] In one case, the Massachusetts Commission Against Discrimination held that the evidence showed "a decades-long struggle between Complainant and [Respondent] over allegations of gender discrimination," and rejected the employer's contention that it had long forgotten those disputes.[67] Let's not acknowledge that institutional memory exists, but then refuse to apply the concept to discrimination.

Even in criminal law, which requires proof beyond a reasonable doubt, prosecutors prove cases based on motives that originated years earlier. Prosecutors are not limited to motive evidence relating only recent events; to do so would require the release of many murderers and other wrongdoers. For example, in *Commonwealth v. Henderson,* 486 Mass. 296 (2020), the jury convicted the defendant of first-degree murder. The motive, according to the prosecutor, was the defendant's anger toward the victim for having "snitched" to law enforcement two years before the murder. *Id.* at 297. The court held that the motive evidence was admissible, even in the absence of a limiting instruction. *Id*. at 306-307. In criminal law, it is perfectly reasonable to infer, beyond a reasonable doubt, that a defendant may be motivated to take retaliatory action based on conduct occurring years before.[68] Likewise, it should be accepted that employers may wait years to retaliate, particularly in civil cases where the burden of proof is more lenient.

Social science recognizes that long-term workplace animosities can lead to delayed retaliation. Conflict in the workplace "can generate a range of powerful negative emotions that can in turn fester into an on-going legacy of animosity, dislike, anger and even hatred."[69] Where an employee believes a coworker or subordinate committed a "transgression" or "betrayal," the resulting anger can "persist and fester," and, in time, turn into a "grudge." *Id.* at 41-42.

Grudges "provide the fodder for revenge motivation." *Id.* at 43. The more an individual thinks about a transgression, the more the individual may perceive a benefit to no longer working with the employee, leading to "long-term" problems. *Id*. at 42. In other words, the passage of time can increase retaliatory bias, not reduce or eliminate it.[70] *Id*.

By obsessively thinking about the event, dwelling on the injury, and re-experiencing the intense emotions evoked, revenge motivation fuels thoughts and plans for retaliation. At the extreme, there can be a sense of towering indignation or self-righteous rage motivating a desire for vengeance and harm to the offender. *Id*. at 42.

Grudges gain long life not only through obsessive ruminations, but by providing a psychological benefit to the one holding the grudge. *Id*. at 42. Those with a grudge may retain a sense of control and potency that develops, in part, from the perception of upholding certain principles or standards. *Id*. at 42. Retaliation, although negative in nature, creates the perceived benefit of intimidating others who might consider committing a similar transgression. Grudges can run particularly deeply when individuals feel they are part of a group under attack. *Id*. at 42-43 ("strong in-group identification was negatively associated with forgiveness"). Finally, delayed retaliation can be experienced by the retaliator as "sweeter" than immediate retaliatory action. The psychological benefits of grudges cannot be ignored when examining how the passage of time affects retaliation claims.

There is a cottage industry trying to ascertain the best methods for dissipating workplace grudges, which would be unnecessary if retaliatory animus simply evaporated after a few months. *Id*. at 43-51. Psychology confirms that which the cases demonstrate: that retaliatory impulses often do not soften, but rather manifest into action after delay.

Management can perceive protected activity, such as reporting workplace discrimination or harassment, as disloyal.[71] Because protected reports of harassment and discrimination are precisely the types of "transgressions" that can trigger lingering grudges and delayed reprisals, it is unreasonable to assume that retaliation must be swift.

The expectation of prompt retaliation may, in part, be rooted in the outdated notion of a traditional workplace, where an emotional manager, driven by impulse, can simply terminate an employee. The contemporary workplace is a creature of Equal Employment Opportunity trainings, personnel procedures, progressive discipline, documented evaluations, oversight, group decision-making, and human resources oversight.[72] Thus, we no longer work in environments where rapid reprisals are always the case, or even the norm.

When evaluating a summary judgment motion, a significant gap in time between the protected activity and adverse action should not be viewed as making retaliation less likely. Delayed action is exactly what unlawful retaliation looks like — it is consistent with retaliatory bias. At worst, delay should be seen as a neutral factor without a negative inference.[73] On the other hand, delay should be seen as affirmative evidence of retaliation where it dovetails with a narrative supporting the claim.[74] At the summary judgment stage, courts should avoid the impulse to consider delay a weakness in the plaintiff's case.[75]

V. A PATH FORWARD: THE *VERDRAGER* CASE

A pair of Massachusetts decisions highlight the continuing problems with timing evidence, and point to their solution. As stated above, the *prima facie* case is generally considered as a four-part burden of production, for example, to show that the plaintiff was (1) protected by law; (2) qualified for the position; (3) terminated; and (4) replaced.

In the first decision, the Massachusetts Supreme Judicial Court (SJC) modified the *prima facie* discrimination cases to require only the first three elements, eliminating the fourth prong, which has generally been described as evidence giving "rise to an inference of unlawful discrimination." *Bulwer v. Mount Auburn Hosp.,* 473 Mass. 672, 681 (2016). This development may be based on the presumption that after an acceptably performing plaintiff is terminated, the employer will act to replace the plaintiff with a similarly qualified individual.[76] Furthermore, employers who claim an employee was terminated due to job elimination may assert that justification at the second stage of the burden-shifting framework. Thus, not much is lost by the change.

The second decision, *Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.,* 474 Mass. 382 (2016), provides an excellent comparison of differences in treatment of *prima facie* cases of discrimination and retaliation. Verdrager was an associate attorney in a Boston law firm, who reported, in the summer of 2004, that her supervisor was sexually harassing her. *Id*. at 386. In October 2004, the supervisor asked a client to submit her criticisms of Verdrager in writing, and provided a negative evaluation of Verdrager's performance. *Id*. at 387. In September 2005, a managing attorney blamed Verdrager's pregnan-

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cy on her honeymoon and discussed reducing her schedule. *Id*. at 389. During Verdrager's pregnancy, employees questioned her commitment to her job, *Id*. at 400, and criticized her for being unavailable, while a male associate was unavailable without consequence. *Id*. at 398-99. When Verdrager took medical leave, her manager interviewed her neighbors to determine whether her at-home conduct was consistent with the medical conditions she reported. *Id*. at 389. In February 2007, after a lackluster evaluation, Verdrager was told that her salary was being reduced and her seniority "stepped back" two years. *Id*. at 391.

Verdrager filed suit, alleging that the step back was both gender discrimination and retaliation. The trial judge granted summary judgment on both claims. The retaliation case was dismissed with a primary focus on timing — because there was allegedly no evidence that the job action was "designed to retaliate against [Verdrager] for her complaints over a year earlier with regard to [the supervisor]." *Id*. at 394-95.

On appeal, with respect to the discrimination claim, the SJC described the *prima facie* burden in accordance with the three-step approach, requiring the plaintiff to show that she was (1) in a protected class; (2) performing acceptably; and (3) subject to an adverse action. *Id*. at 396-97, representing the standard set of proofs, which required the defendant to respond by articulating its reasons for the adverse actions. *Id*.

With respect to the retaliation claim for the "step back," the SJC described the *prima facie* burden as: (1) the plaintiff was in the protected class; (2) she suffered an adverse action; and (3) there is a causal connection between the protected conduct and adverse action, *Id*. at 406-407, mirroring the ultimate burden of proof in retaliation cases.

Despite these side-by-side recitations of *prima facie* requirements, there is no explanation for why one count focused on specific, readily available evidence, like acceptable performance, and the other substituted the plaintiff's ultimate burden of proof as an essential element of her *prima facie* case.

The way to resolve this unfortunate asymmetry is by applying to retaliation claims the *prima facie* burden used for discrimination claims: protected class; qualification; and adverse action. Jurisdictions that use the four-step *prima facie* burden for discrimination cases should apply the same approach to retaliation claims: protected class; qualification; adverse action; and replacement. The burden of proving pretext should also apply to both discrimination and retaliation claims, equally. The same types of evidence should suffice to satisfy the burdens of these parallel claims — retaliation is discrimination.

CONCLUSION

Retaliation often takes place over a substantial period of time. Retaliatory bias is like any other type of cognitive bias, which may manifest only in certain conditions, and may fester, or even increase, over time. The gatekeeper role that some courts have applied to temporal evidence in retaliation cases, but not in discrimination cases, should be eliminated. When evaluating the sufficiency of evidence of retaliation, the mere passage of time tells us nothing — delayed retaliation is typical retaliation. We should adopt *prima facie* discrimination standards to retaliation claims, allowing plaintiffs the ability to prove retaliation based on qualification, replacement and pretext evidence. If we do so, proximate timing will not be seen as a presumptive requirement in retaliation cases, and there will be no need to justify its absence. Retaliation cases have been placed at a disadvantage as compared to other discrimination cases. The misguided notion that retaliation occurs immediately and that unlawful bias simply evaporates must be eradicated. ■

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1. The author wishes to express his appreciation to Caryn Groedel, Esq., for her help in the preparation of this article.
2. *E.g., Tryon v. MBTA*, 98 Mass. App. 673 (2020) (employee fired in retaliation for a report of overtime fraud occurring more than nine years earlier); *Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.*, 474 Mass. 382, 407 (2016) (gap of two and a half years does not preclude finding of retaliation); *Muñoz v. Sociedad Española de Auxilio Mutuo y Beneficiencia de P.R.,* 671 F.3d 49, 56-57 (1st Cir. 2012) (retaliation occurred five years after protected activity); *Veprinsky v. Fluor Daniel, Inc.,* 87 F.3d 881, 891 n.6 (7th Cir. 1996) (jury could find that employer "waited in the weeds" for 10 years before retaliating); *George v. Youngstown State Univ.,* 966 F.3d 446, 459-61 (6th Cir. 2020) (retaliation possible after a nine-year interval); *Gee v. Principi*, 289 F.3d 342, 347 n.3 (5th Cir. 2002) (two-year gap between protected activity and retaliation acceptable for retaliation claim); *Monteiro v. Cambridge, Memorandum of Decision and Order on the Defendant's Motion for Judgment Notwithstanding the Verdict,* C.A. No. 01-2737, *Middlesex, ss., MacLeod-Mancuso, J.*, April 24, 2009, at 7-8, *aff'd on other grounds,* 2011 Mass. App. Unpub. Lexis 965 (retaliation found despite five-year gap between filing MCAD charge and termination); *Coates v. Dalton*, 927 F. Supp. 169, 170-71 (E.D. Pa. 1996) (finding of retaliation proper despite four-year gap).
3. *Edwards v. Commonwealth*, 2021 Mass. Lexis 581, at 28-29 (employee could reasonably be found to have been terminated for conduct occurring six years in the past, as evidenced by the decision-maker's admissions, even though the decision-maker learned of the protected activity years after the protected act occurred).
4. *E.g., Dias v. Verizon New Eng. Inc.,* 566 Fed. App'x 1, 5 (1st Cir. 2014).
5. *See Calero-Cerezo v. U.S. Dept. of Justice,* 355 F.3d 6, 25 (1st Cir. 2004) ("Three and four month periods have been held insufficient to establish a causal connection based on temporal proximity"); *Holloway v. Thompson Island Outward Bound Educ. Ctr., Inc.,* 492 F. Supp. 2d 20, 25-26 (D. Mass. 2007); *Higdon v. Jackson*, 393 F.3d 1211, 1221 (11th Cir. 2004) ("By itself, the three month period . . . does not allow a reasonable inference of a causal relation between the protected expression and the adverse action").
6. *Hernández v. Wilkinson*, 986 F.3d 98, 103 (1st Cir. 2021); *O'Rourke v. Tiffany & Co.,* 988 F.3d 23, 25-26 (1st Cir. 2021).
7. G.L. c. 151B, § 4(1), 4(16); 42 U.S.C. § 2000e-2(a)(1) (Title VII); 29 U.S.C. § 623(a)(1) (Age Discrimination in Employment Act); 42 U.S.C. § 12112 (Americans with Disabilities Act).
8. G.L. c. 151B, § 4(4); 42 U.S.C. § 2000e-3(a) (Title VII); 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 12203(a), (b) (ADA).
9. Title VII contains a special provision that allows plaintiffs to prevail even when race, sex or another protected class was not a determinative factor in the adverse employment action. 42 U.S.C. § 2000e-2(m). This "motivating factor" standard is not applicable to Title VII retaliation cases arising under § 2000e-3(a). *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. 338, 352 (2013). However, this article does not address the "motivating factor" analysis, and instead compares the Title VII retaliation provision to 42 U.S.C. § 2000e-2(a)(1), which remains a valid, alternative method of proving discrimination using the "but-for" standard. *Bostock v. Clayton County, ___ U.S. ___*, 140 S. Ct. 1731, 1740 (2020). Thus, the statutory differences between discrimination under Title VII do not support the differences in how courts analyze retaliation claims.
10. G.L. c. 151B, §§ 4(1), 4(4), 5, 9; 42 U.S.C. § 2000e-2(a)(1), 3(a); 29 U.S.C. § 623(a)-(d).
11. *See Jackson v. Birmingham Board of Education*, 544 U.S. 167, 180 (2005) (the failure to prohibit retaliation would result in more prevalent discrimination); *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006) (retaliation provision protects employee's "unfettered access" to remedial mechanisms to oppose discrimination).
12. 42 U.S.C. § 12203(a) (ADA); 29 U.S.C. § 623(d) (ADEA); G.L. c. 151B, § 4(4).
13. 42 U.S.C. 2000e-3(a) (emphasis added).
14. G.L. c. 151B § 4(4).
15. *Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.*, 474 Mass. 383, 405 n.33 (2016).
16. *Nassar*, 570 U.S. at 348, 353; *Burlington Northern,* 548 U.S. at 63; *see also DeCaire v. Mukasey,* 530 F.3d 1, 19 (1st Cir. 2008).
17. *Gomez-Perez v. Potter*, 553 U.S. 474, 481 (2008) (ADEA prohibition against "discrimination based on age" in the federal employment sector encompasses a prohibition against retaliation for opposing age discrimination); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008) (42 U.S.C. § 1981 prohibition against race discrimination embraces a claim for retaliation for reporting race discrimination); *Sullivan v. Little Hunting Park,* 396 U.S. 229, 237 (1969) (42 U.S.C. § 1982, which prohibits race discrimination in land convey-

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ance, embraces a claim for retaliation for opposing race discrimination).

18. *Jackson*, 544 U.S. at 173-174, 178-79 (Title IX).
19. Temporal proximity is often the first or primary circumstance considered in retaliation cases, while it very rarely is a central focus in discrimination cases.
20. *Bostock*, 140 S. Ct. at 1739 (discrimination); *Nassar*, 570 U.S. at 352 (retaliation).
21. Many types of circumstantial evidence can demonstrate retaliation. *Mesnick v. Gen. Elec. Co.*, 950 F.2d 815, 828 (1st Cir. 1991). Temporal proximity is but one. *Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.*, 474 Mass. 382, 407 (2016); *Che v. MBTA*, 342 F.3d 31, 38 (1st Cir. 2003); *Garayalde-Rijos v. Municipality of Carolina*, 747 F.3d 15, 25 (1st Cir. 2014).
22. *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 168 (1st Cir. 1998) ("close temporal proximity between two events may give rise to an inference of causal connection."); *Ritchie v. Dept. of State Police,* 60 Mass. App. 655, 666 (2004) ("Close temporal proximity between the protected activity and the adverse employment action permits an inference of the causal nexus necessary for a finding of retaliation").
23. *Kachmar v. SunGard Data Sys., Inc.,* 109 F.3d 173, 178 (3rd Cir. 1997). A short gap does not require a finding of retaliation where the evidence reflects that lawful reasons motivated the adverse action. *MacCormack v. Boston Edison Co.,* 423 Mass. 652, 662 n.11 (1996).
24. Some courts have observed that an adverse action initiated prior to an employer becoming aware of protected activity cannot be considered retaliatory, even if the adverse action is completed *after* the employer becomes aware of the activity. *See Mole*, 442 Mass. at 594-95 (hostility between coworkers predated the plaintiff's filing of an MCAD charge); *Clark County Sch. Dist. v. Breeden,* 532 U.S. 268, 272 (2001).
25. *Dias*, 566 Fed. App'x at 5.
26. *E.g., Price v. Thompson,* 380 F.3d 209, 213 (4th Cir. 2004); *Summa v. Hofstra Univ.,* 708 F.3d 115, 128 (2d Cir. 2013); *Porter v. Cal. Dept. of Corr.,* 383 F.3d 1018, 1030 (9th Cir. 2004); *Ford v. GMC,* 305 F.3d 545, 554-55 (6th Cir. 2002); *Bakhtiar v. Infineon Techs. Ams. Corp.,* 2019 Mass. Super. Lexis 73, at 17-19; *Tryon v. MBTA,* 98 Mass. App. Ct. 673 (2020).
27. Explanations for delay include the fact that the employer seized upon its first opportunity to retaliate, *Price*, 380 F.3d at 213; the plaintiff engaged in a series of protected activities that continued over time, *Amirault v. City of Malden*, 335 F. Supp. 3d 111, 122 (D. Mass. 2018); ongoing retaliatory harassment or animosity forms a bridge between the protected activity and the final adverse employment action, *Mogilevsky v. Wellbridge Club Mgt.,* 905 F. Supp. 2d 405, 413 (D. Mass. 2012); or an employer's tactical decision to delay the adverse action until another factor is resolved or a replacement employee is hired. *Velazquez-Garcia v. Horizon Lines of P.R., Inc.,* 473 F.3d 11, 19-20 (1st Cir. 2007).
28. *Wagner v. Baystate Health, Inc.,* 2015 Mass. App. Unpub. Lexis 1005, at 7.
29. For some time, case law suggested plaintiffs must produce comparator evidence in all discrimination cases. However, courts ultimately rejected this exaggerated reliance on a specific type of circumstantial evidence. *Reeves v. Sanderson Plumbing Prods.,* 530 U.S. 133, 146 (2000) (Court of Appeals erred in assuming that preferential treatment of younger people is required to prove age discrimination); *Franchina v. City of Providence,* 881 F.3d 32, 52-53 (1st Cir. 2018); *George v. Leavitt*, 407 F.3d 405, 412 (D.C. Cir. 2005); *Avci v. Brennan*, 285 F. Supp. 3d 437, 441-42 (D. Mass. 2018).
30. "Even when the time between the protected activity and the adverse action is lengthy, other evidence of retaliatory motive may establish the causal link." Equal Employment Opportunity Commission Enforcement Guidance on Retaliation and Related Issues, section II(C)(3), www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues.
31. *Baines v. Walgreen Co.,* 863 F.3d 656, 661-62 (7th Cir. 2017).
32. *Che,* 342 F.3d at 38.
33. *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 99-100 (2003).
34. The *McDonnell Douglas* test is not the only way for plaintiffs to prove discrimination. *Chadwick v. WellPoint, Inc.,* 561 F.3d 38, 45 (1st Cir. 2009).
35. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973); *Reeves*, 530 U.S. at 146-47; *Lipchitz v. Raytheon Co.,* 434 Mass. 493, 501 (2001).
36. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253 n.6 (1981).
37. *Id*. at 253 n.6; *McDonnell*, 411 U.S. at 802.
38. As discussed below, Massachusetts courts have transitioned to a three-step formulation that eliminates the fourth element of the *prima facie* burden. *Verdrager v. Mintz, Levin,* 474 Mass. 382, 396-97 (2016); *Bulwer v. Mount Auburn Hospital,* 473 Mass. 672, 681-82 (2016).
39. *Burdine*, 450 U.S. at 254.
40. *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577 (1978); *Burdine,* 450 U.S. at 254 & n.7; *Sullivan v. Liberty Mutual Ins. Co.*, 444 Mass. 34, 45 (2005).
41. *Thomas v. Eastman Kodak Co.,* 183 F.3d 38, 57-58 (1st Cir. 1999), *cert. denied,* 528 U.S. 1161 (2000); *Lipchitz*, 434 Mass. at 500-501.
42. *Reeves*, 530 U.S. at 144-46, 149.
43. *Reeves*, 530 U.S., at 144-147; *Thomas*, 183 F.3d at 57-58 (rejecting the District Court's requirement that, in order to survive summary judgment, a plaintiff must allege "at least one piece of evidence that explicitly referred to the plaintiff's membership in a protected class"); *Verdrager*, 474 Mass. at 397 (evidence of pretext proves discrimination, "even if that evidence does not show directly that the true reasons were, in fact, discriminatory"); *Abramian v. President & Fellows of Harvard College,* 432 Mass. 107, 118 (2000).
44. *Che v. MBTA,* 342 F.3d 31, 38 (1st Cir. 2003); *Verdrager*, 474 Mass. at 406.
45. *Che*, 342 F.3d at 38 (1st Cir. 2003); *Verdrager*, 474 Mass. at 406.
46. *Che*, 342 F.3d at 38; *DeCaire,* 530 F.3d 1, 19 (1st Cir. 2008); *Treglia v. Manlius,* 313 F.3d 713, 719 (2nd Cir. 2002).
47. *See Burdine*, 450 U.S. at 253-54.
48. *Yee,* 481 Mass. at 294 (disparate treatment of similarly situated comparators); *Marin-Piazza v. Aponte-Roque,* 873 F.2d 432, 434 (1st Cir. 1989) (decision-makers were outside protected class); *Knight v. Avon Prods.*, 438 Mass. 413, 426 n.9 (2003) (others in protected class were terminated at the same time); *Martins v. Univ. of Mass. Med. Sch.,* 75 Mass. App. Ct. 623, 629 (2009) (discriminatory statements).
49. Some cases de-emphasize the requirement by explaining that, for purposes of the *prima facie* case, a plaintiff need not show that retaliation was a "but for" cause of termination. *Meschino v. Frazier Indus. Co.,* 2016 U.S. Dist. Lexis 100363 (D. Mass. 2016), at 20 ("under Massachusetts law, Meschino need only show some causal connection between the protected activity and his termination. A 'but for' showing is not required"). For purposes of the *prima facie* case, the plaintiff need only show that the protected conduct played a substantial or motivating part in the adverse decision. *Fournier v. Mass.*, 2021 U.S. App. Lexis 27676 (1st Cir.), at 7-8.
50. *See, e.g., Treglia,* 313 F.3d at 720 (with respect to final stage of the retaliation *prima facie* case, "[w]e have held that a close temporal relationship between a plaintiff's participation in protected activity and an employer's adverse actions can be sufficient to establish causation"). The case of *Carnakie-Brown v. Santander Bank, N.A.*, 2021 Mass. App. Unpub. Lexis 272, at 8, is a rare example of a decision that considers qualification during a retaliation *prima facie* case. However, even this rare decision is not a true exception, as the evidence of qualification is paired with evidence of close timing. *Id.* ("the bank fired her six weeks after she filed her complaint, at a time when a reasonable jury could find that she had turned the Holbrook branch around and was performing her job satisfactorily").
51. *Che*, 342 F.3d at 39; *Kelley v. Corr. Med. Services,* 707 F.3d 108, 115-16 (1st Cir. 2013); *Verdrager*, 474 Mass. at 406. The evidence used to satisfy the *prima facie* case may be reused to demonstrate pretext. *See, e.g., Che*, 342 F.3d at 39; *Verdrager*, 474 Mass. at 408 (pattern of retaliatory conduct beginning soon after internal complaint, which established *prima facie* case, also established pretext).
52. *DeCaire*, 530 F.3d at 20.
53. *Mercado-Berrios v. Cancel-Alegria,* 611 F.3d 18, 24 (1st Cir. 2010) (timing evidence considered at pretext stage); *Joyce v. Upper Crust, LLC*, 2015 U.S. Dist. Lexis 95542 (D. Mass), at 18-19 (same).
54. Pretext is even more probative in retaliation than discrimination cases, given that the employer often becomes aware of the plaintiff's protected complaints much more recently than they learn of the plaintiff's race or sex. Why, then, would pretext evidence be less valuable to retaliation cases than discrimination? The same pretext evidence can provide an inference of unlawful motive, in various types of cases. *Roy v. Correct Care Solutions, LLC,* 2019 U.S. App. Lexis 2795 (1st Cir.), at 39 (same evidence of pretext may support either a sexual harassment retaliation claim or an alternative, unrelated whistleblowing claim). Therefore, pretext along with a *prima facie* case should be sufficient to prove retaliation, even in the absence of close timing.
55. *Pardo v. General Hosp. Corp.,* 446 Mass. 1, 20 (2006) (a "nearness-in-time" jury instruction might be mandatory, if properly requested).
56. *Hernández*, 986 F.3d at 103; *O'Rourke,* 988 F.3d at 25-26.
57. "Indeed, it is unlikely today that an actor would explicitly discriminate under all conditions; it is much more likely that, where discrimination occurs, it does so in the context of more nuanced decisions that can be explained based upon reasons other than illicit bias, which, though perhaps implicit, is no less intentional. While a company may generally seek to hire women, it may also unfairly deny women positions once they become pregnant. While a school may affirmatively recruit minority students, the race of a student may simultaneously lead to harsher scrutiny when the individual has a disciplinary record. And while a lender may generally grant loans to African-American applicants, it may also view African-American borrowers as less creditworthy and more challenging risks than similarly situated white borrowers under some conditions." *Woods v. City of Greensboro*, 855 F.3d 639, 651-52 (4th Cir. 2017), *cert. denied*

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sub nom. City of Greensboro, N.C. v. BNT Ad Agency, LLC, ____ *U.S.* ____, 138 S. Ct. 558 (2017).

58. *See* Joan C. Williams & Nancy Segal, "Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job," 26 Harv. Women's L.J. 77, 93 (2003).
59. Studies show that discrimination occurs when decisions are difficult and valid criteria are factors in the decision-making. Melissa Hart, "Subjective Decision Making and Unconscious Discrimination," 56 Ala. L. Rev. 741, 748, 760-61 (2005).
60. *Bulwer v. Mount Auburn Hosp.*, 473 Mass. 672, 685 (2016) (white and Asian interns were given the chance to remediate and correct issues, while Black intern was not).
61. *See* Jessica Nordell, "How a Tiny Bit of Gender Bias Adds Up to Hurt Women's Careers," www.nytimes.com/interactive/2021/10/14/opinion/gender-bias.html.
62. Also, wrongdoers can intentionally wait for the right opportunity to maximize harm or conceal their role in the wrongdoing. "Delay in vengeance delivers a heavier blow." John Ford.
63. A retaliatory motive stems from the desire to rid the workplace of employees who engage in protected activity. *Sauer v. Belfor USA Grp., Inc.*, 205 F. Supp. 3d 209, 215 (D. Mass. 2016).
64. *Nassar*, 570 U.S. at 344-45 (retaliation based in part on the "public humiliation" caused by a discrimination complaint and the desire to "publicly exonerate" the alleged perpetrator).
65. Committee on Codes of Conduct Advisory Opinion 24: Financial Settlement and Disqualification on Resignation From Law Firm, Guide to Judicial Policy, Vol. 2B, Ch. 2 (Judges should not sit on cases where a member of their former law firm is acting as counsel for at least two years, and longer depending on the circumstances); www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf.
66. *Supra* fn. 2.
67. *MCAD & Dalrymple v. Winthrop,* 2014 Mass. Comm. Discrim. Lexis 2, at 49.
68. *See also Mendenhall v. State,* 963 N.E.2d 553 (2012) (son assaulted lawyer for suing his father 26 years before).
69. "Clardy, Injury, Grudges, and Restoration: Forgiveness and Relationship Repair at the Workplace," 1 Intl. Jour. of Research in Business and Management, Vol. 2, at 39 (Nov. 2019), available at http://ijrbmnet.com/uploades/volumes/1595587123.pdf.
70. *See Cachopa v. Stoughton*, 72 Mass. App. 657, 662 (2008) (retaliator tried and failed to retaliate over the years, which led to the retaliator's "increasing frustration, followed by escalation").
71. *See DeCaire*, 530 F.3d at 21.
72. *See* Sandra F. Sperino, "A Modern Theory of Direct Corporate Liability for Title VII," 61 Ala. L. Rev. 773, 787-88 (2010); *McGuire v. City of Springfield,* 280 F.3d 794, 796 (7th Cir. 2002) (delay reflects molasses in the administrative process). Consider that unionized workplaces and financial companies have layers of rules and procedures that can prevent immediate retaliation.
73. A useful analogy is the "same actor" inference. Some courts hold that where the plaintiff has been both hired and fired by the same decision-maker, an inference against discrimination should be recognized. While such inference may be plausible, it is inappropriate to draw an inference in the employer's favor during the summary judgment process, as it impermissibly assumes that either the workplace dynamics, or the decision-maker's cognitive state, is static, or that the decision-maker did not harbor bias in the first place. *Verdrager*, 474 Mass. at 404 n.32. Likewise, even if a long delay might support a reasonable inference against retaliation, it is improper to draw such inference at the Rule 56 stage, where it should merely be considered, at most, a neutral circumstance.
74. *Supra* fn. 27.
75. As a comparison, sometimes there are race discrimination cases without evidence of hostile racial remarks. At summary judgment, courts do not regard the absence of such remarks as tending to show that discrimination is less likely. Rather, in the absence of such evidence, the courts simply look to other types of evidence, such as qualification, replacement and pretext, to see if there is sufficient proof of discrimination. Likewise, if there is no timing evidence in a retaliation case, that should be a neutral factor, and the court should direct its attention to whether there are other sources of evidence that support an inference of retaliation. The absence of timing evidence at the summary judgment stage should not be taken as an affirmative indication that retaliation is less likely.
76. *Williams v. Brigham & Women's Hosp.*, 2002 Mass. Super. LEXIS 52, at 13; *Gunther v. Gap, Inc.*, 1 F. Supp. 2d 73, 78 (D. Mass. 1998) (assuming plaintiff was replaced as manager where there was no evidence his store was closed); *Dow v. Donovan,* 150 F. Supp. 2d 249, 262 (D. Mass. 2001) (court assumes, in the absence of countervailing evidence, that employer continued to seek partner-level attorneys).

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to diversity, it is important to remember that diversity is not the same thing as inclusion. Diversity is inviting people to the table, but inclusion necessarily involves empowering those diverse voices. Having a diverse corporate board is an important metric and it surely makes for great marketing, as does a diverse workforce, but savvy investors know the difference between window dressing and actual change.

As companies do this important work, it is equally critical that they take full advantage of the opportunity that diverse leadership teams represent, and realize that the work includes attracting, developing, mentoring, sponsoring and retaining diverse talent at all levels of the organization. As trusted advisers to our clients, management-side employment lawyers are an essential driver of change. So, too, are employee-side attorneys, who work to ensure that companies create and maintain diversity at work. ■

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OSHA'S EMERGENCY TEMPORARY STANDARD REQUIRING COVID-19 VACCINATION OR WEEKLY TESTING FOR LARGE EMPLOYERS SHUT DOWN, BUT FIRST A BUMPY ROLLERCOASTER RIDE

BY ANDREA E. ZOIA AND MICHELLE M. DE OLIVEIRA

In the context of an again-surging COVID-19 virus, on Nov. 4, 2021, the Department of Labor's Occupational Safety and Health Administration (OSHA) released an Emergency Temporary Standard (ETS) requiring employers with 100 or more employees to implement mandatory COVID-19 vaccination or weekly testing requirements. This followed on the heels of the Biden Administration's announcement of its COVID-19 Action Plan, titled "Path Out of the Pandemic," directing the Department of Labor to issue the emergency standard.

OSHA may issue an emergency standard, bypassing the typical period of public notice and comment, only in circumstances where it can establish that employees are "exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards" and the emergency standard is "necessary to protect employees from such danger." Before the COVID-19 pandemic, OSHA had issued emergency standards only nine times. Six were challenged in court, and only one was fully upheld. Despite the 473-page explanation in support of OSHA's authority to issue an ETS requiring weekly testing or mandatory COVID-19 vaccination for large employers, OSHA was ultimately unable to meet the necessary threshold.

Anyone "adversely affected" by an OSHA-issued emergency standard may challenge it within 60 days of its issuance, and several challenges were filed immediately after its release. On Nov. 6, 2021 — just two days after the ETS's issuance — the U.S. Court of Appeals for the Fifth Circuit issued an emergency stay, pending briefing and judicial review. Just a week later, the Fifth Circuit affirmed its stay, holding that the ETS's promulgation exceeded OSHA's statutory authority.

In response to the Fifth Circuit's stay, on Nov. 16, OSHA announced that it was suspending all implementation and enforcement of ETS-related efforts.

Subsequently, a lottery sent the ETS's destiny to the Sixth Circuit so that the challenges could be heard on a consolidated basis. The Sixth Circuit lifted the stay on Dec. 17, 2021. The Sixth Circuit, relying on sections of the OSH Act and other OSHA regulations that expressly discuss diseases, felt that OSHA had the authority to implement an ETS to slow the spread of COVID-19. The Sixth Circuit did not find the ETS to be a novel expansion of the agency's authority, but rather "an existing application of authority to a novel and dangerous worldwide pandemic." For many, the decision seemed well reasoned and sound. To others, absurd.

Regardless of whether the Fifth or Sixth Circuit's decisions resonated, the flurry of litigation and inconsistent analysis left employers without a clear indication of whether the rule — which imposed an affirmative obligation on employers to comply with notice, record-keeping and procedural requirements in hand with the shot-or-test rule — would ultimately be enforced, and what efforts, if any, should be undertaken in the meantime. Nonetheless, the court's decision to lift the stay meant that employers needed to revisit their efforts to ensure compliance with the ETS. Such efforts, however, were not long-lived.

On Jan. 13, 2022, in a 6-3 decision, the Supreme Court of the United States stayed the ETS's implementation, halting enforcement pending further review and a ruling from the U.S. Court of Appeals for the Sixth Circuit and, perhaps, a further appeal to the Supreme Court. The court held that the parties opposing the ETS "are likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate." The court explained that, although Congress has given OSHA the authority to regulate occupational dangers, "it has not given the agency the power to regulate public health more broadly," and "[r]equiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category."

The decision noted that vaccination is not something that can be "undone at the end of the workday," highlighting that:

> [a]lthough COVID-19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most. COVID-19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. Permitting OSHA to regulate the hazards of daily life — simply because most Americans have jobs and face those same risks while on the clock — would significantly expand OSHA's regulatory authority without clear congressional authorization.

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MICHELLE M. DE OLIVEIRA is a partner at Kenney & Sams PC in Boston. She focuses her practice on litigation and counseling aspects of employment-related matters, including without limitation, employment issues relating to COVID-19, wage and hour, restrictive covenants, leaves of absence, retaliation, discrimination and sexual harassment. She also counsels clients on disciplinary actions, internal investigations, and the drafting of employment policies and contracts. De Oliveira conducts trainings relating to discrimination, sexual harassment, and management practices. In addition to her employment practice, De Oliveira maintains a general litigation practice, representing clients in general commercial litigation matters. She is currently serving as the chair of the Massachusetts Bar Association's Labor & Employment Section Council. De Oliveira is a graduate of Northeastern University and Northeastern University School of Law, and is a member of the Northeastern University School of Law's Alumni/Ae Association's Board of Directors.

OSHA

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Employers then, once again, were able to take a deep breath and potentially shelve the preparations they had made to comply with the rule.

Although the ETS's stay was to remain in effect pending the Sixth Circuit's review of the merits, on Jan. 26, 2022, less than three months after the rule was issued, OSHA formally withdrew its ETS. The withdrawal did not come as a surprise in light of the Supreme Court's articulated reasoning in its decision.

While this decision and OSHA's withdrawal of the rule finally gave large employers some of the clarity they were looking for, it appears that more OSHA-issued standards are on the horizon; this may not be the last we hear of an OSHA-mandated vaccine or testing standard. Indeed, in announcing the ETS's withdrawal, OSHA stated that it was "not withdrawing the ETS as a proposed rule," and that OSHA "is prioritizing its resources to focus on finalizing a permanent COVID-19 Healthcare Standard." Thus, it appears that OSHA is not taking a workplace or testing standard off the table.

Any future attempts at a vaccine or testing standard are likely to differ in scope and mechanics from the embattled ETS mandate. Such a standard must be narrowly tailored and targeted if OSHA wants to avoid repeating the litigation challenges that it endured with the ETS.

Rather than issuing a new temporary standard, it is more likely that OSHA will address testing and vaccine requirements via the promulgation of a permanent standard, which will require notice, comment and an opportunity for a public hearing. Additionally, we foresee that OSHA's forthcoming standard (or standards) will be tailored to risks present in different types of workplaces and specific risks that different employees may face. In an attempt to land an enforceable rule, OSHA will need to navigate around the issues the Supreme Court relied on in finding that the agency had exceeded its authority by attempting to apply broad public health measures in the workplace. The issues were, in part, as follows:

- Although there were certain exceptions regarding employees of large employers who did not fall under the mandatory COVID-19 vaccination or weekly testing, the exceptions were "largely illusory" when applied, and the "regulation otherwise operate[d] as a blunt instrument."
- The ETS did not draw any distinctions "based on industry or risk of exposure to COVID-19."
- OSHA has "never before adopted a broad public health regulation of this kind[.]"
- "[T]argeted regulations are plainly permissible[ ]" in circumstances in which COVID-19 "poses a special danger because of the particular features of an employee's job or workplace[.]"

Undoubtedly, these issues are a window into factors that OSHA will be expected to consider when promulgating workplace standards that employers are expected to follow in an attempt to control the risks that COVID-19 presents in the workplace.

Employers should not forget, however, that despite the rollercoaster ride that the ETS has faced since its inception (dragging employers and employees along with it), OSHA's general duty clause imposes a requirement that employers maintain a workplace that is *"free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."* That clause remains intact — and employers should ensure it is considered when making policy decisions regarding what, if any, COVID-19 safety precautions they will implement.

Employers are accustomed to turning to established structures and processes to deal with challenges. Since March 2020, however, workplace challenges have surged to a new level — a level that most of us have not seen in our lifetimes. Employers and employees have been forced to overcome extreme uncertainties accompanying the COVID-19 pandemic and the upheaval in newly imposed legal obligations. This has led to unprecedented agility and flexibility being integrated into employers' structures and processes. However, the rollercoaster journey of the ETS has made one thing crystal clear: when it comes to COVID-19, nothing appears to be set in stone. ■

EVERYBODY INTO THE POOL!

BY KATHRYN N. BARRY

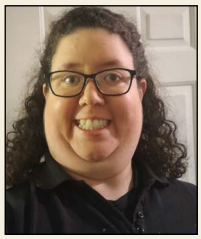
When considering estate plans, certain roles are discussed as critical, such as attorney-in-fact, personal representative, and health care proxy agent, perhaps beneficiaries and trustee. The choice of those nominated to fill these roles is well documented, and their powers are clearly defined in the correct documents. There are other roles that are only needed if an estate plan is not in place or fails, such as a guardian or conservator, with the person chosen by the court and the duties defined by statute. In a bill currently pending in the Massachusetts House, a new role would be created, that of supporter.

When contemplating decisions surrounding end-of-life issues, death, finances, and caretakers for children, it can be useful to have conversations with those who will be affected by these decisions. Many attorneys will encourage clients to have tough conversations with friends and family when considering who will serve in various roles or after the documents are executed. House Bill 272 goes a step further by formalizing some of the conversations into agreements called supportive decision-making agreements. In these agreements, a supporter and the decision-maker enter into an agreement to engage in supportive decision-making. Supportive decision making is defined as "the process of supporting and accommodating the decision-maker, without impeding the self-determination of the decision-maker, in making life decisions, including, but not limited to, decisions related to where the decision-maker wants to live; the services, supports, financial decisions, and medical care the decision-maker wants to receive; whom the decision-maker wants to live with; or where the decision-maker wants to work."[1] The bill's language focuses on the supporter assisting the decision-maker in collecting information, assisting the decision-maker in understanding the information presented, and assisting the decision-maker in clearly expressing their wishes. The bill requires: 1) the agreements to be in writing and to describe the decisions the decision-maker wants assistance with, 2) the supporter agreeing to serve, 3) that the agreement can be revoked or amended at any time, and 4) a provision stating that the supporter may report suspected abuse or neglect; there is no requirement for specific language. The agreements are meant to be personalized by the decision-maker and can be as broad or narrow as the decision-maker dictates.

Although supportive decision-making agreements can be about many different issues, in theory, one clear use is as an alternative to guardianship. The bill states that supportive decision-making agreements shall be offered as an alternative to adult guardianship. The bill requires a supportive decision-making agreement to be presented by schools to a family as an alternative if they are considering placing a student under guardianship. It also requires that the Department of Health and Human Services develop a training program to educate about supportive decision-making agreements as a way to avoid the need for guardianship. This immediately raises the question of oversight. There is nothing in the bill requiring the supporter to answer to an outside party. Although a third party can petition the Probate and Family Court to revoke a supportive decision-making agreement if they can prove abuse or neglect, there is no annual review of the supporters' actions by the Probate and Family Court — thus resulting in fewer protections than guardianship.

In addition, depending on the language of the supportive decision-making agreement, a supporter could be considered a quasi-heath care agent or quasi-attorney-in-fact. They will be able to execute similar or the same powers as those granted in health care proxies and powers of attorney, while the decision-maker can still make decisions themselves. For example, the bill specially mentions the supporter keeping information protected under HIPAA confidential. As these agreements are binding unless revoked by the decision-maker, estate planners will have to consider how to handle them. Can they become part of an estate plan, or will estate plans have to override them? Will a provision revoking supportive decision-making agreements become part of the boilerplate for health care proxies and durable powers of attorney, or, since each agreement is personalized, will this be decided on a case-by-case basis? At a minimum, estate planning attorneys may need to add a question about supportive decision-making agreements to the client intake form.

If House Bill 272 is passed, it would not be the first. Nine states have adopted supportive decision-making agreements, with Rhode Island joining the list in 2019. There is still time for input. The bill is currently under review by the Joint Committee on Children, Families and Persons with Disabilities, meaning the language is still subject to change and the final vote has yet to be scheduled. ■



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1. House Bill 272.

PUBLIC LAW

ON DEMOCRACY: MY TOUR OF MOLDOVA

BY JAMES F. WELLOCK

The Soviet-era prison's thick concrete structure provided some much-needed relief from the nearly 100-degree July heat. It was, by design, an intimidating place: a dark and damp maze of heavy, locked doors. But, at least it was cool. My team, a local English teacher that I had hired as a translator and the Polish diplomat assigned to be my partner on this mission, sat with me. We were told the room we were in was traditionally used for interrogations but was now a multi-function room that (you could smell) had been cleaned with bleach to protect us from COVID-19. The doors were locked for our safety as the inmates were escorted to the room in small groups. I fidgeted with my mask while I sat there and thought: what a strange year 2021 had already turned out to be.

Moldova, a country sandwiched between Romania and Ukraine, was holding an election. I was one of 38 American election experts sent there to join my international colleagues to take part in an international election observation mission orchestrated by the OSCE, the Organization for Security and Cooperation in Europe. This treaty organization is composed of 57 member countries from Europe, Central Asia and North America. It is the world's largest regional security organization with a mission of promoting peace, democracy and stability throughout the region. The Office for Democratic Institutions and Human Rights is the division of the OSCE that monitors elections. It has observed 150 elections in the last decade, deploying thousands of expert observers drawn from the entire OSCE region. The OSCE sends observers to monitor events leading up to, during and after each election. The observers put together a comprehensive and detailed report of what occurred, stating candidly what went well and recommending improvements. The criteria for being certified as an election expert varies from country to country. The United States typically selects candidates with significant poll working, campaigning, and election law experience. Candidates must complete a training and certification program from their home country and a second training and certification program by the OSCE. Observers then need to quickly become experts in the election laws and procedures of the country being observed. For the Moldovan election in July of 2021, 228 observers were deployed across the country, with an overseeing core team of 11 based in Moldova's capital city of Chisinau.

Moldova has a parliamentary system. This election was a "snap" or early election, meaning it did not result from the end of a particular term of office. Instead, it was the result of a series of controversial moves by both the newly elected president and by Parliament, which ended up before the Constitutional Court. The president of Moldova ordered the dissolution of Parliament after it declined to give a vote of confidence to the president's two nominees for prime minister. Parliament prevented dissolution by citing the COVID-19 pandemic to declare a state of emergency. They then voted to rescind the appointment of a Constitutional Court judge and appoint her replacement. Ultimately, the Constitutional Court annulled the state of emergency, upheld the president's dissolution of Parliament, and annulled Parliament's vote to switch out one of its justices, finding it unconstitutional.

My team was part of a regional cohort assigned to an area that includes the second-largest city in the country, Balti. We took a three-hour, very bumpy bus ride northwest of the capital through beautiful sunflower fields to get there. Once in Balti, we attended a regional briefing on the area's political activities, our points of focus for the observation, emergency procedures, and our specific areas of assignment. This regional cohort included members hailing from 10 countries. It was at this meeting I learned my team would be going to jail — but we'll get to that.

On July 11, 2021, my day started with three scrambled eggs, some local farm cheese, some sort of meat product (I politely declined) and some cherry pastries the translator had baked for us. Breakfast was quick and followed by a mad dash to get to our first polling place before it opened. It was still dark out, but we wanted to see with our own eyes the empty ballot box, the fixing of the seals, the opening of the blank ballots from the safe and that all the other opening procedures were followed. We expected to be on our feet for 24 hours standing, watching, assessing and reporting. Typically, we are expected to spend a significant amount of time at each of about a dozen polling places. We report immediately any extraordinary activity. This could include violence, the ballot box being stolen, the polls suddenly closing early, etc. Less urgent activities such as voter intimidation, group voting, ballot box stuffing and other issues are reported by completing short e-forms that are sent electronically to the core team throughout the day. The hand-counting of ballots begins shortly after the polls close at 9 p.m. The seals are checked and removed, and the boxes of ballots are upended and dumped onto a large table. One at a time, the selection indicated on each ballot is called aloud by the president of the local election committee while the ballot is held up and displayed for all in the room to see. The ballots are arranged and then counted and recounted. The count of ballots is expected to match the count of voters tallied on the voter list. This raucous happening did not end until 2 a.m. Next, the ballots and protocol forms are transported to the Central Electoral Commission (in our escort) as the officials from each polling place lined up with their ballots and sheets to be double-checked and processed. The sun was rising again, just as we got back to our hotel.

And in the middle of it all, we went to jail. We were not under arrest. The jail visit was only a small part of our assignment — one of 10 polling places my team would visit on election day. About 120 individuals eligible to vote were at the jail while awaiting trial. My team's assignment included escorting the mobile voting box from the public polling location to inside the jail, watching the casting of ballots, and escorting the box back to the public polling location where the ballots would be comingled with cast ballots from the local precinct.

The OSCE observation mission model and its reports have become the international standard for this work. From my experience contributing to the data gathering, assessing, reporting and analyzing, I recognize the im-

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TAXATION LAW

CLIENT ADVISORY: ERISA PRUDENCE AND *HUGHES V. NORTHWESTERN UNIVERSITY*

BY EVELYN A. HARALAMPU

The U.S. Supreme Court recently heard arguments in *Hughes v. Northwestern University*, in which the Seventh Circuit Court of Appeals had rejected claims that the fiduciaries of two Northwestern University retirement plans had breached their fiduciary duty under the Employee Retirement Income Security Act of 1974 (ERISA). The complaint alleged that the fiduciaries had wasted plan assets by offering many options at retail, rather than at the cheaper institutional cost, overpaying multiple record-keepers, and offering plan participants a confusing number of investment options. At issue was whether a claim of fiduciary breach under ERISA could be brought against defined contribution plans in which participants chose the investments of their own accounts. The courts below held there was no breach, by law, and the claims were dismissed.

The Supreme Court unanimously reversed, concluding that the Seventh Circuit could not excuse Northwestern fiduciaries from imprudent decisions under ERISA because plan participants made investment choices for their own accounts. Rather, the actions of the Northwestern fiduciaries must be reviewed under *Tibble v. Edison International,* 575 U.S. 523, that requires fiduciaries to monitor each investment option and remove imprudent choices. A collection of investment options that includes prudent choices does not erase the breach of fiduciary duty of also offering imprudent investment options.

The Supreme Court views ERISA fiduciary duty as requiring prudent decision-making under the circumstances prevailing when the fiduciary acts. The fiduciary must continually monitor investment choices for all their features, including cost, recognizing that there are tradeoffs that a fiduciary must also consider.

The allegations that may give rise to a breach of ERISA fiduciary duty to act prudently in this case are:

1. The fiduciaries failed to monitor record-keeping fees, resulting in extraordinarily high fees to participants that could have been avoided.
2. The fiduciaries offered retail funds to participants when they could have offered the same funds at lower, institutional rates.
3. By offering 400 investment options, the fiduciaries confused plan participants, resulting in their poor investment choices.

THE TAKEAWAY:

The fiduciary standard of prudence under ERISA requires constant monitoring, considers the circumstances at the time of a fiduciary's decision, and may take into account various tradeoffs. The demands of ERISA prudence do not reflect modern portfolio management that seeks to manage risk by examining the portfolio as a whole. Rather, ERISA fiduciaries have a duty to make available only prudent investment choices to plan participants investing their own accounts. Investment choices deemed imprudent are not rehabilitated by looking at all the investment options available to participants as a whole.

The tension between choosing prudent investments and constantly monitoring fiduciary decisions against changing circumstances, tradeoffs and competing priorities offers a significant challenge to plan fiduciaries' decision-making. Documenting the reasons for decisions, monitoring them, and adjusting course to maintain prudence are keys to meeting the high standard of the law. ■

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Moldova

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portance of impartial election observation. The primary goal is to detect and deter fraud, but so much more comes from this process. It improves the quality of elections and builds public confidence in the integrity of the process by exposing weak or erroneous practices. And, when reports are positive, it can enhance the legitimacy of the governments that emerge from elections and of the process itself.

So much of what we do as attorneys involves seeking the truth and protecting the rights of our clients. International election observation allows me to practice these learned skills in less traditional but equally important ways. Election observation does not ensure free and fair elections, but it does help foster an environment where they can take place. Everyone should have the right to elect the government of his or her country by secret ballot. I am honored to have the opportunity to use my skills in advancement of such a fundamental human right. ■

YOUNG LAWYERS DIVISION

LOOKING BACK AT CANNABIS FOR THE WAY FORWARD IN NAME, IMAGE AND LIKENESS

BY JONATHAN WYNNE

The 2021 U.S. Supreme Court decision in *NCAA v. Alston* cleared the last major hurdle preventing college athletes from profiting off their name, image and likeness (NIL) while still in school. Much has been made of the infant and rapidly changing business and legal landscape at the start of this new reality. Sparse rules and laws shape the path that numerous stakeholders now run, including college athletes, businesses looking for a slice of the pie, and the NCAA athletic bodies and schools trying to keep up.

However, the fledgling NIL industry is not without a roadmap during these early times. The cannabis industry in the U.S. has evolved and grown in fits and starts over the roughly 25 years since California legalized medical cannabis. Massachusetts, having introduced medical cannabis in 2012 and recreational use in 2016, collected a reported $74.2 million in marijuana excise taxes halfway through the current fiscal year. Alcohol taxes during the same time totaled only $51.3 million.

Differing tax rates impact those swings today, but these tax revenue trends follow the impact that other state coffers have seen as legalization progresses through the country. The cannabis industry foothold is strong, despite federal prohibition of the product. NIL, for its part, is now permitted and enjoys the luxury of far fewer rules and regulations. That said, the early landscape is comparable to the Wild West in which cannabis has resided for the last quarter century.

HOW WE ARRIVED AT TODAY

Arguments for and against collegiate athlete compensation and the spirit of "amateurism" are as old as the NCAA itself. The ball that set today's landscape in motion was the 2014 O'Bannon lawsuit against the NCAA. Former college basketball star and professional player Ed O'Bannon argued for a post-graduation scheme of student-athlete compensation for the NCAA's commercial use of their image. O'Bannon brought suit upon his surprise at seeing himself in a popular college basketball video game, over a decade after his collegiate career had ended. He had received no notice and no compensation for his appearance in the game.

The U.S. District Court for the Northern District of California initially held that the NCAA's prohibition against players cashing in was an unreasonable restraint of trade that violated antitrust law. District Judge Claudia Wilken permitted schools to offer full cost-of-attendance expenses (including living expenses) that were not included in NCAA scholarships at that time. Schools would also be permitted to put money in trust and make it available to student-athletes upon leaving.

The 9th Circuit on appeal did away with the trust component, but affirmed crucial aspects of the *O'Bannon* decision. Namely, the court found that the NCAA's compensation rules were in fact subject to antitrust laws, and also deemed them to be an unlawful restraint of trade under the three-step framework of the antitrust Rule of Reason.

The result maintained certain caps on student-athlete academic benefits for a brief time. On the heels of *O'Bannon*, the case line of *NCAA v. Alston* challenged the anti-competitive nature of the remaining caps.

After return trips to both Judge Wilken's courtroom and the 9th Circuit, the U.S. Supreme Court in *Alston* handed down a 9-0 decision that struck the remaining caps on antitrust grounds. The summer of 2021 decision, coupled with the NCAA's subsequent (and almost immediate) interim policy to suspend amateurism rules related to NIL, opened the door for student-athletes to cash in ahead of the fall sports season.

And cash in they did. In a spectacular flex of branding and marketing muscle, University of Alabama quarterback Bryce Young generated over $800,000 in NIL endorsements during the first *month* after *Alston*. Young earned this money before he ever started a single game for Alabama. The investments proved prudent, as Young's on-field exploits led Alabama to an appearance in the National Championship game. Young was also awarded the Heisman Trophy for the sport's most outstanding player of the year. Some would argue that $800,000 turned out to be a bargain.

WHAT IS TO COME?

Most folks did not anticipate paydays approaching seven figures in the first month of NIL. Predicting what the industry will look like, even a year from now, is largely a fool's errand because too many variables remain unsettled. That said, the Wild West development of the cannabis industry can offer some insight on what to expect in the near and longer term.

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This article will touch on the "wait and see" concept, along with the stakeholder interest and lobbying potential in NIL. Additional discussions for another article include brand and market entry, a deeper dive on taxation, revised state and federal laws, potential employment rights of student-athletes, group licensing schemes, and even the odd NCAA enforcement action if that body starts to feel neglected. New issues will arise as the industry matures, but for now the foundations deserve attention.

WAIT AND SEE

Sports agencies dove in headfirst, securing collegiate clients as fast as they could and betting (correctly) that they could figure out how to activate marketing opportunities later. Major companies were not as fast to sign on to deals with these athletes, opting for an initial "wait and see" approach. That approach may have been dictated by marketing budgets that were not prepared for the U.S. Supreme Court to ostensibly open the market for business, and then for the NCAA to throw up its rule-making hands, all in the same month. As fiscal years turn over and this revenue stream takes shape, companies large and small are catching up.

Cannabis remains in a "wait and see" atmosphere as far as larger companies are concerned. Questions of federal regulations and tax rates stand between potential innovations such as CBD soft drink offerings, branding partnerships, and whatever else companies can cook up. These businesses have had over two decades to tinker with their ideas, and the long approach may yet pay off as everyone

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slowly but surely follows the money.

Market and regulatory risk will be longer-term drivers in NIL branding decision-making. This was especially the case for cannabis as different states entered the market. Cannabis encountered a landscape where laws differed vastly from one state to the next, crowded under the umbrella of federal prohibition. For example, some states followed a limited license structure, allowing for a predetermined and typically small number of licenses to operate (Florida, Missouri, New Jersey). Others started with no limits at all (Oklahoma). California took a macro/micro approach where it legalized at the state level but permitted counties and cities to decide if and how cannabis would be permitted within their borders.

NIL faces similar uncertainty in light of the blanket decision by the NCAA to throw up the white flag and refrain from enforcing its amateurism rules. The NCAA will never be accused of innovation in this field, and the body took the position that schools, states, and maybe one day the federal government would be responsible for creating the rules and enforcing them going forward.

For now, each school and each state sets its own rules, and everyone is waiting to see what will happen. This is cold comfort to large and small universities and colleges alike, none of which operate in a vacuum. Sports programs rise and fall, players and coaches move for greener pastures and the professional ranks, and universities occasionally pick up and move from one conference to the next, in search of the next multi-billion-dollar television deal. But with major money to be had in NIL, these larger stakeholders likely will not sit on the sidelines for long.

STAKEHOLDER INFLUENCE AND FUTURE LOBBYING

The battle for influence is just starting in NIL. Student-athletes sit in a unique and challenging position. On the one hand, profiting from name, image and likeness no longer comes with the specter of running afoul of rules and losing eligibility (and accompanying scholarships). However, students must still remain academically eligible, attend workouts and practices, and compete in actual games. Despite what any good civil litigator may tell you, there are only so many hours in the day.

Businesses and sport agencies must consequently decide into which 18-22-year-olds they will invest serious time and money, a risky venture no matter the industry. For every Bryce Young that succeeds, there are countless worthy individuals for whom things simply do not pan out. The athletic institutions (colleges and universities, coaches, conferences and divisions) still have compliance rules to follow. They must navigate the influx of influence, with limited help from the outside world. All the while, millions upon millions of dollars are changing hands.

There is no dominant lobby representing the student-athletes involved in this discussion. Historic disadvantages dog this population in large part due to the transient nature of a college career, which generally ends after four years. Consequently, NIL, among other issues, easily falls into the realm of "capable of repetition, yet evading review." Danger lies in the possibility that other stakeholders may decide, rightly or not, that the value of NIL is too great for a proportionate balance in the hands of students in search of a shorter-term payday.

Ultimately, whoever makes the first move may come out on top. Student-athletes will likely not enjoy a say. The early California cannabis industry is again instructive. California took a me-first approach on two fronts that gave it a stranglehold. First and more obvious, California said cannabis taxes would be high, and they are. In Los Angeles County, the final sales tax today approaches 40%, a great number for state budgets, but harder for businesses and consumers.

California also maintained control. The state openly explained that it would heavily regulate the industry to intentionally cause market inefficiency. This would prevent the cannabis industry from generating the money needed to form the powerful types of lobbying groups that Americans are accustomed to seeing in billion-dollar, multi-national industries. To date, this approach has worked for California, as those lobbies have not materialized.

The NIL realm is one large, unsettled power dynamic, flush with new money, new players, and the possibility of 50 different versions of state rules to contend with. In short, a vacuum to be filled, and time will tell who takes control. ■

Special and sincere thanks to an old and dear friend, Erick Gustafson, for sharing his vast knowledge and experience in the California and U.S. cannabis industry.

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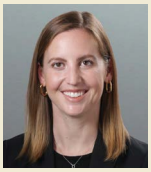

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